Legal Decisions[1]

Income-tax Act

LD/61/63

Bangalore Club
Vs.
CIT
January 14, 2013 (SC)
[Assessment Years 1989-90,1990-91,1993-94 to 1999-2000]

Section 4 of the Income-tax Act, 1961 – Income – Charge of Tax

Interest earned by a club on fixed deposits kept with banks, which were its corporate members, would not be exempted from payment of income-tax on basis of doctrine of mutuality

The assessee-club earned interest income on fixed deposits kept with different banks. While it offered tax on income earned from other banks, it claimed exemption from tax on interest earned from those banks which were its corporate members on the basis of doctrine of mutuality

The Supreme Court held that to apply the doctrine of mutuality certain conditions are to be fulfilled.

The *first* condition requires that there must be a complete identity between the contributors and participators. In short, there has to be a complete identity between the class of participators and class of contributors; the particular label or form by which the mutual association is known is of no consequence.

The *second* feature demands that the actions of the participators and contributors must be in furtherance of the mandate of the association. In the case of a club, it would be necessary to show that steps are taken in furtherance of activities that benefit the club, and in turn its members.

Thirdly, there must be no scope of profiteering by the contributors from a fund made by them which could only be expended or returned to themselves.

Firstly, the arrangement lacks a complete identity between the contributors and participators. Till the stage of generation of surplus funds, the setup resembled that of a mutuality; the flow of money, to and fro, was maintained within the closed circuit formed by the banks and the club, and to that extent, nobody who was not privy to this mutuality, benefited from the arrangement. However, as soon as these funds were placed in fixed deposits with banks, the closed flow of funds between the banks and the club suffered from deflections due to exposure to commercial banking operations. During the course of their banking business, the member banks used such deposits to advance loans to their clients. Hence, in the present case, with the funds of the mutuality, member banks engaged in commercial operations with third parties outside of the mutuality, rupturing the 'privity of mutuality', and consequently, violating the one to one identity between the contributors and participators as mandated by the first condition. Thus, in the instant case the first condition for a claim of mutuality is not satisfied.

As aforesaid, the second condition demands that to claim an exemption from tax on the principle of mutuality, treatment of the excess funds must be in furtherance of the object of the club, which is not the case here. In the instant case, the surplus funds were not used for any specific service, infrastructure, maintenance or for any other direct benefit for the member of the club. These were taken out of mutuality when the member banks placed the same at the disposal of third parties, thus, initiating an independent contract between the bank and the clients of the bank, a third party, not privy to the mutuality. This contract lacked the degree of proximity between the club and its member, which may in a distant and indirect way benefit the club, nonetheless, it cannot be categorized as an activity of the club in pursuit of its objectives. It needs little emphasis that the second condition postulates a direct step with direct benefits to the functioning of the club. For the sake of argument, one may draw remote connections with the most brazen commercial activities to a club's functioning. However, such is not the design of the second condition. Therefore, it stands violated.

The facts at hand also fail to satisfy the third condition of the mutuality principle i.e. the impossibility that contributors should derive profits from contributions made by themselves to a fund which could only be expended or returned to themselves. This principle requires that the funds must be returned to the contributors as well as expended solely on the contributors. True, that in the present case, the funds do return to the club. However, before that, they are expended on non- members i.e. the clients of the bank. Banks generate revenue by paying a lower rate of interest to club-assessee, that makes deposits with

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

them, and then loan out the deposited amounts at a higher rate of interest to third parties. This loaning out of funds of the club by banks to outsiders for commercial reasons, snaps the link of mutuality and thus, breaches the third condition.

There is nothing on record which shows that the banks made separate and special provisions for the funds that came from the club, or that they did not loan them out. Therefore, clearly, the club did not give, or get, the treatment a club gets from its members; the interaction between them clearly reflected one between a bank and its client. This directly contravenes the third condition.

The interest accrues on the surplus deposited by the club of any other deposit made by an account holder with the bank. The interest earned by the assessee even from the member banks on the surplus funds deposited with them had the taint of commerciality, fatal to the principle of mutuality.

The assessee is already availing the benefit of the doctrine of mutuality in respect of the surplus amount received as contributions or price for some of the facilities availed by its members, before it is deposited with the bank. This surplus amount was not treated as income; since it was the residue of the collections left behind with the club. A façade of a club cannot be constructed over commercial transactions to avoid liability to tax. Such setups cannot be permitted to claim double benefit of mutuality.

Unlike the aforesaid surplus amount itself, which is exempt from tax under the doctrine of mutuality, the amount of interest earned by the assessee from the banks will not fall within the ambit of the mutuality principle and will therefore, be exigible to Income-Tax in the hands of the assessee-club.

Note: In this case, the Supreme Court had elaborately discussed the principles of the doctrine of mutuality.

