Legal Decisions[1]

DIRECT TAXES

Income-tax Act

LD/60/34

LS Cable Ltd., In re
July 26, 2011 (AAR)

Section 9 of the Income-tax Act, 1961 - Income - Deemed to accrue or arise in India

Where clauses in offshore supply contract agreement regarding transfer of ownership and payment mechanism in form of letter of credit, would go to establish that transaction of sale and title took place outside Indian Territory and ownership and property in goods passed outside India, amounts receivable by a foreign company for offshore supply of equipments and material are not liable to tax in India, merely on the ground that transit risk is borne by applicant till goods reach site in India

The applicant-Korean company was the successful bidder in the bids invited by the Delhi Transco Limited (DTL). The scope of work of the applicant under the said contracts for all these projects include: (1) offshore supply contract involving supply of equipments and materials including mandatory spares on CIF basis, (2) onshore supply contract and (3) onshore service contract. The applicant refers to various clauses in the contract documents relating to offshore supply contract *viz.,* transfer of title, insurance, payment mechanism etc. and submits that in connection with the said contract, the property in the goods to be supplied from Korea would pass outside India in favour of DTL and the sale would be concluded outside India and the payment would be received outside India in foreign currency. The applicant contends that no income accrues or arises in India and further no income will be received or deemed to be received in India.

The question formulated by the applicant for seeking advance ruling is whether the amounts receivable by the applicant from DTL under 'offshore supply contract' for offshore supply of equipments and materials, spares are liable to tax in India.

The Authority for Advance Rulings held that the clauses in the offshore supply contract agreement regarding the transfer of ownership, the payment mechanism in the form of letter of credit which ensures the credit of the amount in foreign currency to the applicant's foreign bank account on receipt of shipment advice and insurance clause, would go to establish that the transaction of sale and the title took place outside Indian Territory. The ownership and property in goods passed outside India. The transit risk borne by the applicant till the goods reach the site in India is not necessarily inconsistent with the sale of goods taking place outside India. The parties may decide between them as to when the title of the goods should pass. As the consideration for the sale portion is separately specified, it can well be separated from the whole.Nothing in law prevents the parties to enter into a contract which provides for sale of material for a specified consideration, although they were meant to be utilised in the fabrication and installation of a complete plant. Regarding the revenue's plea that as the applicant has a PE in India, the income arising should be taxed in India, the authority stated that the existence of PE would be for the purpose of carrying out the contract for onshore supplies and services etc. but such a PE would have no role to play in offshore supplies. Even if a PE is involved in carrying on some incidental activities such as clearance from the port and transportation, it cannot be said that the PE is in connection with the offshore supplies. Accordingly, the applicant was not liable to tax in respect of offshore supplies as per the Act.

LD/60/35

Columbia Sportswear Company, In re
August 8, 2011 (AAR)

Section 9 of the Income-tax Act, 1961 read with Article 5 of the Indo-US DTAA - Income - Deemed to accrue or arise in India

Where Indian liaison office of applicant US company is not used solely for purpose of purchasing goods or merchandise or for collecting information for enterprise, rather identifies competent manufacturer/supplier, negotiates competitive price, helps in choosing material to be used, ensures compliance with quality of material, acts as 'go between', between applicant and seller or manufacturer-seller of goods and even gets material tested to ensure quality in addition to ensuring compliance with its policies and relevant laws of India by suppliers, and, furthermore, takes identical activities in Egypt and Bangladesh, liaison office in question would qualify to be a permanent establishment in terms of Article 5 of DTAA

In the year 1995, the applicant US company established a liaison office for undertaking liaison activities in connection with purchase of goods in India, Bangladesh and Egypt. Besides coordinating purchase of goods it is engaged in quality monitoring and production monitoring of goods purchased from these countries. The goods procured from Egypt and Bangladesh do not come to India but are directly sold to the applicant in the United States.

The applicant approached the Authority for Advance Rulings essentially seeking a ruling on the question whether in the nature of the activities carried on by the liaison office it could be understood as a permanent

[1] *Readers are invited to send their comments on the selection of cases and their utility at eboard@icai.org.*

establishment of the applicant and whether any income can be said to accrue or arise in India to the applicant, liable to be taxed in India.

The Authority for Advance Rulings held that what section 9(1)(i) *Explanation* 1(b) deems in the case of a non-resident, is that no income arises in India to him through or from operations which are confined to the purchase of goods in India for the purpose of export. In this case, the activities of the Liaison Office of the applicant in India is not confined to the purchase of goods in India for the purpose of export. The applicant, in fact, transacts in India its business of designing, quality controlling, getting manufactured consistent with its policy and the laws, the branded products it sells elsewhere. All these activities cannot be understood as activities confined to purchase of goods in India for export from India. 'Confined' means, 'limited restricted'. 'Purchase' means 'get by payment, buy'. It is difficult to accept that all these activities enumerated are activities confined to purchase. None can accept the position that these activities are limited to the purchase of goods.

Income resulting from manufacture, purchase and sale cannot be compartmentalized and confined to one arising out of a sale only. The whole process of procurement and sale has to be completed to generate income. Hence, getting manufactured and purchasing form integral parts of the process of generating income. The liaison office acts as the arm of the applicant regarding that part of the activity. A function related to purchase is not a function confined to purchase or mere purchase.

There is another aspect. The activities of the Liaison Office of the applicant in India, is not confined to India. It also takes up the identical activities as in India, in Egypt and Bangladesh. The applicant has only pleaded that the goods procured from Egypt and Bangladesh are not imported into India and are sold only to the applicant in the US. Whether product of the applicant are sold in Egypt and Bangladesh is not clear. Whatever it be, since the activities of the applicant in India takes in, its business in Egypt and Bangladesh, it cannot be stated that the operations of the applicant in India are confined to the purchase of goods in India for the purpose of export. Therefore, inclined to the view that the applicant cannot take shelter under *Explanation 1*(b) to section 9(1)(i) of the Income-tax Act.

According to article 5 of the Indo-US DTAA, the term 'permanent establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried on. Then, the article proceeds to enumerate certain establishments as included in the term 'permanent establishment' in sub-article (2). Sub-article (3) excludes certain establishments from within the term 'permanent establishment'. Clause (*d*) therein excludes a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information for the enterprise. Clause (*e*) excludes a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for other activities which have a preparatory or auxiliary character, for the enterprise. Article 5.1 defines a permanent establishment as meaning a fixed place of business through which the business of an enterprise is wholly or partly carried on. If an establishment satisfies this definition, there is no need to go into the question whether the establishment cannot be brought within the inclusive part of the definition in sub-article (2). Once the definition in article 5.1 is satisfied, the only inquiry to be undertaken is to see whether it is one of those establishments excluded by sub-article (3). In construing the exclusion in sub-article (3), it appears to us that the exclusion has to be tested with reference to one or more of the activities referred to therein.

