Legal Decisions[1]

DIRECT TAXES

Income-tax Act

LD/60/91

Delhi Music Society

Vs.

Director General of Income-tax

December 16, 2011 (DEL)

Section 10(23C) of the Income-tax Act, 1961 - Exemption - Religious Trust / Institution

Where petitioner society was run like any school or educational institution in a systemic manner with regular classes, vacations, attendance requirements, enforcement of discipline and so on without any profit motive, it should be approved as an educational institution; mere fact that it was not recognised by UGC or it did not conduct its own examination or awards degrees of its own, would not disentitle it from being approved as educational institution

The petitioner was registered as a society established with the aims and objects to teach, promote and encourage all forms of Music and Dancing (Western, Indian or any other). In the financial year 2008-09, the gross receipts of the petitioner exceeded ₹1 crore and, therefore, as stipulated in section 10(23C)(vi), the petitioner was obliged to apply to the "prescribed authority" for approval so that it could continue to enjoy the tax exemption.

The prescribed authority, after giving the petitioner an opportunity of being heard, rejected the claim for exemption. He took the objections that (a) the petitioner had to satisfy that it came within the expression "other educational institution", (b) after conclusion of the classes, examinations were conducted by the Trinity College and the Associated Board of the Royal School of Music, London. The petitioner itself did not award any degree/certificate, (c) The petitioner was not an institution recognized by the UGC or any Board constituted by the Government of India, and (d) the petitioner could not be distinguished from any coaching or training institute preparing the students for appearing any examination for obtaining a formal degree by a formally recognised institution. The prescribed authority held that the petitioner was not entitled to be characterized as an "educational institution" within the meaning of section 10(23C) (vi) for the assessment year 2010-11 onwards.

The Delhi High Court held that the petitioner was teaching and promoting all forms of music and dance, western, Indian or any other. In accordance with the object, it was running a music school in Delhi, collecting tuition fee and admission fee from the students. Teachers had been employed and they had been paid salaries. Expenditure was also incurred on the maintenance of musical instruments. The petitioner had also filed audited account for these years. There are 549 students enrolled with the petitioner who are taught western instruments according to their choice such as Piano, Guitar, Electronic Key Board, Wind Instruments, Drums and Vocal. The school faculty comprises of 30 teachers with 25 of them being Grade 8 and above in western music. There is reference to scholarships that are open to the students including waiver of fees from 25% to 90%. It had been stated that several students of the school have gone on for higher musical studies to places like Moscow, London, New York, Prague and Rome. There are rules and regulations governing the running of the school. The main rules and regulations are that the school works for all seven days a week and remains closed only on national and public holidays; that the school year is divided into four terms of three months each; that students who are attending instrumental music classes would be taught individually by the teachers; that dance students would be taught in groups; that there would be workshops/lecture demonstrations arranged for the benefit of the students from time to time and that attendance in such workshops would be compulsory; that students who report late by more than 20 minutes may be marked absent and so on. There is also a rule that the students who are irregular in attending the classes or absent themselves frequently for long periods without prior intimation, would be removed from the rolls and if any of the students are found lacking in application or discipline, they are liable to be terminated by the Principal.

It is seen from the above that the petitioner is being run like any school or educational institution in a systemic manner with regular classes, vacations, attendance requirements, enforcement of discipline and so on. These provisions in the rules and regulations satisfy the condition laid down in the judgment of the Supreme Court in *Sole Trustee, Loka Shikshana Trust vs. CIT (1975) 101 ITR 234*, that there should be a process of training and developing the knowledge, skill, mind and character of the students by "normal schooling". It cannot be doubted that, having regard to the manner in which the petitioner runs the music school, that there is imparting of systematic instruction, schooling or training given to the students so that they attain proficiency in the field of their choice – vocal or instrumental in western classical music.

The observations of the Supreme Court in *Centre for Policy Research; V.A. Pai Panandiker v. Brahma Chellaney and Others (2010) INDLAW DEL 928*, support the stand

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

of the petitioner that it does not conduct its own examination or awards degrees of its own is not decisive of the question whether it is an educational institution or not. It also lends support to the petitioner's stand before the prescribed authority that it is not a mere coaching centre preparing students for competitive examinations. The coaching centres, as understand, are where candidates are specially prepared to appear in competitive examinations such as civil services, entrance examination for IIMs, IITs and other professional colleges. Profit motive pervades and is the essence of the business activity undertaken by the coaching institutes. The primary object of the coaching institutes is personal or self gain and activity undertaken is with the said objective. Knowledge of education may be imparted but "charity" or philanthropy is missing. No such finding or observation is recorded and stated in the impugned order. The difference between coaching centers and an "educational institution" from section 2(15) or 10(vi) is apparent.

In the petitioner's case, the prescribed authority has not stated that the music school is being run with a profit motive. No objection to the application for approval has been taken by the prescribed authority on this ground.

Thus, the petitioner meets the requirements of an educational institution within the meaning of section 10(23C)(vi). Accordingly, the order passed by the prescribed authority was to be quashed.

LD/60/92

Vodafone International Holdings B.V.
Vs.
Union of India
January 20, 2012 (SC)

Section 45, read with sections 9, 163 and 195, of the Income-tax Act, 1961 - Capital gains - Chargeable as

Where a non-resident company HTIL entered into off shore transaction of transferring its non-resident subsidiary CGP to another non-resident company VIH by virtue of which CGP's shareholding in its Indian subsidiary HEL is also transferred, such off shore transaction being a bonafide structured FDI investment into India and not a sham or tax avoidant preordained transaction, was not taxable in India

The Cayman Island company HTIL held shares of another Cayman Island company CGP. CGP held through various subsidiaries, the direct and indirect equity and loan interests in Indian telecom company HEL. HTIL transferred CGP to Dutch Company VIH for consideration of about US $ 11.08 billion. The Indian tax authorities sought to impose tax on payment made to HTIL on ground that in fact there was transfer of controlling interest in an Indian company.

The Supreme Court held as follows:

International Tax Aspects of Holding Structures

The approach of both the corporate and tax laws, particularly in the matter of corporate taxation, generally is founded on the separate entity principle, *i.e.*, treat a company as a separate person. The Indian Income Tax Act, 1961, in the matter of corporate taxation, is founded on the principle of the independence of companies and other entities subject to income-tax. Companies and other entities are viewed as economic entities with legal independence *vis-a-vis* their shareholders/participants. It is fairly well accepted that a subsidiary and its parent are totally distinct tax payers. Consequently, the entities subject to income-tax are taxed on profits derived by them on standalone basis, irrespective of their actual degree of economic independence and regardless of whether profits are reserved or distributed to the shareholders/participants. Furthermore, shareholders/participants, that are subject to (personal or corporate) income-tax, are generally taxed on profits derived in consideration of their shareholding/participations, such as capital gains. Now a days, it is fairly well settled that for tax treaty purposes a subsidiary and its parent are also totally separate and distinct tax payers.

