Legal Decisions

— *Ms. Priya Subramanian and* **Mukta Kathuria**

1. Can the transaction of sale of computer software package off the shelf be considered as sale of goods?

Tata Consultancy Services Vs. State of Andhra Pradesh (2004)271 ITR 401(SC)

The assessee provided consultancy services including computer consultancy services. As part of their business they prepared and loaded on customers computers custom made software [uncanned software] and also sold computer software packages off the shelf [canned software]. The canned software packages were of the ownership of companies/persons, who have developed these software. The assessee was a licensee with permission to sub-license those packages to others. In respect of canned software the Commercial Tax Officer (CTO), Hyderabad passed a provisional order of Assessment under the provision of the Andhra Pradesh General Sales Tax Act 1957 holding that the software were goods. The CTO accordingly levied sales tax on this software. The appellate Deputy Commissioner of commercial taxes and High Court upheld the assessment. The question raised in the appeal was whether canned software sold by the appellants can be termed as 'goods' and as such assessable to sales tax under the said Act.

The Apex court held that a transaction of sale of computer software package off the shelf was clearly a sale of "goods" within the meaning of that term in section 2(h) of the Andhra Pradesh General Sales tax Act 1957. The term "all materials, articles and commodities" in section 2(h) of the Act includes both tangible and intangible/incorporeal property which is capable of abstraction, consumption and use and which can be transmitted, transferred, stored, possessed etc. The software programme has all these attributes.

Therefore, canned software (i.e. computer software packages off the shelf) can be termed to be 'Goods' and as such assessable to sales tax under relevant Sales Tax Act.

2. Can the income/receipt derived by a company incorporated in and tax resident of Panama from transfer of documents containing know how outside India to a company incorporated under laws of Denmark under the sale and purchase of Technology Agreement be taxable in India having regard to IT Act?

Pfizer Corporation, In re (A.A.R)(2004) 271 ITR 101

The Applicant Pfizer Corporation, Panama (PC) a non-resident company and a part of Pfizer group owned the technology information pertaining to the manufacture of nutritional food supplement product, which was manufactured and sold by Pfizer India another group company under the "Protinex" and "Dumex" trade marks both registered in India. Under an arrangement, the Indian company used the technology information in respect of the above-mentioned products without payment of royalty.

EAC Nutrition Ltd., Denmark (EAC) acquired from the applicant the Trade marks and Technology Information by two separate agreements. A separate agreement for early termination of the license granted to Indian company was entered. In exchange, the applicant delivered / transferred the technology information in the form of dossier in Bangkok. EAC withheld 21% tax on payment of consideration to Applicant. The Applicant objected to TDS and sought a ruling on the following question.

"Whether the income/receipt derived by a company incorporated in and tax resident of

(The authors are Education Officer and Executive Officer respectively in ICAI)

Panama from transfer of documents containing know how outside India to a company incorporated under laws of Denmark under the sale and purchase of Technology Agreement would be taxable in India having regard to IT Act?"

It was held:

1) That since there was no Double Taxation Avoidance Agreement between India and Denmark, the transaction had to be considered under the Domestic Law;
2) That transfer of technical information in the form of a dossier was transfer of a capital Asset;
3) That once the Indian company had entered into agreement with EAC of Denmark for early termination of license to manufacture the product, the technical information reverted to the applicant;
4) Therefore, the situs of the technical information, which was subject matter of the sale in India, was not in India. The receipt from transfer of technical information in the form of dossier in Bangkok was a receipt on transfer of a capital asset and was not chargeable to tax in India u/s 5(2)(ii) read with sec 9(1)(i) of IT Act 1961, as the asset was situated outside India. The subsequent agreements between an Indian affiliate of EAC of Denmark and Indian company to have business support during the initial period of EAC'S trading operations in India did not affect the situs of the asset that was the subject matter of the sale.

3. Can the income from residential properties belonging to the assessee let out to employees of sister concern of the assessee be treated as business income?

CIT vs. T.V. Sundaram Iyengar and Sons Ltd. (2004) 271 ITR 79 (Madras)

Properties belonging to the assessee were let out to the employees of the sister concern of the assessee. The assessee claimed that income from such properties was business income. The Assessing Officer did not accept the claim and assessed those properties u/s 22 of IT Act as income from House Property. The Tribunal held that income was assessable as business income.