In the instant case the liaison office has a fixed place of business. It was originally in Chennai and now it is being established in Bangalore. It has 35 employees and it deals with different aspects of the business of the applicant. The business of the applicant is designing, getting manufactured, purchasing and selling of garments based on its research relating to consumer preferences and market conditions. Other than the actual business of selling, the rest of the activities of the applicant are conducted by the liaison office in India at best in part. In other words, a part of the business of the applicant is carried on in India by the liaison office. Not only in India, but also in Egypt and Bangladesh. There cannot be much doubt in such circumstances that the liaison office would be a permanent establishment of the applicant within the meaning of article 5.1 of the DTAA. The applicant has admitted that it has a fixed place of business in India through which it carries on its business and has invoked the exclusionary provisions in Article 5(3) of the Treaty to get out of the obligations arising therefrom.

The liaison office is not used solely for the purpose of purchasing goods or merchandise or for collecting information for the enterprise. The liaison office identifies a competent manufacturer, negotiates a competitive price, helps in choosing the material to be used, ensures compliance with the quality of the material, acts as 'go between' between the applicant and the seller or the manufacturer-seller of the goods and even gets the material tested to ensure quality in addition to ensuring compliance with its policies and the relevant laws of India, by the suppliers. What sub-article (3)(*d*) excludes is a place of business solely for the purpose of purchasing goods or of collecting information for the enterprise. The activities carried on by the liaison office cannot said to be an activity solely for the purpose of purchasing the goods or for collecting information for the enterprise. It is practically an involvement in all the activities connected with the business of the applicant except the actual sale of the products outside the country. On these facts, it is not possible to find that such an establishment would be excluded by clause (*d*) of sub-article (3) of article 5. Further,

the liaison office, admittedly is collecting information for the enterprise, though it may not be established solely for that purpose.

Clause (*e*) speaks of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for other activities which have preparatory or auxiliary character for the enterprise. Auxiliary means providing extra help and support. Preparatory means done in order to prepare for something. Here again, the liaison office is not solely involved in advertising, for the supply of information for scientific research or other activities which have preparatory or auxiliary character. The liaison office is involved in conducting a substantial part of the business of the applicant which as indicated earlier, takes in a number of activities culminating in designing of apparel or goods with material to the taste of the customers and after adequate research at a competitive price, supervision of the manufacturing process and then sale by the applicant in a brand name. The liaison office is also the conduit for conveying the requirements and the decisions of the applicant to the various manufacturers identified by it and approved by the applicant and for processing the goods and paying for them. A part of the business of the applicant in Egypt and Bangladesh is also carried on by or through the liaison office. On the facts of this case and in the light of the activities undertaken by the liaison office, clauses (*d*) and (*e*) of article 5(3) read separately or together, would take the liaison office out of the definition of permanent establishment contained in article 5(1) of DTAA. On the facts of this case, the liaison office would be a permanent establishment of the applicant in India.

It is true that in terms of the permission taken from the Reserve Bank of India, the liaison office can undertake purely liaison activities, *viz.,* to inspect the quality, to ensure shipments and to act as a communication channel between Head office and parties in India and will not take up any other activity of a trading, commercial or industrial nature. The liaison office, on the applicant's own showing is also engaged in identifying suppliers, recommending them for acceptance, getting competitive quotations from suppliers, recommending their acceptance and so on. In addition, it is also doing the work of the applicant in Egypt and Bangladesh. The question, whether all these activities will also come within the permission granted by the Reserve Bank of India, need not be considered here. Suffice it is to say that one has to test the effect of the activities admittedly undertaken by the liaison office in the context of Article 5 of DTAA to adjudge whether it would be a permanent establishment within that Article. On the basis of the reasoning as above, the liaison office in question would qualify to be a permanent establishment in terms of Article 5 of the DTAA.

LD/60/36

Commissioner of Income Tax
Vs.
K. Raheja Corporation P. Limited
August 8, 2011 (BOM)
[Assessment Year 2000-01]

Section 14A read with Section 10(33) of the Income Tax Act, 1961 - Total income - Expenditure incurred in relation to income not includible in

In absence of any material or basis to hold that interest expenditure directly or indirectly was attributable for earning dividend income, interest expenditure could not be disallowed under section 14A

The finding of fact recorded by the Tribunal was that the investments in equity shares and mutual funds were made by the assessee year after year and it has been consistently held by the Tribunal that these investments had been made out of the assessee's own funds and not out of the borrowed funds. The Revenue could not point as to how interest on borrowed funds was attributable to earning dividend income which are exempt under Section 10(33) (as it then stood).

The Bombay High Court held that in the facts of the present case, in the absence of any material or basis to

hold that the interest expenditure directly or indirectly was attributable for earning the dividend income, the decision of the Tribunal in deleting the disallowance of interest made under section 14A could not be faulted.

LD/60/37

Siem Offshore Inc., In re
July 25, 2011 (AAR)

Section 44BB read with section 9 of the Income-tax Act, 1961 read with Article 25 of the Indo-Norwegian DTAA - Non-residents, business of exploration mineral oils etc

Where in addition to ensuring marine logistics support in event of any operational exigency, applicant was mainly engaged in transportation of cargo, material and personnel required at rig, responsibilities resting on applicant in terms of contract did not involve providing of any technical service; obviously, applicant was engaged in business of providing service or facilities in connection with extraction or production of oil, a mining activity and, thus, income would take it out of section 9(1)(vii) and bring it within section 44BB

The applicant-foreign company is incorporated in the Cayman Islands. The applicant formed a consortium with three other companies which were awarded work by ONGC. The consortium agreement provides scope of work of each one and ONGC was to make direct payments to each company for performance of work. Under agreement with ONGC, applicant was required to provide 'sea logistics services', which included service to provide marine logistics support for transportation of essential cargo including operators, operators', sub-contractors' and rig contractors' materials and personnel required at rig in addition to ensuring marine logistics support in event of any operational exigency.

The Authority for Advance Rulings held that the work undertaken by the applicant is the providing of Sea Logistics Services. The applicant was mainly engaged in transportation of cargo, material and personnel required at the rig in addition to ensuring marine logistics support in the event of any operational exigency. Thus, the responsibilities resting on the applicant in terms of the contract did not involve the providing of any technical service. Obviously, the applicant was engaged in the business of providing service or facilities in connection with extraction or production of oil, a mining activity. It could also be said to be supplying plant and machinery for hire to be used in the prospecting of oil. Thus, the income derived by the applicant from the activities undertaken by it under the consortium agreement as recognized by ONGC, the explorer, takes it out of section 9(1)(vii) and brings that income within section 44BB. On the terms of the transaction in question, it is clear that what is paid to the applicant is not fee for technical services and consequently the proviso to section 44BB is not attracted. It is not, therefore, necessary to go into the question as to what constitutes fee for technical services and whether section 44DA will be attracted to the case. On facts, the services being provided by the applicant are not technical services. Hence, the applicant can claim to be assessed in terms of section 44BB especially since there is no case that ONGC is not involved in prospecting, exploration and extraction of oil and the services being provided by the applicant are services in connection with that activity.