It is generally accepted that the group parent company is involved in giving principal guidance to group companies by providing general policy guidelines to group subsidiaries. However, the fact that a parent company exercises shareholder's influence on its subsidiaries does not generally imply that the subsidiaries are to be deemed residents of the State in which the parent company resides. Further, if a company is a parent company, that company's executive director(s) should lead the group and the company's shareholder's influence will generally be employed to that end. This obviously implies a restriction on the autonomy of the subsidiary's executive directors. Such a restriction, which is the inevitable consequences of any group structure, is generally accepted, both in corporate and tax laws. However, where the subsidiary's executive directors' competences are transferred to other persons/bodies or where the subsidiary's executive directors' decision making has become fully subordinate to the Holding Company with the consequence that the subsidiary's executive directors are no more than puppets then the turning point in respect of the subsidiary's place of residence comes about. Similarly, if an actual controlling Non-Resident Enterprise (NRE) makes an indirect transfer through "abuse of

organisation form/legal form and without reasonable business purpose" which results in tax avoidance or avoidance of withholding tax, then the Revenue may disregard the form of the arrangement or the impugned action through use of Non-Resident Holding Company, recharacterize the equity transfer according to its economic substance and impose the tax on the actual controlling Non-Resident Enterprise. Thus, whether a transaction is used principally as a colourable device for the distribution of earnings, profits and gains, is determined by a review of all the facts and circumstances surrounding the transaction. It is in the above cases that the principle of lifting the corporate veil or the doctrine of substance over form or the concept of beneficial ownership or the concept of alter ego arises. There are many circumstances, apart from the one given above, where separate existence of different companies, that are part of the same group, will be totally or partly ignored as a device or a conduit (in the pejorative sense).

The common law jurisdictions do invariably impose taxation against a corporation based on the legal principle that the corporation is "a person" that is separate from its members. It is the decision of the House of Lords in *Salomon v. Salomon* [1897] A.C. 22 that opened the door to the formation of a corporate group. If a "one man" corporation could be incorporated, then it would follow that one corporation could be a subsidiary of another. This legal principle is the basis of Holding Structures. It is a common practice in international law, which is the basis of international taxation, for foreign investors to invest in Indian companies through an interposed foreign holding or operating company, such as Cayman Islands or Mauritius based company for both tax and business purposes. In doing so, foreign investors are able to avoid the lengthy approval and registration processes required for a direct transfer *(i.e.,* without a foreign holding or operating company) of an equity interest in a foreign invested Indian company. However, taxation of such Holding Structures very often gives rise to issues such as double taxation, tax deferrals and tax avoidance. The concept of GAAR is not new to India since India already has a judicial anti-avoidance rule, like some other jurisdictions. Lack of clarity and absence of appropriate provisions in the statute and/or in the treaty regarding the circumstances in which judicial anti-avoidance rules would apply has generated litigation in India. Holding Structures are recognized in corporate as well as tax laws. Special Purpose Vehicles (SPVs) and Holding Companies have a place in legal structures in India, be it in company law, takeover code under SEBI or even under the income tax law. When it comes to taxation of a Holding Structure, at the threshold, the burden is on the Revenue to allege and establish abuse, in the sense of tax avoidance in the creation and/or use of such structure(s). In the application of a judicial anti-avoidance rule, the Revenue may invoke the "substance over form" principle or "piercing the corporate veil" test only after it is able to establish on the basis of the facts and circumstances surrounding the transaction that the impugned transaction is a sham or tax avoidant. To give an example, if a structure is used for circular trading or round tripping or to pay bribes then such transactions, though having a legal form, should be discarded by applying the test of fiscal nullity. Similarly, in a case where the Revenue finds that in a Holding Structure an entity which has no commercial/business substance has been interposed only to avoid tax then in such cases applying the test of fiscal nullity it would be open to the Revenue to discard such inter-positioning of that entity. However, this has to be done at the threshold. In this connection, the "look at" principle enunciated in *W.T. Ramsay Ltd. V. Inland Revenue Commissioners (1981) 1 All E. R. 865* may be reiterated in which it was held that the Revenue or the Court must look at a document or a transaction in a context to which it properly belongs to. It is the task of the Revenue/Court to ascertain the legal nature of the transaction and while doing so it has to look at the entire transaction as a whole and not to adopt a dissecting approach. The Revenue cannot start with the question as to whether the impugned transaction is a tax deferment/saving device but that it should apply the "look at" test to ascertain its true legal nature.

Applying the above tests, it is to be concluded that every strategic foreign direct investment coming to India, as an investment destination, should be seen in a holistic manner. While doing so, the Revenue/Courts should keep in mind the following factors: the concept of participation in investment, the duration of time during which the Holding Structure exists; the period of business operations in India; the generation of taxable revenues in India; the timing of the exit; the continuity of business on such exit. In short, the onus will be on the Revenue to identify the scheme and its dominant purpose. The corporate business purpose of a transaction is evidence of the fact that the impugned transaction is not undertaken as a colourable or artificial device. The stronger the evidence of a device, the stronger the corporate business purpose must exist to overcome the evidence of a device.

Whether Section 9 is a "look through" provision as submitted on behalf of the Revenue?

Section 9(1)(i) gathers in one place various types of income and directs that income falling under each of the sub-clauses shall be deemed to accrue or arise in India. Broadly there are four items of income. The income dealt with in each sub-clause is distinct and independent of the other and the requirements to bring income within each sub-clause, are separately noted. Hence, it is not necessary that income falling in