On appeal, the High Court held that the occupation of the residential properties in question by the employees of the sister concern could not be construed as occupation by the employees of the assessee in absence of any specific provision in law to that effect. The income from property let out to the employees of the subsidiary company should be treated as income from House property u/s 22.

4. Transfer of business without transfer of assets to a trust, would it attract the provisions of sec 60 of IT Act 1961?

CIT vs. A Radhakrishnan (2004) 271 ITR 109 (Madras)

The assessee, an individual, is the owner of residential property. He gifted the income from the said property to a educational & charitable trust and claimed that no part of income from the said property was chargeable in his hands. The Assessing Officer rejected the claim by referring sec 60 of IT Act. CIT (Appeals) confirmed the order of Assessing Officer.

The Tribunal held that although the property with lodging business had not been transferred, there was transfer of business of lodging house to the trustee and since the business itself was a capital Asset, transfer made by the assessee was not hit by the provision of sec 60 of IT Act and thus Appellate Tribunal deleted the income earned from property in hands of Assessee.

On reference the High court held, that there existed an agreement in favour of trust to manage the property receive rent from that property and utilize the same for the purposes of educational and charitable institution. Since the lodging business was transferred the provisions of section 60 are not attracted even though the property with which the lodging business was done had not been transferred by the assessee to the trust.

5. Whether the profits arising from or attributable to cross border execution of turnkey contracts in India are taxable under Income Tax Act 1961 and the relevant DTAA?

Ishikawajima-Harima Heavy Industries Co. Ltd. In re (2004) 271 ITR 193 (A.A.R)

In this case, a non-resident Japanese Company formed a consortium with five other enterprises and secured a turnkey project from Petronet LNG Ltd. for setting up liquefied natural gas facility in Gujarat. The project involved supply and services and construction and erection, both offshore and onshore. Property in goods passed to Petronet on high seas outside India. The Japanese Company unloaded the goods, cleared them from custom and transported them to site on behalf of Petronet. The expenditure was reimbursed to it. The question arose whether amounts received from petronet for offshore supplies can be taxed in India either under Income tax Act or Indo – Japanese DTAA.

It was held that certain operations were inextricably linked in India such as signing the contract, receiving, unloading, storing, transporting and paying demurrage charges. The price covered not only that of the goods but also the operations carried out in India. The income that accrued from such offshore supplies was through business connection in India. In the composite contract, where all the operations are not carried out in India, the deemed accrual of income shall be only such part of income as is reasonably attributable to the Indian operations. The price of offshore services was taxable under the Act read with the treaty.

6. Is salary paid by a foreign company for off period outside India to a non –resident taxable in India?

CIT v. Halliburton Offshore Services Inc. (2004) 140 Taxman 405 (Uttaranchal)

The assessee was a non-resident foreign technician, employed by a foreign company, which executed contracts in India. The Contract between parties provided for on periods and off periods and it referred to alternative time schedule. Off period followed on period – i.e. after 35/28 days of hard work, the technician went back to the country of his residence. The Contract covered both periods. The assessee derived salary from the foreign company and claimed that salary paid to him by the foreign company for off period outside India was not chargeable to tax contending that period following on period was not a rest period as the assessee had to undergo training during that period.

The High Court observed that since both periods form an integral part of the contract, it was not possible to give separate tax treatment to on period and off period salaries. The *Explanation* to section 9(1)(ii) introduced by the Finance Act, 1983 refers to what constitutes 'income earned in India'. It explains that the expression 'income earned in India' means payment for services in India even if the contract is executed outside India or amount is payable outside India. However, from the said *Explanation*, it is not possible to infer the corollary i.e. that in all cases where services are rendered outside India, the salary cannot be deemed to accrue in India, *ipso facto*. In certain cases, even if the services were rendered outside India, the income can still accrue or arise in India. It would depend on the facts of each case. In this case, even assuming that there was no rest period as alleged by the assessee and that payment was for stand by, training abroad during that period was directly connected with work on rigs in India and it made the assessee mentally and physically fit. Therefore, the payment of salary for off period was income earned in India, i.e., for services rendered in India under section 9(1)(ii). Further, the assessment records show that from the income of the Indian Operations, the entire salary (including off period salary) has been paid by the employer company. This conduct shows the intention of the contracting parties. Hence, the entire salary for both the periods was taxable in India under section 9(1)(ii). ■