However, in view of the developments that took place after 1-1-2010, the income of the applicant should be assessed only in the context of Article 25 of the India-Norwegian Treaty. Thus, the tax liability of the applicant to be taxed in India is governed by Article 23(4) of DTAA read with its *non obstante* clause fixing the limit.

LD/60/38

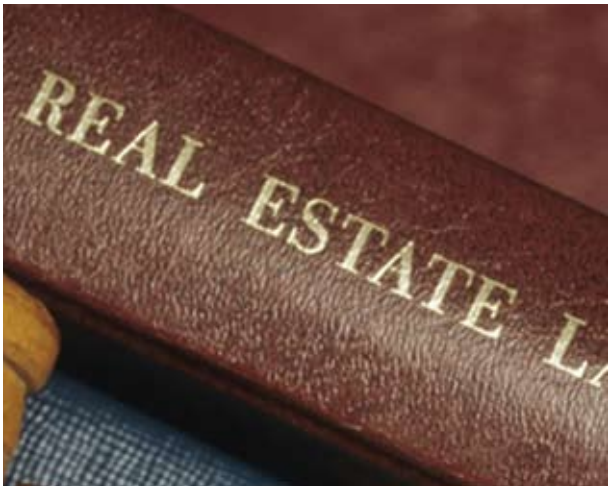
WesternGeco International Ltd., In re
July 25, 2011 (AAR)

Section 44BB of the Income-tax Act, 1961 - Non-residents, business of exploration mineral oils etc

Revenues to be earned by the Non-resident-Applicant under the seismic data acquisition and processing contract with a company engaged in the exploration and production of mineral oils in India are taxable in accordance with section 44BB

The applicant, British Virgin Islands Company, is engaged in the business of acquisition and processing of 2D and 3D seismic data for companies engaged in the exploration and production of mineral oils in India. The applicant desires to obtain a ruling on the questions as to whether revenues to be earned by the applicant under the seismic data acquisition and processing contract with BHP Billiton in India are taxable in accordance with section 44BB.

The Authority for Advance Rulings held that in terms of the contract, the applicant is to provide vessels and seismic crew at the area of operations to acquire the 2D geophysical survey in the MB/KK blocks offshore India to BHP Billiton. The vessels are to be equipped with hardware



and software to process the seismic data. The survey work is to be carried out 24×7 hours a day, seven days a week and without shut down for holidays. The cost of maintenance of the vessels, catering and accommodation services on board the seismic vessels is to be borne by the applicant. It is therefore obvious that the applicant is engaged in the business of providing services or facilities in connection with extraction or production of oil, a mining activity. It could also be said that the applicant is supplying plant and machinery for hire to be used in the prospecting of mineral oil. The activities undertaken are recognised by BHP Billiton in connection with the extraction or production of oil. The activities being mining, the services rendered goes out of the purview of section 9(1)(*vii*). The executive understanding of *Explanation 2* to section 9(1)(*vii*) is also explained in CBDT's Instruction No. 1862 in the similar manner. As section 44BB is a special, specific and exclusive provision, even where the profits arising from business specified therein fall within the ambit of fees for technical services, the provision should prevail for the purposes of computation.

Therefore, revenues to be earned by the Applicant under the seismic data acquisition and processing contract with BHP Billiton in India are taxable in accordance with section 44BB.

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Section 44BB of the Income-tax Act, 1961 - Non-residents, business of exploration mineral oils etc

Where applicant company is engaged in business of acquisition and processing of seismic data for companies engaged in exploration and production of mineral oils in India and equipment vessel mobilization/demobilization activities was attributable to distance travelled by the vessel outside India, entire mobilization/ demobilization revenues received by applicant with respect to seismic data acquisition and/or processing would be taxable in India at an effective rate of 4.223 per cent

The applicant, British Virgin Islands company, is engaged in the business of acquisition and processing of 2D and 3D seismic data for companies engaged in the exploration and production of mineral oils in India. The applicant desires to obtain a ruling on the questions as to whether the revenues arising under the contract with BHP Billiton on account of mobilization/demobilization activities attributable to distance travelled by the vessel outside India will be subject to tax in India.

The Authority for Advance Rulings held that once an assessee opts to come under section 44BB(1), the provision itself deems its profits and gains as 10 per cent of the aggregate of the amounts specified in sub-section (2). Sub-section (2)(*a*) specifies that that aggregate amount is the amount paid or payable whether in or out of India to the assessee on account of provision of services in India. In the scenario, there is no scope for splitting up the amount payable to the assessee. If the assessee wants to seek such a splitting up it has to go under section 44BB(3).

Section 44BB does not close its doors to an applicant who desires to know which part of its income accrues or arises in India and how much. The applicant can exercise its rights provided it opts to get the income taxed under section 44BB(3). The scheme of computation of income under this section does not provide any leeway to apply both the sub-sections (1) and (3) of section 44BB to the income arising from the business activities falling under the ambit of section 44BB(1). Even if part of the income falls under 'Royalties' or 'Fees for technical Services', there is no scope to assess such receipts under these heads, once it is held that the income is from its oil exploration and production activities as envisaged under section 44BB. In view thereof, the entire mobilization/ demobilization revenues received by the applicant with respect to seismic data acquisition and/or processing would be taxable in India at an effective rate of 4.223 per cent.

LD/60/39

Sahney Kirkwood Private Limited, Mumbai
Vs.
Additional Commissioner of Income-tax
July 29, 2011 (BOM)

Section 60 of the Income-tax Act, 1961 - Transfer of income – Where there is no transfer of assets

Where assessee let out a part of its premises to another company in which one of directors of assessee company was also a director, but there was nothing on record to show that transaction between assessee and said company was a sham transaction, amounts received by said company on account of letting out premises to third parties were not liable to be assessed in hands of assessee

By a Leave and Licence Agreement, the assessee let out a part of its premises to a company Minicon. Minicon let out the said premises on leave and licence to various third parties. The Assessing Officer sought to tax the amount received by Minicon from various persons in the hands of the assessee on the ground that the leave and licence agreement between the appellant assessee and Minicon was a sham transaction.

The Bombay High Court held that the amounts received by Minicon had been taxed in the hands of Minicon and the assessment orders passed to that effect had attained finality. If the amounts received by Minicon by letting out the premises taken on leave and licence agreement from the assessee, had been taxed in the hands of Minicon, then taxing the very same amount once again in the hands of the assessee would amount to taxing an income twice which is not permissible in law.

The fact that one of the directors of the assessee company was also a director in Minicon, but there was

nothing on record to show that the transaction between the assessee and Minicon was a sham transaction. In these circumstances, the amounts received by Minicon on account of letting out the premises were not liable to be assessed in the hands of the assessee.