one category under any one of the sub-clauses should also satisfy the requirements of the other sub-clauses to bring it within the expression "income deemed to accrue or arise in India" in Section 9(1)(i). In this case, the last sub-clause of Section 9(1)(i) is concerned which refers to income arising from "transfer of a capital asset situate in India". Thus, charge on capital gains arises on transfer of a capital asset situate in India during the previous year. The said sub-clause consists of three elements, namely, transfer, existence of a capital asset, and situation of such asset in India. All three elements should exist in order to make the last sub-clause applicable. Therefore, if such a transfer does not exist in the previous year no charge is attracted. Further, Section 45 enacts that such income shall be deemed to be the income of the previous year in which transfer took place. Consequently, there is no room for doubt that such transfer should exist during the previous year in order to attract the said sub-clause. The fiction created by Section 9(1)*(i)* applies to the assessment of income of nonresidents. In the case of a resident, it is immaterial whether the place of accrual of income is within India or outside India, since, in either event, he is liable to be charged to tax on such income. But, in the case of a non-resident, unless the place of accrual of income is within India, he cannot be subjected to tax. In other words, if any income accrues or arises to a nonresident, directly or indirectly, outside India is fictionally deemed to accrue or arise in India if such income accrues or arises as a sequel to the transfer of a capital asset situate in India. Once the factum of such transfer is established by the Department, then the income of the non-resident arising or accruing from such transfer is made liable to be taxed by reason of Section 5(2)(b) of the Act. This fiction comes into play only when the income is not charged to tax on the basis of receipt in India, as receipt of income in India by itself attracts tax whether the recipient is a resident or nonresident. This fiction is brought in by the legislature to avoid any possible argument on the part of the non-resident vendor that profit accrued or arose outside India by reason of the contract to sell having been executed outside India. Thus, income accruing or arising to a non-resident outside India on transfer of a capital asset situate in India is fictionally deemed to accrue or arise in India, which income is made liable to be taxed by reason of Section 5(2)(b) of the Act. This is the main purpose behind enactment of Section 9(1)*(i)* of the Act. One has to give effect to the language of the section when it is unambiguous and admits of no doubt regarding its interpretation, particularly when a legal fiction is embedded in that section. A legal fiction has a limited scope. A legal fiction cannot be expanded by giving purposive interpretation particularly if the result of such interpretation is to transform the concept of chargeability which is also there in Section 9(1) *(i)*, particularly when one reads Section 9(1)*(i)* with Section 5(2) (b) of the Act. What is contended on behalf of the Revenue is that under Section 9(1)*(i)* it can "look through" the transfer of shares of a foreign company holding shares in an Indian company and treat the transfer of shares of the foreign company as equivalent to the transfer of the shares of the Indian company on the premise that Section 9(1)*(i)* covers direct and indirect transfers of capital assets. For the above reasons, Section 9(1)*(i)* cannot by a process of interpretation be extended to cover indirect transfers of capital assets/property situate in India. To do so, would amount to changing the content and ambit of Section 9(1)*(i)*. The Court cannot re-write Section 9(1) *(i)*. The legislature has not used the words indirect transfer in Section 9(1)*(i)*. If the word indirect is read into Section 9(1)*(i)*, it would render the express statutory requirement of the 4th sub-clause in Section 9(1) *(i)* nugatory. This is because Section 9(1)*(i)* applies to transfers of a capital asset situate in India. This is one of the elements in the 4th sub-clause of Section 9(1) (i) and if indirect transfer of a capital asset is read into Section 9(1)*(i)* then the words capital asset situate in India would be rendered nugatory. Similarly, the words underlying asset do not find place in Section 9(1) *(i)*. Further, "transfer" should be of an asset in respect of which it is possible to compute a capital gain in accordance with the provisions of the Act. Moreover, even Section 163(1)*(c)* is wide enough to cover the income whether received directly or indirectly. Thus, the words directly or indirectly in Section 9(1)*(i)* go with the income and not with the transfer of a capital asset (property). Lastly, it may be mentioned that the Direct Tax Code (DTC) Bill, 2010 proposes to tax income from transfer of shares of a foreign company by a non-resident, where at any time during 12 months preceding the transfer, the fair market value of the assets in India, owned directly or indirectly, by the company, represents at least 50% of the fair market value of all assets owned by the company. Thus, the DTC Bill, 2010 proposes taxation of offshore share transactions. This proposal indicates in a way that indirect transfers are not covered by the existing Section 9(1)*(i)* of the Act. In fact, the DTC Bill, 2009 expressly stated that income accruing even from indirect transfer of a capital asset situate in India would be deemed to accrue in India. These proposals, therefore, show that in the existing Section 9(1)*(i)* the word indirect cannot be read on the basis of purposive construction. The question of providing "look through" in the statute or in the treaty is a matter of policy. It is to be expressly provided for in the statute or in the treaty. Similarly, limitation of benefits has to be expressly provided for in the treaty. Such clauses cannot be read into the Section by interpretation. For the foregoing reasons it is to

be held that Section 9(1)(i) is not a "look through" provision.

On facts, it may be seen that under the HTIL structure, as it existed in 1994, HTIL occupied only a persuasive position/influence over the downstream companies *qua* manner of voting, nomination of directors and management rights. That, the minority shareholders/investors had participative and protective rights (including Right of First Refusal (RoFR), Tag Along Rights (TARs), call and put options which provided for exit) which flowed from the CGP share. That, the entire investment was sold to the VIH through the investment vehicle (CGP). Consequently, there was no extinguishment of rights as alleged by the Revenue.

Role of CGP in the transaction

On the role of CGP in the transaction, two documents are required to be referred to. One is the Report of the KPMG dated 18.10.2010 in which it is stated that through the acquisition of CGP, VIH had indirectly acquired the rights and obligations of GSPL in the Centrino and NDC Framework Agreements. That, the said two agreements were put in place with a view to provide AG and AS with downside protection while preserving upside value in the growth of HEL. The second document is the Annual Report 2007 of HTIL. Under the caption "Overview", the Report observes that on 11.02.2007, HTIL entered into an agreement to sell its entire interests in CGP, a company which held through various subsidiaries, the direct and indirect equity and loan interests in HEL (renamed VEL) and its subsidiaries to VIH for a cash consideration of HK $86.6 bn. As a result of the said Transaction, the net debt of the Group which stood at HK $37,369 mn as on 31.12.2006 became a net cash balance of HK $25,591 mn as on 31.12.2007. This supports the fact that the sole purpose of CGP was not only to hold shares in subsidiary companies but also to enable a smooth transition of business, which is the basis of the SPA. Therefore, it cannot be said that the intervened entity (CGP) had no business or commercial purpose.

As a general rule, in a case where a transaction involves transfer of shares lock, stock and barrel, such a transaction cannot be broken up into separate individual components, assets or rights such as right to vote, right to participate in company meetings, management rights, controlling rights, control premium, brand licences and so on as shares constitute a bundle of rights. Further, the High Court has failed to examine the nature of the following items, namely, non-compete agreement, control premium, call and put options, consultancy support, customer base, brand licences etc. On facts, the High Court, in the present case, ought to have examined the entire transaction holistically. VIH has rightly contended that the transaction in question should be looked at as an entire package. The items mentioned hereinabove, like, control premium, non-compete agreement, consultancy support, customer base, brand licences, operating licences etc. were all an integral part of the Holding Subsidiary Structure which existed for almost 13 years, generating huge revenues, as indicated above. Merely because at the time of exit capital gains tax becomes not payable or exigible to tax would not make the entire "share sale" (investment) a sham or a tax avoidant. The High Court has failed to appreciate that the payment of US$ 11.08 bn was for purchase of the entire investment made by HTIL in India. The payment was for the entire package. The parties to the transaction have not agreed upon a separate price for the CGP share and for what the High Court calls as "other rights and entitlements" (including options, right to non-compete, control premium, customer base etc.). Thus, it was not open to the Revenue to split the payment and consider a part of such payments for each of the above items. The essential character of the transaction as an alienation cannot be altered by the form of the consideration, the payment of the consideration in instalments or on the basis that the payment is related to a contingency ('options', in this case), particularly when the transaction does not contemplate such a split up. Where the parties have agreed for a lump sum consideration without placing separate values for each of the above items which go to make up the entire investment in participation, merely because certain values are indicated in the correspondence with FIPB which had raised the query, would not mean that the parties had agreed for the price payable for each of the above items. The transaction remained a contract of outright sale of the entire investment for a lump sum consideration. Thus, one needs to "look at" the entire Ownership Structure set up by Hutchison as a single consolidated bargain and interpret the transactional documents, while examining the Offshore Transaction of the nature involved in this case, in that light.

Summary of Findings

Applying the **look at** test in order to ascertain the true nature and character of the transaction, it is to be held that the Offshore Transaction herein is a *bonafide* structured FDI investment into India which fell outside India's territorial tax jurisdiction, hence not taxable. The Offshore Transaction evidences **participative investment** and not a sham or tax avoidant preordained transaction. The Offshore Transaction was between HTIL (a Cayman Islands company) and VIH (a company incorporated in Netherlands). The subject matter of the Transaction was the transfer of the CGP (a company incorporated in Cayman Islands). Consequently, the Indian Tax Authority had no territorial tax jurisdiction to tax the said Offshore Transaction.