Judgment and Order of Karnataka High Court in ITA No. 115 of 1999, upheld.

LD/61/64

Director of Income-tax (Exemption), New Delhi

Vs.

Raunaq Education Foundation

January 7, 2013 (SC)

[Assessment Year 2002-2003]

Section 13 read with Sections 11 & 12 of the Income-tax Act, 1961 - Charitable or religious trusts/ Institutions - Denial of exemptions

Where on receiving post dated donation cheque meant for next year, the assessee trust recorded it as an amount receivable in future and donor also did not acquire any benefit out of said cheque in current year, no violation of section 13(2)(b) could be alleged against assessee

During the relevant accounting year *i.e.* 2001-2002, the respondent-assessee had, by way of donation, received two cheques for a sum of ₹40 lac each from M/s Apollo Tyres Ltd. One of the cheques was dated 22nd April, 2002 and yet it was given in accounting year 2001-2002 i.e. before 31st March, 2002. The said cheque for donation was received by the respondent-assessee before 31st March, 2002 but was honoured after 1st April, 2002 i.e. in accounting year 2002-2003.

In the assessment proceedings, the Assessing Officer came to the conclusion that with an intention to do undue favour to M/s Apollo Tyres Ltd., the cheque dated 22nd April, 2002, given by way of donation for a sum of ₹40 lac had been accepted by the respondent-assessee and receipt for the said amount was also issued before 31st March, 2002 i.e. in the accounting year 2001- 2002. According to the Assessing Officer, many of the trustees of the assessee trust were related to the directors of M/s Apollo Tyres Ltd.

The Assessing Officer observed that this had been primarily done with the sole objective of giving advantage to the donor company M/s Apollo Tyre Ltd. in which the main trustees and their relatives were substantially interested as per provisions of section 13(3). This was clearly in violation of provisions of section 13(2)(d)(h) and as such exemption under sections 11 and 12 could not be allowed to the assessee and the assessment would be made in the status of AOP.

The Supreme Court held that though the assessee trust had issued receipt when it received the cheque dated 22nd April, 2002 for ₹40 lac in March, 2002, it was clearly stated in its record that the amount of donation was receivable in future and accordingly, the said amount was also shown as donation receivable in the balance sheet prepared by the assessee trust as on 31st March, 2002. It is also not in dispute that M/s Apollo Tyres Ltd. did not avail any advantage of the said donation during the accounting year 2001-2002. Upon perusal of the Assessment Order of M/s Apollo Tyres Ltd. for the assessment year 2002-2003, it is

clearly revealed that the cheque dated 22nd April, 2002 was not taken into account for giving benefit under Section 80G of the Act as the said amount was paid in April, 2002, when the cheque was honoured.

No irregularity had been committed by the assessee trust and there was no violation of the provisions of Sections 13(2)(b) or 13(2)(h). The fact that most of the trustees of the assessee trust and the directors of M/s Apollo Tyres Ltd. are related is absolutely irrelevant.

Note: Order passed in ITA No. 150 of 2008 by Delhi High Court upheld.

LD/61/65
I.C.D.S. LTD.
Vs.
CIT, Mysore
January 14, 2013 (SC)
[Assessment Years 1991-92 to1996-97]

Section 32 of the Income-tax Act, 1961 read with Section 2(30) of the Motor Vehicle Act, 1988 - Depreciation

Whether where assessee-leseasing company leased out trucks purchased by it and derived rental income, while maintaining ownership with it, assessee would be entitled to claim depreciation on these trucks

The assessee non-banking finance Company is engaged in the business of hire purchase, leasing and real estate etc. The vehicles, on which depreciation was claimed, are stated to have been purchased by the assessee against direct payment to the manufacturers. The assessee, as a part of its business, leased out these vehicles to its customers and thereafter, had no physical affiliation with the vehicles. In fact, lessees were registered as the owners of the vehicles, in the certificate of registration issued under the Motor Vehicles Act, 1988.

In its return of income for the relevant assessment years, the assessee claimed, among other heads, depreciation in relation to certain assets, (additions made to the trucks) which, as explained above, had been financed by the assessee but registered in the name of third parties. The assessee also claimed depreciation at a higher rate on the ground that the vehicles were used in the business of running on hire.

The Assessing Officer disallowed claims, both of depreciation and higher rate, on the ground that the assessee's use of these vehicles was only by way of leasing out to others and not as actual user of the vehicles in the business of running them on hire. It had merely financed the purchase of these assets and was neither the owner nor user of these assets.

The Supreme Court held as follows:

Issue of USE by the assessee

The Revenue argued that since the lessees were actually using the vehicles, they were the ones entitled to claim depreciation, and not the assessee.