LD/60/40

Deputy Commissioner of Income-tax
Vs.
Deloitte Consulting India (P.) Ltd.
July 22, 2011 (ITAT-HYD)
[Assessment Year 2004-05]

Section 92C of the Income-tax Act, 1961 - Transfer Pricing - Computation of

- *It is mandatory to use current year data first and then datas for period not more than two years*
- *Tolerance band provided in section 92C is not to be taken as a standard deduction; actual working is to be taken for determining ALP without giving deduction of 5%*
- *Companies having related party transaction of more than percentage limit of turnover fixed, is to be excluded from list of comparable*
- *No two comparable companies can be replicas of each other; intangibles or outsourcing manpower would not materially affect price or profit margin*
- *Giant company having 20 times more turnover than assessee company, cannot be a comparable*
- *Section 92A(2)(i) clearly deals with manufacturing of goods and articles and not with provision of services; rejection of comparable on basis of criteria of services provided by it, was not just*
- *Where comparable companies did not have any export business for year under consideration whereas assessee company had full-fledged export business, those companies could not be comparable*
- *Where assessee company was carrying several risks while undertaking various works/services for its associate enterprise, adjustment towards risks was to be made*
- *During transfer pricing assessment, authorities are not required to demonstrate motive of assessee company to shift profits outside India by manipulating prices*

The assessee is a company which derives income from software development and IT enabled services. It has entered into international transactions with its associated enterprises. For determining arms length's price (ALP), the Tribunal made following observations:

- For the purpose of determining the ALP, the transactions entered into the Associate Enterprises are to be compared with uncontrolled transactions carried on by an entity during the same period as that of the assessee company as provided under rule 10B (4) of the Income-tax Rules. In view of this matter, consideration of the data of only one year is justified. The expression "shall" used in the said Rule makes it clear that it is mandatory to use the current year data first and if any circumstances reveal an influence on the determination of ALP in relation to the transaction being compared than other datas for period not more than two years prior to such financial year may be used.
- The tolerance band provided in section 92C is not to be taken as a standard deduction. If the arithmetic mean falls within the tolerance band, then there should not be any ALP adjustment. If it exceeds the said tolerance band, then ALP adjustment is not required to be computed after allowing the deduction at 5 per cent. That means, actual working is to be taken for determining the ALP without giving deduction of 5 per cent.
- The TPO applied the criteria of excluding the companies having related party transaction of more than 25 per cent of the turnover from the list of comparable companies. Having done so, the TPO should have excluded those companies from the list of comparable companies where it was evident that the percentage of related party transaction in these cases above said 25 per cent and this, failed to satisfy the TPO's own criteria.
- It is contended that the comparable company VITL has employee-cost at 1.38 per cent of its revenue when compared to that of the assessee company which was at 52.12 per cent. Further, VITL owns valuable intangible when compared to the assessee company. Hence, the said company had to be excluded.

Held that it appeared that the VITL had outsourced the manpower and the cost of outsourcing appeared to have been included in the other heads of the expenditure instead of wages-employee cost. Moreover, the intangibles would not materially affect the price or profit earning. By outsourcing the manpower, the VITL would have incurred more cost compared to the assessee company, thus resulting in lesser operating profit. But, the intangibles or outsourcing the manpower would not materially affect the price or profit margin.

No two comparable companies can be replicas of each other. The application of rule 10B should be carried out and judged not with technical rigor, but on a broader prospective. In this view of the matter, selecting the VITL as comparable company was proper.

- Wipro Company's turnover was 20 times more than the assessee company. Hence, the assessee company was not comparable with Wipro BPO, the reasoning being that the latter is a giant company having 20 times more turnover than the assessee company. Wipro BPO should be excluded from the list of comparable companies. Hence, the ground raised by the assessee on this issue is allowed.
- The company ASL was rejected as comparable company in back office services segment on the basis that the company sourced it exclusively from Apex

Data Services Inc., USA and thus, has related party transactions.

Held that ASL did not render any services to Apex Data but only sources business from them. Therefore, ASL rendered services directly to the third parties and not to the Apex Data. ASL had only transaction with Apex Data in purchasing of fixed assets. In view of this matter, no controlled transaction between the ASL and Apex Data. Thus, no materially significant related party transactions exist. Section 92A(2)(*i*) clearly deals with manufacturing of goods and articles and not with provision of services. Therefore, the TPO/CIT (A) was not justified in rejecting the ASL as comparable company from the final list of comparable companies.

- Independent comparable companies were rejected by TPO/CIT (A) on the basis that they did no have any foreign exchange revenue. The TPO, in the case of back office services segment, had rejected five companies on account of the fact that these companies did not generate foreign exchange revenue.

Held that the domestic BPO is much smaller business segment than the export BPO. The productivity and return in domestic segment is also much less than the export segment. The TPO clearly demonstrated in his order that the earnings per seat in domestic segment was 0.45 lakhs as against 2.37 lakhs in the export segment which worked out to 5.27 times more than the domestic segment. In the export segment, the earnings would be more due to the fact that they had advantage of time zone and higher productivity etc. It appeared that the assessee company agreed that one criterion for selection/rejection of the comparables is FAR analysis. The aforesaid companies did not have any export business for the year under consideration whereas the assessee company had full-fledged export business. The functions, risks and assets are entirely different. Hence, these companies could not be considered as a comparable company for determining the ALP.

The reference to resident and non-resident in rule 10A of IT Rules, is related to the residential status and not related to the domestic or export. Moreover, the Delhi Bench of the Tribunal in the case of *Mentor Graphics Noida (P.) Ltd. v. Dy. CIT* [2007] 109 ITD 101 (Delhi) held that the ALP should be determined by taking results of a comparable transaction in comparable circumstances. Rule 10B(2)(d) also emphasizes that the comparability of the transaction should be international transaction. There was no merit in the argument that the companies rejected by the TPO operate in similar market condition as that of assessee company due to the fact that the aforesaid companies did not have any international transaction. In view of the above, rejecting the aforesaid company as not comparable was justified.

- There are several factors such as market risks, environmental risk, entrepreneurial risk and functional risk etc., which affect the matter and which ultimately affect the results of the company. All the aforesaid factors make it impracticable to any authority to find out exact duplicate company of the assessee as comparable. Some variation bound to exist.

The TPO had made efforts to identify the comparables whose functions are similar to the assessee company by applying filter quantitatively and qualitatively to eliminate the differences between the assessee companies with that of comparable companies to neutralize the aforesaid risk factors.

The assessee company was an independent contracting entity and would be solely responsible for determining the manner, means and methods by which it performs its obligation under the said contract as per Article-5, the assessee company has undertaken the warranty that all its work and documentation to be delivered to the associate enterprise would be free of error. In a nutshell, the assessee company was carrying several risks while undertaking various works/services for its associate enterprise. It could not be said that the assessee company was operating in a risk free environment and accordingly the assessee company was not entitled to any adjustment towards risks borne by various comparable companies.

- Transfer pricing rules shall apply when one of the parties to the transaction is a non-resident, even if the transaction takes place within India. There is no need to find out the legislative intent behind the transfer pricing provision when the provisions themselves were unambiguous. Therefore, existence of actual cross border transactions or motive to shift profits outside India or to evade taxes is not free conditions for transfer pricing provisions to apply. In view of this, the lower authorities, during transfer pricing assessment, are not required to demonstrate the motive of the assessee company to shift the profits outside India by manipulating the prices.