Note: Judgment of Bombay High Court in Writ Petition No 1325 of 2010 dated 8-9-2010 was set aside.

LD/60/93
Commissioner of Income-tax (Central)
Vs.
Smt. Shaila Agarwal
November 25, 2011 (ALL)
[Assessment Year 2002-03]

Section 153A read with Section 132 of the Income-tax Act, 1961 - Assessment in case of search or requisition

As a consequence of search under Section 132, and notice under section 153A, regular assessment proceedings, which had become final, cannot be abated and restored to file of Assessing Officer

A plain reading of Section 153A would show that where notice under this Section is issued as result of any search under Section 132, assessment or reassessment if any relating to any assessment year falling within the period of six assessment years referred to under Section 153, pending on the date of initiation of search under Section 132 or requisition under Section 132A shall abate. The words, pending on the date of initiation of search under Section 132, or making of requisition under Section 132A, as the case may be, has to be assigned simple and plain meaning. Where the assessment or reassessment is finalised, there are no pending proceedings to be abated, and restored to the file of the assessing officer. To abate means to diminish or to take away.

The word 'abatement' is referable to something, which is pending alive, or is subject to deduction. The abatement refers to suspension or termination of the proceedings either of the main action, or the proceedings ancillary or collateral to it. The word is commonly used in the legislations, which provide for abatement of action/ suit; abatement of legacies; abatement of nuisance; and all actions for such nature, which have the pendency or continuance. The proceedings, which have already terminated are not liable for abatement unless statute expressly provides for such consequence thereof.

The word 'pending' occurring in the second proviso to Section 153A of the Act, is also significant. It is qualified by the words 'on the date of initiation of the search', and makes it abundantly clear that only such assessment or reassessment proceedings are liable to abate.

The pendency of an appeal in the Tribunal against the order of assessment against which an appeal has been decided by CIT (A) is not a continuation of the proceedings of assessment. An appeal under the Income Tax Act lies to the Appellate Tribunal on a question of law. Even if it is pending on the date of search, no such intention has indicated by the Tribunal arises out of the provisions of second proviso to Section 153A, to abate the proceedings, which have been completed, or concluded, and to restore assessment to the file of the Assessing Officer.

There is no force in the submission that where a notice under Section 153A has been given after the search operations under Section 132, for filing assessment for the block period of 6 years, and if such period includes any of the assessment year, the abatement of assessment and re-assessment proceedings, to give way to reassessment considering the additions in the assessment under Section 153A, will also include the assessment or re-assessment, which has been completed. If as a result of search, some undisclosed income is found to have escaped assessment, the Assessing Officer, may initiate steps for reassessment after sanction of competent authority, within the prescribed period of limitation.

A Circular No.7 of 2003 dated 5.9.2003 issued by the Commissioner of Income Tax has clarified the position stating that "The Assessing Officer shall assess or reassess the total income of each of these six assessment years. Assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years pending on the date of initiation of the search under section 132 or requisition under section 132A, as the case may be, shall abate. It is clarified that the appeal, revision or rectification proceedings pending on the date of initiation of search under section 132 or requisition shall not abate. Save as otherwise provided in the proposed section 153A, section 153B and section 153C, all other provisions of this Act shall apply to the assessment or reassessment made under section 153A. It is also clarified that assessment or reassessment made under section 153A shall be subject to interest, penalty and prosecution, if applicable. In the assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the rate or rates as applicable to such assessment year."

The second proviso to Section 153A, refers to abatement of the pending asssessment or re-assessment proceedings. The word 'pending' does not operate any

such interpretation, that wherever the appeal against such assessment or reassessment is pending, the same alongwith assessment or reassessment proceedings is liable to be abated. The principles of interpretation of taxing statutes do not permit the Court to interpret the Second Proviso to Section 153A in a manner that where the assessment or reassessment proceedings are complete, and the matter is pending in appeal in the Tribunal, the entire proceedings will abate.

There is another aspect to the matter, namely that the abatement of any proceedings has serious causes and effect in as much as the abatement of the proceedings, takes away all the consequences that arise thereafter. The material found in the search may be a ground for notice and assessment under Section 153A of the Act but that would not efface or terminate all the consequence, which has arisen out of the regular assessment or reassessment resulting into the demand or proceedings of penalty.

For the aforesaid reasons, the Income Tax Appellate Tribunal erred in law in abating the regular assessment proceedings, which had become final, and restoring them as a consequence of search under Section 132, and notice under Section 153A of the Act to the file of the Assessing Officer.

LD/60/94
Bhura Exports Ltd.
Vs.
Income-tax Officer (TDS)
August 30, 2011 (CAL)
[Assessment Year 2002-03]

Section 201 of the Income-tax Act, 1961 - Deduction of tax at source - Failure to deduct or pay, consequences of

In applying the provisions contained in Section 201 where the previous bar of limitation was lifted by amendment and there was no period of limitation fixed for exercising such power at the relevant point of time i.e., from 1-4-1989 to 1-4-2010, no question of invoking a reasonable period of limitation arises

The embargo of limitation provided earlier in Section 231 of the Act for taking action under Section 201 had been omitted with effect from April 1, 1989 and the selfsame bar of limitation was re-introduced by way of addition of sub-Section (3) of Section 201 with effect from April 1, 2010 and thus, in between these periods, there was no bar of the period of limitation of taking action under Section 201 of the Act. The time limit prescribed in Section 149 of the Act for taking action under Section 147 by giving notice under Section 148 cannot have any application for taking action under Section 201 as it is not a case of income escaping assessment but a case of inaction of a debtor to deduct tax on interest while making payment of the interest in violation of Section 194A the Circular No. 275/201/95-IT

(B), dated January 29, 1997 issued by the Central Board of Direct Taxes, has put an end to the controversy as regards the extent of liability of the deductor. The circular states that *"no demand visualized under Section 201(1) of the Income-tax Act should be enforced after the tax deductor has satisfied the officer-in-charge of TDS, that taxes due have been paid by the deductee-assessee. However, this will not alter the liability to charge interest under Section 201 (1A) of the Act till the date of payment of taxes by the deductee-assessee or the liability for penalty under Section 271C of the Income-tax Act."*

Even if the person to whom interest was paid without deduction of tax had subsequently paid tax on that income, the deductor cannot escape the liability to pay interest under Section 201(1A) of the Act till the date of payment of taxes by the deductee-assessee nor can the deductor avoid the liability of penalty under Section 271C of the Act and the said provision is mandatory in nature. It is a different kind of a situation from the one of "income escaping assessment" and for the above reason, the legislature made a separate provision of bar of limitation as prescribed in Section 231 of the Act in spite of existence of the provision contained in Section 149 being conscious that the said provision cannot have any application in the matter of taking action under Section 201 and again reintroduced the same period of limitation by way of incorporation of sub-section (3) of Section 201. There would be a definite error of law in applying the time limit prescribed in Section 149.

The next question is if in any given Statute, there is no period of limitation prescribed for taking an action under that Statute, whether such action should be taken within a reasonable period. If no period of limitation is prescribed under a Statute for taking action under it and at the same time, the Limitation Act does not apply to such a Statute, there cannot be any prohibition of the period of limitation for taking action under the said Statute unless there is any contrary intention expressed in the said Statute.