None can agree with the argument. The Section requires that the assessee must use the asset for the "purposes of business". It does not mandate usage of the asset by the assessee itself. As long as the asset is utilised for the purpose of business of the assessee, the requirement of Section 32 will stand satisfied, notwithstanding non-usage of the asset itself by the assessee.

In the present case, the assessee is a leasing company which leases out trucks that it purchases. Therefore, on a combined reading of Section 2(13) and Section 2(24), the income derived from leasing of the trucks would be business income, or income derived in the course of business, and has been so assessed. Hence, it fulfills the aforesaid second requirement of Section 32 of the Act *viz*. that the asset must be used in the course of business.

Issue of the OWNERSHIP of the assessee

The vehicle, along with its keys, was delivered to the assessee upon which, the lease agreement was entered into by the assessee with the customer.

The Revenue argued that at the end of the lease period, the ownership of the vehicle is transferred to the lessee at a nominal value not exceeding 1% of the original cost of the vehicle, making the assessee in effect a financer.

As long as the assessee has a right to retain the legal title of the vehicle against the rest of the world, it would be the owner of the vehicle in the eyes of law. A scrutiny of the sale agreement cannot be the basis of raising question against the ownership of the vehicle. The clues qua ownership lie in the lease agreement itself, which clearly point in favour of the assessee.

In this regard the Tribunal observed that after the lessee took possession of the vehicle under a lease deed from the appellant-company, the lessee was

paying lease rent. The ownership of the vehicles would vest with the assessee-company. Further the assessee company is having right of inspection at any time it wants. In case of default of lease rent, in addition to expenses, interest etc. the assessee- company was entitled to take possession of the vehicle that was leased out. Finally, as per clause (19) of the lease agreement, on the expiry of the lease tenure, the lessee should return the vehicle to the appellant company in working order.

Thus, it is clear that the transactions occurring in the business of the assessee-appellant are leases under agreement, but not hire purchase transactions. In fact, they are transactions of 'hire'. The transactions involved in the appellant business are nothing but lease transactions.

As far as the factual portion is concerned, it was to be concluded that leasing of vehicles was nothing but hiring of vehicles. These two aspects are one and the same.

Position under Motor Vehicles Act

The general opening words of the Section 2(30) of the MV Act say that the owner of a motor vehicle is the one in whose name it is registered, which, in the present case, is the lessee. The subsequent specific statement on leasing agreements states that in respect of a vehicle given on lease, the lessee who is in possession shall be the owner. The Revenue thus, argued that in case of ownership of vehicles, the test of ownership is the registration and certification. Since the certificates were in the name of the lessee, they would be the legal owners of the vehicles and the ones entitled to claim depreciation. Therefore, the general and specific statements on ownership construe ownership in favour of the lessee, and hence, are in favour of the Revenue.

There is no merit in the Revenue's argument for more than one reason: (i) Section 2(30) of the MV Act is a deeming provision that creates a legal fiction of ownership in favour of lessee only for the purpose of the MV Act. It defines ownership for the subsequent provisions of the MV Act, not for the purpose of law in general. It serves more as a guide to what terms in the MV Act mean. Therefore, if the MV Act at any point uses the term owner in any Section, it means the one in whose name the vehicle is registered and in the case of a lease agreement, the lessee. That is all. It is not a statement of law on ownership in general. Perhaps, the repository of a general statement of law on ownership may be the Sale of Goods Act; (ii) Section 2(30) of the MV Act must be read in consonance with sub- sections (4) and (5) of Section 51 of the MV Act.

The MV Act mandates that during the period of lease, the vehicle be registered, in the certificate of registration, in the name of the lessee and, on conclusion of the lease period, the vehicle be registered in the name of lessor as owner. Section 51 of the MV Act leaves no choice to the lessor but to allow the vehicle to be registered in the name of the lessee Thus, no inference can be drawn from the registration certificate as to ownership of the legal title of the vehicle; and (iii) if the lessee was in fact the owner, he would have claimed depreciation on the vehicles, which, as specifically recorded in the order of the Appellate Tribunal, was not done. It would be a strange situation to have no claim of depreciation in case of a particular depreciable asset due to a vacuum of ownership. As afore-noted, the entire lease rent received by the assessee is assessed as business income in its hands and the entire lease rent paid by the lessee has been treated as deductible revenue expenditure in the hands of the lessee. This reaffirms the position that the assessee is in fact the owner of the vehicle, in so far as Section 32 of the IT Act is concerned.

There was some controversy regarding the invoices issued by the manufacturer – whether they were issued in the name of the lessee or the lessor. For the view taken above, it will be unnecessary to go into the said question as it is of no consequence to the final opinion on the main issue. From a perusal of the lease agreement and other related factors, as discussed above, the assessee's ownership of the trucks in question is proved. Therefore, in the facts of the present case, it was to be held that the lessor i.e. the assessee is the owner of the vehicles. As the owner, it used the assets in the course of its business, satisfying both requirements of Section 32 of the Act and hence, is entitled to claim depreciation in respect of additions made to the trucks, which were leased out.