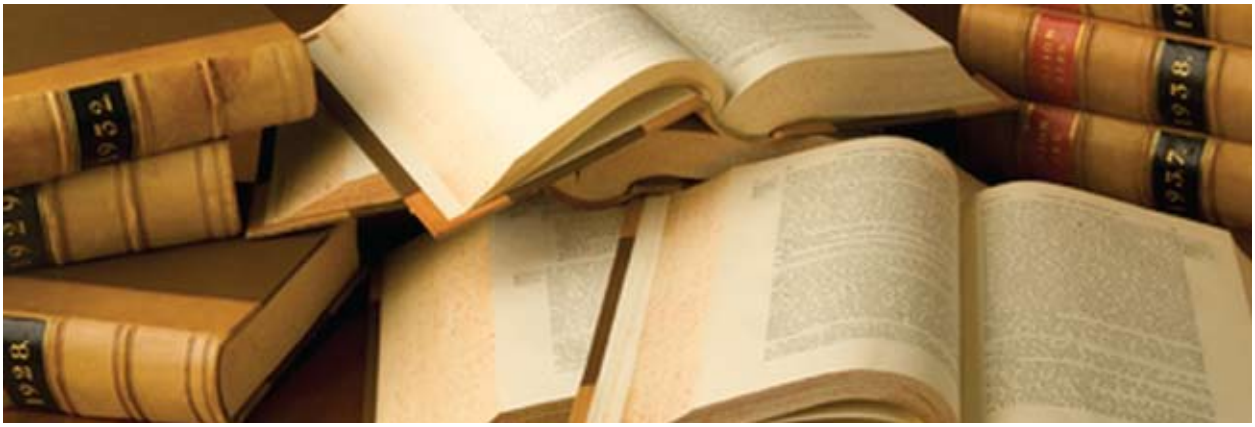
LD/60/41

Cairn U.K. Holdings Ltd., In re
August 1, 2011 (AAR)

Section 112, read with section 48, of the Income-tax Act, 1961 - Capital gains - Tax on long term capital gains

Where foreign company sold equity shares held by it in an Indian listed company in off-market mode, Tax payable on long-term capital gains arising to does not get benefit of lower rate of 10 per cent as provided by proviso to section 112

The applicant CUHL, a Scotish company, acquired the equity shares of Indian company CIL. As per the share purchase agreement, 135,267,264 equity shares of CIHL were transferred by the applicant to CIL and as a consideration, CIL issued 861,764,893 equity shares to the applicant. Accordingly, these equity shares of CIL were allotted to the applicant under a swap of share arrange-



ment. Approval of the Foreign Investment Promotion Board of India was also obtained. Later on PCIL acquired 2.29 per cent equity shares in CIL from the applicant, pursuant to which the applicant transferred 4,36,00,000 equity shares to PCIL for a consideration of USD 241,426,379. The transaction took place in off-market-mode and not through the recognised stock exchange. The question arose for a ruling from the Authority as to whether the tax payable on long term capital gains arisen to CUHL on sale of equity shares of CIL will be 10 per cent of the amount of capital gains as per proviso to section 112(1).

The Authority for Advance Rulings held that the assets on which tax is payable in respect of any income arising from the transfer are listed securities or unit or zero coupon bond. If the asset is not a share or debenture, the residents and non-resident assessees are allowed computation of capital gains on the basis of indexation. In respect of units and zero coupon bonds, which are other than shares or debentures, all the assessees, whether residents or non-residents, are eligible to the benefit of indexation in the computation of capital gains arising on their transfe. However, the 3rd proviso denies the benefit of indexation to bonds or debentures. While applying the proviso to section 112(1) to determine the tax payable, the computation mechanism includes such assets. There is thus no dichotomy in the proviso to section 112(1) and the 3rd proviso to section 48. Section 48 is a section which governs mode of computation of income whereas section 112 determines the tax payable on such income. It may be important to keep in mind that the application of the proviso is based on the capital asset to which the provisions of 2nd proviso to section 48 apply. If it is the case that it applies to the 1st proviso meant for a non-resident assessee then the proviso would have made a mention of it.

The indexation formula already enters into the computation in the first limb where it is mentioned that "tax payable in respect of any income arising from the transfer of long-term capital asset" is to be determined. In fact there is no issue on this part of proviso whether the 2nd proviso to section 48 enters into the said computation or not. The issue that arises lies in the second limb of the proviso starting with the phrase "ten per cent of the amount of capital gains before giving effect to the provisions of the second proviso to section 48". This cannot be read to mean "deny the concessional rate of tax to the category of assessees who are not eligible to have the benefit of indexed cost of acquisition under the second proviso of section 48". It only conveys how a particular amount is to be determined. Any other meaning would tantamount to rewriting this part of the proviso of section 112(1).

As the indexation on the zero coupon bond is available by virtue of 2nd proviso, it will affect the computation of capital gains under section 48 on which tax is payable under the first limb of the proviso and thus would not go out of the purview of the proviso to section 112(1). The zero coupon bond on which indexation is available will get the benefit of the lower rate of tax at 10 per cent under the proviso. The exclusion from application of 1st and 2nd provisos to section 48 while calculating the amount of Income-tax on the income by way of long-term capital gains in the cases of non-residents and allow them the benefits of lower tax rates of 10 per cent also find mention in sections 115AC(3) and 115AD(3). The Act has taken care when, where, and how the 1st and the 2nd provisos to section 48 are to be excluded. The long-term capital gains on the sale of shares of the listed companies are otherwise exempt from tax under section 10(38) if the sale of the shares takes place through the recognized stock exchange on which security transaction tax is paid. However, in this case such exemption is not available as the shares of the listed company CIL are sold in the off-market mode.

As the section 48 must be read with section 112 and if the tax on long-term capital gains provision cannot be given effect to for any reason, then the provision has no application under the Act. Resultantly, the applicant is not eligible to avail the benefit of lower rate of tax of 10 per cent on the capital gains on the sale of shares to PCIL.

LD/60/42

Hyundai Heavy Industries Ltd.
Vs.
Union of India
July 21, 2011 (Uttarakhand)
[Assessment Years 2002-03, 2004-05 to 2007-08]

Section 144C of the Income-tax Act, 1961 read with Rule 3 of the Income-tax Rules, 1962 – Reference to Dispute Resolution Panel

Provision of Section 144C and Rule 3 (2) of Rules is not ultra vires

Where, one of members of Dispute Resolution Panel is also a jurisdictional Commissioner, said officer should not sit and adjudicate upon matter brought before DRP

The petitioner, being aggrieved by the draft assessment orders, approached the Dispute Resolution Panel and filed its objection. During the pendency of the proceedings before the Panel it came to know that one of the members of the collegium was a Commissioner presently holding the post of Director of Income Tax (International Taxation), who was ceased of various proceedings against the petitioner. It was contended that the said DIT had exercised his power granting approval for the re-assessment for the same of assessment years in question under section 148. The petitioner consequently orally objected to the constitution of the collegium and submitted that there was a conflict of interest if the DIT continued to sit in the collegium since he was involved in the reassessment proceedings. Inspite of the oral objection, the DIT did not recuse himself and participated in the proceedings and finalised the draft assessment order. The Panel without considering the objection of the petitioner issued orders to the Assessing Officer by its order for the assessment years in question.