A Three-Judge- Bench of the Supreme Court in the case of *Uttam Namdeo Mahale Vs. Vithal Deo and others, AIR 1997 SC 2695* has held that "*In the absence of any specific limitation provided under Mamlatdar's Court Act,*

necessary implication is that the general law of limitation provided in Limitation Act (Act 2 of 1963) stands excluded. Where no limitation has been prescribed, an order can be executed at any time, especially when the law of limitation for the purpose of filing appeal therefore is not there. Where there is statutory rule operating in the field, the implied power of exercise of the right within reasonable limitation does not arise".

The Supreme Court in the case of *Ishar Singh Vs. Financial Commissioner and others, AIR 1984 SC 1719* took a similar view and held that no period of limitation would apply to the filing of an application under Section 43 of the Pepsu Tenancy Act of 1955 since no such period was prescribed by that Act and the Limitation Act had also no application to a proceeding under the Pepsu Tenancy Act.

Under the Income-tax Act, there is no scope of applying the provisions of the Limitation Act as would appear from the fact that in Section 260A itself, the power of condonation of delay in filing the appeal has been incorporated by the legislature by introducing sub-section 2A with effect from April 1, 2010 only and if the Limitation Act of its own had the application to such an appeal, there was no necessity of incorporation of such a provision in Section 260A and that too, with effect from April 1, 2010.

Therefore, in applying the provisions contained in Section 201 where the previous bar of limitation was lifted by amendment and there was no period of limitation fixed for exercising such power at the relevant point of time, no question of invoking a reasonable period of limitation arises.

■

Section 201 of the Income-tax Act, 1961 - Deduction of tax at source - Failure to deduct or pay, consequences of

Where assessee had utilized unspent credit limits of third party for importing goods and interest payable by third party to Bank was paid back to third party and further, assessee paid commission to said third party, payment made by assessee would be liable to TDS under section 194A

The appellant had paid ₹7,54,521 to Globe International Ltd. and the documents were sent through Bank. Since the appellant did not have sufficient Bank Letter of Credit limits (LC) for import of materials from foreign countries, it had utilized the LC limit of Globe International, for which the appellant paid commission @ 1% on utilized LC limits and Bank charges etc. According to the appellant, for utilizing the L.C. limits of Global, interest had been charged by the Bank which was paid by Global to the Bank on behalf of the appellant. Thus, the amount paid by the appellant to those two parties was the reimbursement of interest and consequently, no TDS was liable to be deducted.

On merit, the appellant tried to convince that the appellant did not take any loan from Globe International but utilized its unspent credit limits for importing the goods and thus, interest payable by the Global to the Bank was paid back to Global and as such, the interest was really payable by Globe International to the Bank and in such a circumstance, Section 194A was not attracted.

The Calcutta High Court held that the word "interest" has been defined in Section 2 (28A) of the Act. According to this definition "interest" means *interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized.*

Thus, the case of the appellant that it really paid commission to Globe International for utilizing its unspent credit facilities for import clearly comes within the definition of interest as it is a debt incurred by the appellant, which includes an obligation to pay fee or other charges in respect of the unspent credit facility of the Globe International. It appears that the appellant in its book described the amount as interest paid to Globe International and the said Globe International also confirmed the same before the Assessing Officer. The appellant was under the obligation to deduct TDS from the amount paid to Globe International in terms of Section 194A.

LD/60/95
Classic Papers Converters P. Ltd.
Vs.
CIT
September 2, 2011 (DEL)
(Assessment Years 1994-95 & 1995-96)

Section 220 of the Income-tax Act, 1961 read with Section 3 of the Taxation Law (Continuation and Validation of Recovery Proceedings) Act, 1964 - Collection and recovery of tax – When tax payable and when assessee deemed in default

Where (i) addition made by Assessing Officer was deleted by Commissioner (Appeals), but upheld by Tribunal and

(ii) assessee's case was that though demand on addition was in fact paid, still show cause notice was issued for levying interest, matter was to be remanded for fresh adjudication

For the assessment years 1994-95 and 1995-96, additions were made by the Assessing Officer disallowing the foreign tour expenses of one of the directors of the petitioner. The aforesaid addition was deleted by the Commissioner (Appeals), but was confirmed by the Tribunal *vide* orders dated 19th April, 2004 and 29th April, 2004. The petitioner did not challenge the said orders and the additions attained finality.

Penalties under section 271(1)(c) were imposed and were sustained in the first appeal. The petitioner did not file any further appeal and the orders imposing penalty have attained finality. The petitioner had filed an application under section 273A for waiver of penalty, which was dismissed. Therefore, the demands both on account of additional tax and penalty had to be paid by the petitioner. Notices dated 23-12-2005 and 8-12-2006 were issued by the Income Tax Officer, and the rectification order dated 25-1-2007 was also passed by the same officer.

The petitioner claimed that after the assessment orders were passed, notice of demand under section 156 of the Act was issued to the petitioner. Such notice of demand would stand nullified as the Commissioner (Appeals) had deleted the additions. In this connection, reliance was placed on the decision of the *Supreme Court Vikrant Tyres Ltd.* v. *First Income-Tax Officer,* [2001] 247 ITR 821 (SC).

The respondent, on the other hand, had submitted that the demand would be so nullified in case demand had been paid in full at the initial stage. However, when demand has not been paid in full, in view of section 3 of the Taxation Law (Continuation and Validation of Recovery Proceedings) Act, 1964, the earlier notice under section 156 of the Act would stand revived. In this connection, they have relied on the decision of the Kerala High Court in *Indira Rani (B.)* v. *Commissioner of Income Tax* [1999] 237 ITR 20 (Ker).

The High Court of Delhi held that the judgments referred to above had not been considered and examined. Further, the petitioner had now contended that the demands were in fact paid. Another question which might arise was whether these demands were fully or partly paid and the effect of part payment, if any. As facts had not been discussed and stated in the order by the ITO, the order of the ITO dated 25-1-2007 was to be set aside and the matter was to be remitted.

LD/60/96

Poonawalla Aviation Private Limited, In re

December 5, 2011 (AAR)

Section 245Q read with Section 195 of the Income-tax Act, 1961 read with Article 12 of the India-France Double Taxation Avoidance Convention - Advance rulings - Application for

Where French seller provides export credit facility to Indian purchaser and credit insurance premium was to be paid to French authority for extending export credit, interest paid to French seller on installment of loan or interest paid to French bank on endorsement of promissory notes for installment executed in its favour would not be taxable in India

The applicant, a company incorporated in India entered into an agreement for purchase of an aircraft from Dassault, a company incorporated in France. The French body 'COFACE', acting on behalf of French State in the export credit insurance, agreed to ensure the credit facility to be extended by the seller. As per amended agreement, the price payable was $ 41,000,000. Out of that amount, Dassault, the seller, agreed to provide as export credit facility a sum of $ 30,010400. Out of that amount, the credit insurance premium of $ 5,10,400 was to be paid to COFACE towards insurance premium. The amount loaned, or in respect of which the credit facility was extended was to be repaid in six-monthly instalments. Promissory notes, for installment payable, covering the principal and the interest separately were executed by the applicant in favour of Dassult. All the promissory notes were assigned by Dassault to bank BNP Paribas, France. The application was filed seeking an advance ruling as to whether it had any obligation to withhold tax on the interest payable.

The Authority for Advance Rulings held that insurance is a contract by which one party in consideration of a premium engages to pay an agreed sum on a certain event or indemnify another against a contingent loss. In a wider sense, a contract of insurance will come within

the scope of a contract of indemnity. But a contract of insurance against loss or damage to the subject matter of the insurance would not be a contract of indemnity. Here, the insurance is extended to the creditor, not to the debtor. The contract by the insurer is to indemnify the creditor, on the basis of the insurance contract. The liability is not based on the contract between the debtor and the creditor. COFACE has not extended the insurance facility to the debtor, the applicant. So, the mere fact that COFACE has insured the credit extended by Dassault, and is obliged to pay on the happening of the contingency agreed upon, does not mean that it has endorsed the credit facility extended by Dassault to the applicant.

COFACE has not guaranteed the repayment of the loan by the applicant. It has only engaged itself to pay an agreed sum to Dassault on the happening of a certain event, the event of Dassault incurring a loss on not being able to recover the loan or credit it has extended to the applicant. A contract of guarantee is a tripartite contract. It is only bilateral in this case, between COFACE and the Dassault.

Giving by the Convention between India and France, the mere extending of insurance cover by COFACE does not amount to 'extending or endorsing' the loan or credit by COFACE so as to attract paragraph 3(b) (i) of Article 12 of the DTAC. Further, the benefit of the Most Favoured Nation clause has been extended to Indo-French Convention.

Clause 7 of the Protocol reads that in respect of articles 11 (dividends), 12 (interest) and 13 (royalties, fee for technical services and payments for the use of equipment), if under any Convention, Agreement or Protocol singed after 1.9.1989, between India and a third State which is a member of the OECD, India limits its taxation at source.

In Treaties India had entered into with Canada, Hungary and Ireland exemption from taxation for interest relating to a loan or credit is available not only in respect of loans or credits made, guaranteed or extended, but also in respect of loans insured by institutions corresponding to COFACE in France.

In case of France also the convention covers loans or credits extended or endorsed by two institutions, the Banque Francaise du Commerce Exteriur or COFACE, the benefit is available.

When applying a tax treaty, it is necessary to carefully examine the Protocols and other additional documents. A protocol by itself amends or supports the existing treaty.

Clause 7 of the Protocol speaks of India limiting its taxation at source on interest dealt with in Article 12 of the Convention by providing a lower rate or by providing a scope more restricted than the rate or scope provided for in the Convention, the same rate or scope shall also apply to the Convention in question.

Clause (b) of paragraph 3 of the India France Convention exempts interest income from tax in the State in which it arises in respect of France, if the loan and credits extended or endorsed by Banque Francaise due Commerce Exteriur or COFACE and any institution in charge of the public financing of external trade and in respect of India, if it is extended or endorsed by Export Import Bank of India or any institution incharge of the public financing of external trade.

If the coverage or protection is understood as extended to loan or credit insured by one of the institutions referred to in the Convention between India and France in the context of the provisions noticed above, it has to be held that a loan or credit insured by COFACE would also come within the purview of Article 12.3(b) of the India-France Convention. Hence, on the argument on behalf of the applicant based on the Most Favoured Nation clause, it is to rule that the interest payable in the case on hand is not taxable in India.

Based on this conclusion, it is ruled that the interest payable to Dassault is not taxable in India under Article 12.3(b) of the India-France Double Taxation Avoidance Convention in view of the Most Favoured Nation Clause in the India-France Protocol which has to be taken as part of the Convention. Further, the interest payable to BNP PARIBAS on endorsement of the promissory notes in its favour is also not taxable in India in view of the Article 12.3 (b) of the DTAC between India and France as modified by the Most Favoured Nation protocol. In view of the above, there will be no obligation on the applicant to withhold tax on the interest paid to Dassault or to BNP PARIBAS on the transaction.

Excise/Customs

INDIRECT TAXES

LD/60/97
Flex Engineering Limited
Vs.
Commissioner of Central Excise
January 13, 2012 (SC)
Rule 57A of the Central Excise Rules, 1944 - Modvat Credit

Materials which are not physically used in manufacture of customized machine but used for testing packging machines would be entitled to Modvat Credit as process of testing customised machines is integrally connected with ultimate production of final product

The appellant-assessee, is engaged in the manufacture of various types of packaging machines, marketed as Automatic form 'fill and seal' machines (F&S machines), classified under chapter heading 8422.00 of the Schedule to the Central Excise Tariff Act, 1985. The assessee has prototype models of F&S machines

with technical details. The machines are 'made to order', inasmuch as all the dimensions of the packaging/sealing pouches, for which the F&S machine is required, are provided by the customer. The purchase order contains the inspection clause.

Flexible Laminated Plastic Film in roll form and Poly Paper which are duty paid, falling under chapter headings 3920.38 and 4811.30 of the Schedule to the Tariff Act, are used for testing, tuning and adjusting various parts of the F&S machine in terms of the purchase order. As the machine ordered is customer specific, if after inspection by the customer it is found deficient in respect of its operations for being used for a particular specified packaging, it cannot be delivered to the customer, till it is re-adjusted and tuned to make it match with the required size of the pouches as per the customer's requirement. On completion of the above process and when the customer is satisfied, an entry is made in the RG 1 register declaring the machine as manufactured, ready for clearance.

The assessee filed declarations and availed of the benefit of Modvat credit in respect of the Flexible Laminated Plastic Film in roll form and Poly Paper used for testing the F&S machine. The benefit of Modvat credit on the above goods was denied, on the ground that they have used the said material for the purpose of testing the final product i.e. the F&S machine which cannot be treated as inputs as stipulated in Rule 57A.

The Supreme Court of India held that the amended Rule itself contemplates that physical presence of the input, in respect of which Modvat credit is claimed, in the final product is not a pre-requisite for such a claim; even otherwise this issue is no longer *res-integra*.

In *CCE v. Rajasthan State Chemical Works (1991) 4 SCC 473 : 1991 (55) E.L.T. 444 (S.C.),* the Supreme Court had held that any operation which results in the emergence of the manufactured goods would come within the ambit of the term manufacture. This is because of the words used in Rule 57A, namely, goods used in or in relation to the manufacture of final products.

It is trite to state that "manufacture" takes place when the raw materials undergo a series of changes and transformation that result in the formation of a commercially distinct commodity having a different name, character and use. It is equally well settled that physical presence of an input in the final finished excisable goods is not a pre-requisite for claiming Modvat credit under Rule 57A of the Rules. It may very well be indirectly related to manufacture and still be necessary for the completion of the manufacture of the final product. It needs little emphasis that the process of manufacture is complete only when the product is rendered marketable. Thus, manufacture is intrinsically integrated with marketability.