The Uttarakhand High Court held that the *doctrine of nemo judex in causa sua* is subject to the doctrine of necessity. Bias cannot be established merely because one of the members of the Dispute Resolution Panel is also a jurisdictional Commissioner. Where, there was nothing to indicate that the jurisdictional Commissioner was interested in his personal capacity in the outcome of the assessment order. Further, there was nothing to indicate that the direction issued by the Panel to the Assessing Officer was based on extraneous considerations.

The Commissioner is required to discharge certain functions under the Act. He exercises his power impartially and with an independant mind. Such exercise of statutory functions does not get coloured when a member of a Panel issues directions to the Assessing Officer.

The DIT in question was only discharging its statutory functions provided under the Act and, therefore, on the principles of the doctrine of necessity, bias stood excluded. There was no violation of the principles of natural justice. The law permits certain things to be carried out as a matter of necessity. The doctrine of necessity makes it imperative for the authority to carry out its statutory functions and if

the doctrine of necessity is not allowed full play in certain situations, it would impede the course of justice.

The contention of the petitioner that Section 144C of the Act and Rule 3 (2) of the Rules should be declared ultravires was patently erroneous. Mere potential of bias against one of the members of the panel will not render the provision unconstitutional. In the facts and circumstances of the case, there was no conflict of interest. Alleged bias against one member of the Panel does not make the provision ultravires. Even though, no specific prayer for the quashing of Section 144C of the Act and Rule 3 (2) of the Rules, was made in the petition. The Court has dwelt on it since long drawn arguments were made. In the light of the aforesaid, the provision of Section 144C of the Act and Rule 3(2) of the Rules could not be held to be *ultra vires*.

However, the jurisdictional Commissioner was one of the members of the Panel. He was the officer who approved the reopening of the assessment orders and issued directions to the Assessing Officer, which according to the averments in the counter affidavit, was supervisory in nature. The respondents admitted that in the exercise of statutory functions, the Officer could have an "official bias" towards the department to which he was attached and that it was extremely difficult to insulate the officials discharging adjudicatory functions completely from "policy bias".

The DIT in question was exercising supervisory functions and had a hand in the reopening of the assessments under section 147/148 and was also a member of the Panel considering the draft assessment which has been made pursuant to the reopening of the assessment. Therefore, real likelihood of bias could not be ruled out. Even if the officer was impartial and there was no personal bias or malice, nonetheless, a right minded person would think that in the circumstances, there could be a likelihood of bias on his part. In that event, the officer should not sit and adjudicate upon the matter. He should recuse himself. This follows from the principle that justice must not only be done but seen to be done.

Excise

INDIRECT TAXES

LD/60/43

Commissioner of Central Excise
Vs.
Doaba Steel Rolling Mills
July 6, 2011 (SC)

Section 3A of the Central Excise Act, 1944, read with Rule 5 of the Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997 – Power of Central Government to charge excise duty on the basis of capacity of production in respect of notified goods

Rule 5 of the 1997 Rules will be attracted for determination of the annual capacity of production of the factory when any change in the installed machinery or any part thereof is intimated to the Commissioner of Central Excise in terms of Rule 4(2) of the 1997 Rules

The short question for consideration is whether Rule 5 of the 1997 Rules will apply in a case where a manufacturer proposes to make some change in the installed machinery or any part thereof and seeks the approval of the Commissioner of Excise in terms of Rule 4(2) of the 1997 Rules?

The Supreme Court held that Section 3A was inserted in the Act to enable the Central Government to levy Excise duty on manufacture or production of certain notified goods on the basis of annual capacity of production to be determined by the Commissioner of Central Excise in terms of the Rules to be framed by the Central Government. Section 3A is an exception to Section 3 – the charging Section and being in nature of a *non obstante* provision, the provisions contained in the said Section override those of Section 3. Rule 3 of Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997 framed in terms of Section 3A(2) lays down the procedure for determining the annual capacity of production of the factory. Sub-rule (3) of that Rule contains a specific formula for determination of annual capacity of production of hot rolled products. This is the only formula whereunder the annual capacity of production of the factory, for the purpose of charging duty in terms of Section 3A, is to be determined. Second proviso to sub-section (2) of Section 3A contemplates re-determination of annual production in a case when there is alteration or modification in any factor relevant to the production of the specified goods but such re-determination has again to be as per the formula prescribed in Rule 3(3) of the 1997 Rules. It is clear that sub-rule (2) of Rule 4, which, in effect, permits a manufacturer to make a change in the installed machinery or part thereof which tends to change the value of either of the parameters, referred to in sub-rule (3) of Rule 3, on the basis whereof the annual capacity of production had already been determined, would obviously require re-determination of annual capacity of production of the factory/mill, for the purpose of levy of duty. It is plain

that in the absence of any other Rule, providing for any alternative formula or mechanism for re-determination of production capacity of a factory, on furnishing of information to the Commissioner as contemplated in Rule 4(2) of the 1997 Rules, such determination has to be in terms of subrule (3) of Rule 3. That being so, it must logically follow that Rule 5 cannot be ignored in relation to a situation arising on account of an intimation under Rule 4(2) of the 1997 Rules. Moreover, the language of Rule 5 being clear and unambiguous, in the sense that in a case where annual capacity is determined/redetermined by applying the formula prescribed in sub-rule (3) of Rule 3, Rule 5 springs into action and has to be given full effect to.

The principle that a taxing statute should be strictly construed is well settled. It is equally trite that the intention of the Legislature is primarily to be gathered from the words used in the statute. Once it is shown that an assessee falls within the letter of the law, he must be taxed however great the hardship may appear to the judicial mind to be.

There is no reason to depart from these well settled principles to be applied while interpreting a fiscal statute. Therefore, bearing in mind these principles and the intent and effect of the statutory provisions, analysed, the conclusion becomes inevitable that Rule 5 of the 1997 Rules will be attracted for determination of the annual capacity of production of the factory when any change in the installed machinery or any part thereof is intimated to the Commissioner of Central Excise in terms of Rule 4(2) of the 1997 Rules.

LD/60/44

CCE
Vs.
Pals Microsystems Ltd.
July 29, 2011 (SC)

Section 11A of the Central Excise Act, 1944 - Recovery of duties not-levied or not-paid or short-levied or short-paid or erroneously refunded

Where alleged suppression of payment of duty by the respondent-company was brought to the notice of the authority on 25th October, 1996, whereas the show cause notice was issued on 26th June, 2000 and department could not establish that there was any suppression of facts or a fraud on the part of assessee, notice could be said to have been issued after expiry of the period of limitation

The alleged suppression of payment of duty by the respondent-company was brought to the notice of the authority on 25th October, 1996, when the Superintendent of Central Excise had inspected the premises of the respondent-assessee, whereas the show cause notice was issued on 26th June, 2000. The department could not establish that there was any suppression of facts or a fraud on the part of the respondent-assessee.