If a product is not saleable, it will not be marketable and consequently the process of manufacture would not

be held to be complete and duty of excise would not be leviable on it. The corollary to the above is that till the time the step of manufacture continues, all the goods used in relation to it will be considered as inputs and thus, entitled to Modvat credit under Rule 57A of the Rules. In the present case, as aforesaid, each machine is tailor made according to the requirements of individual customers. If the results are not in conformity with the order, then the machine loses its marketability and is of no use to any other customer. Thus, the process of manufacture will not be said to be complete till the time the machines meet the contractual specifications and that will not be possible unless the machines are subjected to individual testing. Even though the revenue has alleged that the process of manufacture is complete as soon as the machine is assembled, yet it has not discharged the onus of proving the marketability of the machines thus assembled, prior to the stage of testing.

Thus, the process of testing the customised F&S machines is inextricably connected with the manufacturing process, in as much as, until this process is carried out in terms of the afore-extracted covenant in the purchase order, the manufacturing process is not complete; the machines are not fit for sale and hence not marketable at the factory gate. Therefore, the manufacturing process in the present case gets completed on testing of the said machines and hence, the afore-stated goods viz. the flexible plastic films used for testing the F&S machines are inputs used in relation to the manufacture of the final product and would be eligible for Modvat credit under Rule 57A.

The process of testing the customised machines is integrally connected with the ultimate production of the final product viz. the F&S machines and therefore, that process is one in relation to the manufacture, falling within the sweep of Rule 57A.

Note: Judgments of the Allahabad High Court was set aside.

LD/60/98
Indian Oil Corporation Ltd.
Vs.
CCE, Vadodara
&
Indian Oil Corporation Ltd.
Vs.
CCE, Lucknow
January 13, 2012 (SC)

Rule 192 read with Rule 8 of the Central Excise Rules, 1944 – Application for Concession

For availing concession from excise duty as per Notification No. 75/84-CE dated 01.03.1984 on excisable goods used in a specified industrial process, a person must obtain a registration certificate from the Collector and that "the concession shall, unless renewed by the Collector, cease on the expiry of the registration certificate"; for period between expiry of registration certificate and granting of fresh certificate, concession would not be available

The appellant produces *inter alia* Reduced Crude Oil (RCO). Under Notification No. 75/84-CE dated 01.03.1984, one of the goods exempted from excise duty by the notification was RCO, if produced only from indigenous crude oil subject to intended use as fuel for generation of electrical energy by electricity undertakings owned or controlled by the Central Government or any State Government or any State Electricity Board or any local authority or any licensee under Part-II of the Indian Electricity Act, 1910 except those who produce electrical energy not for sale but for their own consumption or for supply to their own undertakings. The proviso in the notification stated two conditions subject to which the exemption was granted and one of the conditions was that where the intended use is elsewhere than in the factory of production, it is necessary to obtain an excise registration certificate. Rule 192 further provided that the concession shall, unless renewed by the Collector, cease on the expiry of the registration certificate.

The Ahmedabad Electricity Company Ltd. had obtained a registration certificate in Form CT-2 under Rule 192 of Chapter X of the Rules and on the strength of such registration certificate, purchased RCO from the appellant availing the exemption from excise duty under Notification No. 75/84 dated 01.03.1984. The registration certificate obtained by the Ahmedabad Electricity Company Ltd. expired on 31.12.1995 and a fresh registration was granted in its favour on 26.06.1996. The Assistant Commissioner orders demanding excise duty of ₹32,35,485/- from the appellant for RCO supplied to the Ahmedabad Electricity Company Ltd. during the period 01.01.1996 to 25.06.1996 on the ground that the said company did not have a registration certificate in Form CT-2 under Rule 192 of Chapter X of the Rules during this period and, therefore, the RCO supplied by the appellant to the Ahmedabad Electricity

Company Ltd. during this period was not exempt from excise duty.

The Supreme Court of India held that the proviso to Rule 192 makes it clear that for availing the exemption two conditions must be satisfied: First, that it is proved to the satisfaction of the excise officer that the goods are used for intended use specified in Column (5) of the Table annexed to the exemption notification and second, where such use is elsewhere than in the factory of production, the procedure set out in Chapter X of the Rules is followed. Therefore, none can accept the contention of the appellant that if the first condition is satisfied, i.e. it is proved to the satisfaction of the Central Excise Officer that the goods are used for the intended use, the exemption has to be granted. Unless the second condition is also satisfied, i.e. the procedure set out in Chapter X of the Rules is followed where the use of the goods is elsewhere than in the factory of production, the exemption cannot be granted under the exemption notification.

In the facts of the present case, the RCO was not to be used in the factory of the appellant but at the place of generation of electricity by the Ahmedabad Electricity Company Ltd. Hence, the second condition laid down in the proviso was also to be complied with.

The language of Rule 192 of Chapter X of the Rules is clear that for availing concession from excise duty as per Notification No. 75/84-CE dated 01.03.1984 on excisable goods used in a specified industrial process, a person must obtain a registration certificate from the Collector and that "the concession shall, unless renewed by the Collector, cease on the expiry of the registration certificate". Admittedly, the registration certificate of the appellant expired on 31.12.1995. Hence, the exemption granted under the notification ceased on 31.12.1995. The fresh registration certificate in favour of the Ahmedabad Electricity Company Ltd. was issued on 26.06.1996 and the registration certificate was not for any period prior to 26.06.1996. As the procedure laid down in Rule 192 of Chapter X of the Rules has not been complied with, the appellant is not entitled to avail the exemption of excise duty under the exemption notification during the period from 01.01.1996 to 25.06.1996.

■

Rule 3(1) the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 read with Section 5A of the Central Excise Act, 1944 – Application by the Manufacturer to obtain the benefit

Where manufacturer of fertilizer had not submitted application in the Form at Annexure-1 for obtaining Naphtha without payment of duty, appellant producer would not be entitled to exemption on provided by Notification No. 3/2001-CE dated 01.03.2001

The appellant produces *inter alia* Naphtha. By

Notification No. 3/2001-CE dated 01.03.2001 Naphtha cleared for the intended use in the manufacture of fertilizers was exempted from excise duty subject to relevant conditions specified in the annexure to the notification. In the annexure to the exemption notification, one of the conditions specified was that where such use is elsewhere than in the factory of production, the exemption shall be allowed if the procedure set out in the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 is followed.

Indo Gulf Corporation Limited placed an order on 16.07.2001 on the appellant for supply of Naphtha for the purpose of manufacture of fertilizers and furnished a letter to the appellant saying it has made an application to the Commissioner of Excise for authorization for dispatch of one rake of Naphtha. The appellant supplied 2241.908 MT of Naphtha to Indo Gulf Corporation Limited and while clearing the aforesaid Naphtha from its factory did not make any payment of Central Excise duty. The Commissioner of Central Excise raised the demand of duty and also imposed a penalty.

The Tribunal held that the manufacturer, namely, Indo Gulf Corporation Limited had not submitted application in the Form at Annexure-1 for obtaining Naphtha without payment of duty as the condition of the exemption notification has not been complied with, the appellant was not entitled to clear naphtha without payment of excise duty and accordingly sustained the demand of excise duty.

The Supreme Court held that by the exemption Notification No. 3/2001-CE dated 01.03.2001 the Central Government exempted the excisable goods from duty "subject to the relevant conditions specified in the Annexure" to the exemption notification.