The Supreme Court held that the honest mistake committed in maintenance of stock register etc. was frankly admitted by the Managing Director of the respondent-assessee. There was no finding to the effect that there was a fraud or willful mis-statement or suppression of facts. Thus, it was very clear that the notice was issued after expiry of the period of limitation and the initiation of proceedings against the respondent-assessee was barred by limitation.

Service Tax

LD/60/45

Idea Mobile Communication Ltd.
Vs.
CCE & C
August 4, 2011 (SC)

Section 65 (105) (zzzx) of the Finance Act, 1994 – Telecommunication Service

Value of SIM cards sold by mobile telecommunication operators to subscribers is to be included in taxable service under Section 65 (105)(zzzx), which provides for levy of service tax on telecommunication service and it is not taxable as sale of goods under Sales Tax Act

A SIM Card or Subscriber Identity Module is a portable memory chip used in cellular telephones. It is a tiny encoded circuit board which is fitted into cell phones at the time of signing on as a subscriber. The SIM Card holds the details of the subscriber, security data and memory to store personal numbers and it stores information which helps the network service provider to recognize the caller. Kerala High Court, in *Escotel Mobile Communications Ltd. vs. Union of India and Others*, (2002) 126 STC 475 (Kerala), has held that a transaction of selling of SIM Card to the subscriber is also a part of the "service" rendered by the service provider to the subscriber.

The charges paid by the subscribers for procuring a SIM Card are generally processing charges for activating the cellular phone and consequently the same would necessarily be included in the value of the SIM Card.

The position in law is therefore clear that the amount received by the cellular telephone company from its subscribers towards SIM Card will form part of the taxable value for levy of service tax, for the SIM Cards are never sold as goods independent from services provided. They are considered part and parcel of the services provided and the dominant position of the transaction is to provide services and not to sell the material i.e. SIM Cards which on its own but without the service would hardly have any value at all. Thus, the value of SIM cards forms part of the activation charges as no activation is possible without a valid functioning of SIM card and the value of the taxable service is calculated on the gross total amount received by the operator from the subscribers. The Sales Tax authority understood the aforesaid position that no element of sale is involved in the present transaction.

Therefore, the value of SIM cards sold by the appellant to their mobile subscribers is to be included in taxable service under Section 65 (105) (zzzx), which provides for levy of service tax on telecommunication service and it is not taxable as sale of goods under the Sales Tax Act.

OTHER ACTS

Companies Act

LD/60/46

Legum & Law Awareness Society
Vs.
Union of India
August 11, 2011 (DEL)

Section 33 read with Section 459 of the Companies Act, 1956 read with Section 11 of the Limited Liability Partnership Act, 2008 – Registration of Memorandum and Articles

Advocates/corporate advocates cannot be included in list of practicing professionals and they cannot issue various certificates integrated into various e-forms notified under Companies Act, 1956 and Limited Liability Partnership Act, 2008

The petitioner filed writ petition praying for direction to respondent to include the advocates/corporate advocates in the list of practicing professionals and enable them to issue various certificates integrated into various e-forms notified under the Companies Act, 1956 and the Limited Liability Partnership Act, 2008 and to eliminate the obligatory certification of e-forms notified under the Companies Act, 1956 and the Limited Liability Partnership Act, 2008.

The respondent, in the counter affidavit, has clarified that full effect is being given to section 33 of the Companies Act and section 11 of the Limited Liability Partnership Act. The said provisions are being fully complied with.

As far as filing of Forms 18 and 32 under the Companies Act are concerned, these were never filed by advocates. With the introduction of e-filing, the said forms have to be now filed electronically. These forms required declaration and verification to be made in the prescribed format by the parties. There is similarly a provision for making declaration and verification in the prescribed format in respect of limited liability partnerships, which again are required to be filed electronically. In this regard, authentication or certification is required to be made by company secretaries, chartered accountants and cost accountants.

Keeping in view the explanation given by the respondent, the prayer made by the petitioner could not be accepted.

LD/60/47

Sanjay Somani
Vs.
The Registrar of Companies, West Bengal
August 3, 2011 (CAL)

Section 295 read with Section 633 of the Companies Act, 1956 read with Section 468 of the Criminal Procedure Code 1973 – Loans to Director

Alleged violation of Section 295 in advancing money to another company in which directors of lender company had more than 30% of paid-up share capital would fall under section 468 of the Criminal Procedure Code; accordingly, time limit for taking cognizance of the offence is one year from date of its commission or knowledge by inter alia person aggrieved by it

According to the Central Government the amount paid by the Company in question to company H.N.G. was loan and advance. According to them the Directors of the Company were holding 30% of the paid up share capital of the other Company and, therefore, for advancing money, permission of the Central Government was required, which was not obtained. Therefore, there was violation of Section 295 (1) (d).

The High Court of Calcutta held that the first ground taken was on limitation. The alleged violation is of Section 295. The penalty for such violations, if proved is six months imprisonment or fine or both. Hence, under Section 468 of the CrPC the time limit for taking cognizance of the offence is one year from the date of its commission or knowledge by *inter alia* the person aggrieved by it. The period for which the violation had allegedly taken place ended 31st March, 2008.

Now it is the usual case of the Registrar of Companies, that the date of knowledge is the date of the show cause notice which is 14th July, 2010. Hence limitation did not set in when this application was filed. The commencement of the period of limitation is from the date of the offence or from the date of knowledge of the offence by the person aggrieved (*See* Section 469 (1) (a) and (b) of the CrPC). Even if it is assumed that on the date of the alleged offence the Registrar of Companies had no knowledge, but by 22nd December, 2008 the Registrar was deemed to have knowledge of the offence as knowledge by the office of the Regional director is knowledge of the Registrar of Companies.

This application was filed on 4th August, 2010. On that date no criminal complaint was lodged by the Registrar of Companies, West Bengal. Therefore, if he was fixed with knowledge of the alleged offence by 22nd December, 2008, cognizance of the offence was barred when this application was filed. If cognizance of the offence would be barred the alleged complaint would be liable to be dismissed and the accused discharged. The above cognizance of the offence would become barred.

■

Section 633 of the Companies Act, 1956 read with Section 190 of Code of Criminal Procedure - Power of Court to Grant Relief in Certain Cases

Papers in section 633(2) applications constitutes information under Section 190 of Code of Criminal Procedure, on basis of which High Court can dismiss complaint and discharge accused

In the case of In Re S.B.I. Home Finance Ltd. Vs. Regional Director, December 7, 2006 (CAL) it was held that the High Court in a section 633(2) application becomes a criminal Court and has the power to acquit or exonerate an accused. The papers in the Section 633(2) application constituted the information under Section 190 of the Code of Criminal Procedure, on the basis of which the High Court can dismiss the complaint and discharge the accused.

LD/60/48

Smt. Anupam Khosla
Vs.
Official Liquidator
July 20, 2011 (CAL)

Section 543 of the Companies Act, 1956 read with Section 47 of the Presidency Insolvency Act, 1909 - Power of Court to Assess Damages against Delinquent Directors, etc.

Section 47 of the Presidency Insolvency Act do not authorise the Company Court to neither reopen decree nor give any authority to adjust the amount realised in execution of decree

An application for misfeasance was filed against the ex-directors of company-in-liquidation in which an ex-parte misfeasance decree was passed. The assets of the judgment debtors who were delinquent directors, were sold in execution of the decree and decretal dues were duly paid. The applicant preferred the instant application for adjustments in decretal dues.

The High Court of Calcutta held that the High Court has no authority and/or power to reopen the decree. The decree had become final and binding upon all the parties. Section 47 of the Presidency Insolvency Act do

not authorize this Court to reopen decree nor give any authority to adjust the aforesaid amount of rent. Section 70 of the Contract Act had no application in the present case of the petitioner. The applicant did not pray for any variation before the Court when the order was passed.

The amount collected by the Official Liquidator could be refunded only after the payments were made to the secure creditors. The claim of the petitioner, on the basis of the balance sheet prepared in 1958 was also not acceptable to the Court in view of the fact that the order of winding up was passed on 7-9-1965 and, therefore, there was no scope today to consider the balance sheet of 1958, which was lost all its relevance. Furthermore, the claim made by the applicants as regards payment of decretal dues to some persons were disputed questions of facts and there was nothing on record before this Court to come to a conclusion on the same either. Therefore, the claim of making payments to the said persons was also to be rejected.

SEBI

LD/60/49

Mansukh Securities and Finance Ltd.
Vs.
The Adjudicating Officer
July 7, 2011 (SAT-MUM)

Regulation 26 of the SEBI (Brokers and Stock Broker's) Regulations, 1992 - Procedure for Action in Case of Default - Liability for monetary penalty

Even where number of transactions, which were entered into by appellant-stock broker in cash to/from clients in lieu of securities, is small as compared to total number of transactions but he had failed to give strict proof of what were exceptional circumstances that led it to accept or pay to client in cash, irregularity is culpable enough calling for monetary penalty

The appellant/noticee stock broker was alleged to have paid and received cash to/from clients in lieu of securities which was alleged to be in violation of Regulation 26(xv) of the Stock brokers Regulations, read with Board's circular dated November 18, 1993 and August 27, 2003. The appellant submitted before the Board that the transactions were made against trading obligation of clients in exceptional circumstances and in the interest of commercial prudence. It was further submitted by it that the number of such transactions is negligible when compared to the total transactions during the period covered by the inspection report.

The Tribunal held that Regulation 26 of the stock brokers regulations makes a stock broker or a sub broker liable to monetary penalties in respect of the violations mentioned there under. Clause (xv) of the said regulation makes failure to comply with the directions issued by the Board under the Act or the Regulations framed there under liable to monetary penalty. The violation in the case in hand was neither of the Act nor of the Regulations framed there under but of the two circulars of Board dated 18-11-1993 and 27-8-2003. Perusal of the record showed that the number of transactions which were entered into by the appellant-stock broker in cash to/from clients in lieu of securities was small as compared to the total number of transactions entered into by the appellant during the inspection report and all such transactions are of amounts less than ` 20,000.

The purpose of carrying out inspection is not punitive and every minor discrepancy/ irregularity found during the course of inspection is not culpable and the object of the inspection could well be achieved by pointing out the irregularities/deficiencies to the intermediary at the time of inspection and making it compliant. While holding the appellant guilty of this irregularity, the adjudicating officer had stated that the noticee failed to give strict proof of what were the exceptional circumstances that led noticee to accept or pay to the client in cash. If that was so, the adjudicating officer could have sought further clarification from the appellant which was not done. In the facts and circumstances of this case the irregularity was culpable enough calling for monetary penalty.

■

Regulation 26 of the SEBI (Brokers and Stock Broker's) Regulations, 1992 - Procedure for Action in Case of Default - Liability for monetary penalty

Where some persons who operated proprietary account trading enabled terminals, were employees of its group company and those employees were seconded to it by said group company and were working under direct control and supervision of appellant, in absence of any bar in Rules or Regulations on this subject, there was no illegality or irregularity in procedure adopted by appellant in this regard

The irregularity for which the appellant/noticee had been held guilty by the adjudicating officer was that the appellant allowed unauthorized persons i.e. the employees of its group company to carry out proprietary account trading besides client based trading. The appellant had admitted that some persons who operated the proprietary account trading enabled terminals were employees of its group company and those employees were seconded to it by the said group company and were working under the direct control and supervision of the appellant. The proof of secondment of the persons by the group company was also submitted by the appellant which was not accepted by the adjudicating officer on the ground that it was not ascertainable whether the persons who were deputed to the noticee carried out the proprietary trading besides client based trading. The other ground for not accepting the appellant's reply was that the memos of secondment were blanket agreement entered into with a group company.

The Tribunal held that the logic given by the adjudicating officer of the Board could not be accepted.

In the absence of any bar in the rules or regulations on this subject, there was no illegality or irregularity in the procedure adopted by the appellant in this regard.

■

Regulation 26 of the SEBI (Brokers and Stock Broker's) Regulations, 1992 - Procedure for Action in Case of Default - Liability for monetary penalty

Where no explanation is forthcoming on records explaining entries in sample of receipts and payments made through client's account with regard to salary, interest on FD, telephone charges, FDR etc. Such withdrawals are not permissible under Board's circular dated 18-11-1993

The appellant had been found guilty for failure to segregate the client's fund from its own fund which resulted in client's accounts being used for purposes other than that of clients' transaction. In its response to the adjudicating officer, the appellant had submitted that the amounts alleged to have been withdrawn by it from the client accounts and used for purposes other than client transaction never exceeded the brokerage due to it on the date of such withdrawal.

The Tribunal held that the Board's circular dated November 18, 1993 which prescribes regulation of transactions between clients and brokers specifically mandates that no money shall be drawn from clients account other than some specified ones.

No explanation was forthcoming on records explaining the entries in the sample of receipts and payments made through client's account with regard to salary, interest on FD, telephone charges, FDR, etc. Such withdrawals are not permissible under the Board's circular referred to above. Therefore, there was no infirmity in the findings arrived at by the adjudicating officer in this regard.

■

Regulation 26 of the SEBI (Brokers and Stock Broker's) Regulations, 1992 - Procedure for Action in Case of Default - Liability for monetary penalty

Where appellant broker failed to mention settlement number and order time in contract notes and thus, failed to issue contract notes in form and manner as required and for such procedural irregularities corrective measures had been taken by appellant, said irregularities did not call for any punitive action

The appellant-broker had been found guilty of not mentioning settlement number and order time in the contract notes and thus, failed to issue the contract notes in the form and manner as required under the Regulations and this amounted to violation of regulation 26(xvi).

The Tribunal held that these procedural irregularities for which corrective measures had been taken by the appellant. Thus, the irregularities did not call for any punitive action.

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