It will be clear from Para 3 of the Annexure to the exemption notification that the exemption shall be allowed if it has been proved to the Central Excise Officer having jurisdiction that the goods are cleared for the intended use specified in column 3 of the table. In addition to this condition, there is a further condition in Para 4 of the Annexure to the exemption notification that where the intended use is elsewhere than the factory of production, the exemption shall be allowed if the procedure set out in the 2001 Rules is followed.

The condition specified in Para 4 in the Annexure to the exemption notification states that where the intend use is elsewhere than in the factory of production, the exemption shall be allowed if the procedure set out in the 2001 Rules is followed. In the facts of this case, the Naphtha produced by the appellant in its factory was to be used for the manufacture of fertilizer elsewhere than in its own factory, i.e. in the factory of Indo Gulf Corporation Limited. Hence, the exemption could be allowed only if the procedure set out in the 2001 Rules was followed.

Rule 3(1) makes it amply clear that the manufacturer, who intends to use subject goods for specified use at concessional rate of duty, shall make an application in quadruplicate in the Form at Annexure-1 to the jurisdictional Assistant Commissioner or Deputy Commissioner of Central Excise, as the case may be. Admittedly, no such application was made by Indo Gulf Corporation Limited in the Form at Annexure-1 to the jurisdictional Assistant Commissioner or Deputy Commissioner of Central Excise. As the procedure set out in the 2001 Rules has not been followed, the appellant was not entitled to exemption on the Naphtha cleared from its factory for supply to Indo Gulf Corporation Limited for manufacture of fertilizer.

Companies Act

OTHER ACTS

LD/60/99
Sumana Bhasin
Vs.
Eastern Connexion (Exports) Pvt. Ltd.
December 19, 2011 (DEL)

Section 10F of the Companies Act, 1956 – Appeal against the Orders of the Company Law Board

Where on consent of both parties, chartered accountants was appointed for valuation of shares, said valuation cannot be wriggled out later on unless there is fraud and collusion on part of valuer

The petitioner expressed her willingness to go out of the respondent company if fair consideration was paid for her shares. Both the sides agreed before the CLB that this Board itself would appoint an independent valuer to fix the share price as per the balance sheet as on 31-3-2008. Accordingly, CLB appointed Chartered Accountants to determine the fair price of the shares. The valuer determined the fair price of the share of ₹10 each at ₹174.82 per share and at this fair price, the total consideration for 1000 shares would come to ₹174820. The petitioner desired a sum of ₹10 lakhs. The respondent was agreeable to pay ₹3 lacs which was not acceptable to the petitioner.

The CLB found that the petitioner had not advanced any grounds for challenging the valuation. The valuation done by the company itself, the fair price of the shares came only to ₹157.81 per share. The difference in valuation was not large. The CLB held that once the petitioner had consciously given her consent for the date of valuation being 31.3.2008, the question of change of valuation date did not arise.

Company Law Board passed an order whereby the respondent-company was directed to pay

₹3,00,000 to the appellant as "fair valuation for the 1000 shares held by the appellant". On receipt of the aforesaid consideration, the appellant was directed to transfer to the respondent her entire shareholding in the respondent company.

The Delhi High Court held that the independent valuer *i.e.* Chartered Accountants had been appointed by the CLB at the instance and with the consent of both the parties. The appellant-petitioner had specifically given her consent for the date of valuation as 31-3-2008. It was not open to the appellant to wriggle out of the consent given by her for appointment of Chartered Accountants as well as for determination of the share price. Hence the conclusion of the CLB that the appellant-petitioner could not go back out on its consent was correct and the same called for no interference.

Trademarks Act

LD/60/100
Tata Sons Limited
Vs.
Hoop Anin
December 16, 2011 (DEL)

Section 29 of the Trademarks Act, 1999 - Infringement of registered trade marks

Using business name 'TATA Diamonds' and web name tatadiamonds.com by a third party, other than TATA Group of company constitutes infringement of trademark 'TATA'

The defendant no.1 was carrying the business under and name and style of "Tata Diamonds" was alleged to be engaged in the business of diamonds and diamond jewellery. He had also registered a domain name "tatadiamonds.com".

The case of the plaintiff was that by using the word 'Tata', which is phonetically, visually and structurally similar to the plaintiff's registered trademark, the defendant is infringing its trademark. It was also alleged that use of the word 'Tata' as part of the trade mark/ trade name/web name is likely to cause confusion and deception in the mind of the public, which might be misled to assume that the defendant has a connection with the House of Tatas, in fact there being no connection or affiliation. It was also alleged that these trade activities of defendants under the impugned name are likely to cause injuries in the business, goodwill and reputation, which the mark 'TATA' enjoys in a number of activities. The plaintiff has, therefore, sought an injunction restraining the defendant for using any trademark/trade name/ web name, of which word 'TATA' forms. The plaintiff has also sought an order directing transfer of domain name "tatadiamonds.com" to it.

The Delhi High Court held that the word mark 'TATA' is registered in favour of the plaintiff company and the products covered by registration include jewellery and precious metals. Defendant No.1 has also used the mark 'TATA' as a part of the domain name www.tatadiamonds.com and thereby infringed the registered trademark of the plaintiff. The plaintiff is entitled to injunction against use of the mark "TATA" by the defendant for two reasons firstly because of "TATA" being a registered trademark in Class-14 in respect of jewellery and precious metals and secondly because of "TATA" being a well known mark. Defendant No.1 by using the name "TATA DIAMONDS" as his business name and www.tatadiamonds.com as his web name has included the whole of the registered and well known trademark "TATA" as a part of his business name and domain name. Mere suffixing the words "Diamond" with "Tata" would not take the case of defendant No.1 out of purview of sections 29(1), (2) and (5) of the Act. It can hardly be disputed that considering the extent to which the mark 'TATA' is known, not only in India but in other countries as well, anyone coming across the business name "Tata Diamonds" and/or domain name www.tatadiamonds.com would assume that defendant No. 2 is a business entity from the House of Tatas, or defendant No.1 has either some business connection with the House of Tatas or that they have licensed him to carry the business which he carries on under the name M/s Tata Diamonds or that there is some kind of a collaboration between him and Tata Sons and that is why name "Tata" is being used by him as a part of his business name and his domain name. Besides diluting the distinctiveness of the trademark "TATA", this is also likely to cause confusion amongst the persons who come across the aforesaid business name and domain name and as regards source of the goods being sold under the name Tata Diamond, and/or on the website www.tatadiamonds.com, in fact, would amount to causing a deception on them by inducing them to believe that defendant No.1 has some kind of a business connection or association with the House of Tatas.

The defendant No.1 has given a hyperlink to the website of the plaintiff www.tata.com from his web-site and is also using the device containing the word Tata and 't' in a circle device both of which are registered marks of the plaintiff. The device of the plaintiff, which can be seen on the web site of defendant No.1, is registered in favour of plaintiff in Class-14. Thus, defendant No.1 has gone to the extent of making use of the registered device of the plaintiff without any prefix or suffix to it. Defendant No.1 thus had indulged in, what the plaintiff terms as, "framing".

Therefore, the defendant No.1 needs to be restrained from using the business name/trademark/symbol akin to 'TATA' and also liable to pay damages to the plaintiff. ■