Claim of the assessee for a higher rate of depreciation

The import of the same term "purposes of business", used in the second proviso to Section 32(1) of the Act gains significance. The interpretation of these words would not be any different from that which has been ascribed to them earlier, under Section 32 (1). Therefore, the assessee fulfils even the requirements

for a claim of a higher rate of depreciation, and hence is entitled to the same.

Note: Judgment of High Court set aside. Answered in favour of assessee.

LD/61/66
Asstt. CIT, Chennai
Vs.
A.R. Enterprises
January 14, 2013 (SC)
[Assessment Year 1995-96]

Section 158B of the Income-tax Act, 1961 - Block assessment in search cases - Block period/undisclosed income

Payment of Advance Tax, which is based upon estimated income, cannot tantamount to the disclosure of the total income, which must be declared in the return; where assessee had not filed its return of income by due date, Assessing Officer was correct in assuming that assessee would not have disclosed its total income

After the search was conducted, it was found that for the assessment year 1995-96, the respondent-assessee had not filed its return of income by the due date. It is only when block assessment proceedings were initiated by the assessing officer, that the assessee filed its return for the said assessment year under Section 158BC of the Act, showing its total income as ₹7,02,768. The assessee claimed, that since Advance Tax had been paid in three installments, it could not be said that the income had not been disclosed or that there was no intention to disclose income.

The Supreme Court held as follows:

The only way of disclosing income, on the part of an assessee, is through filing of a return, as stipulated in the Act, and therefore an "undisclosed income" signifies income not stated in the return filed. Keeping that in mind, it seems that the legislature has clearly carved out two scenarios for income to be deemed as undisclosed: (i) where the income has clearly not been disclosed and (ii) where the income *would* not have been disclosed. If a situation is covered by any one of the two, income would be undisclosed in the eyes of the Act and hence subject to the machinery provisions of Chapter XIVB. The second category, *viz*. where income *would* not have been disclosed, contemplates the likelihood of disclosure; it is a presumption of the intention of the assessee since in concluding that an assessee would or would not have disclosed income, one is *ipso facto* making a statement with respect to whether or not the assessee possessed the intention to do the same. To gauge this, however, reliance must be placed on the surrounding facts and circumstances of the case.

One such fact, is the payment of Advance Tax. However, the degree of its material significance depends on the time at which the search is conducted in relation to the due date for filing return. Depending on which side of the due date the search is conducted, material significance of payment of Advance Taxes vacillates in construing the intention of the assessee. If the search is conducted after the expiry of the due date for filing return, payment of Advance Tax is irrelevant in construing the intention of the assessee to disclose income. Such a situation would find place within the first category carved out by Section 158B of the Act i.e. where income has clearly not been disclosed. The possibility of the intention to disclose does not arise since, as held earlier, the opportunity of disclosure has lapsed i.e. through filing of return of income by the due date. If, on the other hand, search is conducted prior to the due date for filing return, the opportunity to disclose income or, in other words, to file return and disclose income still persists. In which case, payment of Advance Tax may be a material fact for construing whether an assessee intended to disclose. An assessee is entitled to make the legitimate claim that even though the search or the documents recovered, show an income earned by him, he has paid Advance Tax for the relevant assessment year and has an opportunity to declare the total income, in the return of income, which he would file by the due date. Hence, the fulcrum of such a decision is the due date for filing of return of income vis-à-vis date of search. Payment of Advance Tax may be a relevant factor in construing intention to disclose income or filing return as long as the assessee continues to have the opportunity to file return and disclose his income and not past the due date of filing return. Therefore, there can be no generic rule as to the significance of payment of Advance Tax in construing intention of disclosure of income. The same depends on the facts of the case, and hinges on the positioning of the search operations qua the due date for filing returns.

Thus, at the very outset, the question that whether payment of Advance Tax by an assessee *per se* is tantamount to disclosure of total income, for the relevant assessment year, must be answered in the negative.

There is yet another reason to opine so. Payment of Advance Tax and filing of return are functions of completely different notions of income i.e. estimated income and total income respectively. The payment of Advance Tax is based on an ***estimation*** of the total income that is chargeable to tax and not on the ***total income*** itself.

The computation of "undisclosed income" for the purposes of Chapter XIVB has to be construed in terms of the "total income" received, accrued, arisen; or which is deemed to have been received, accrued or arisen in the previous year, and is computed according to the provisions of the Act. According to Section 139(1) of the Act, every person who is assessable under the Act, must file a return declaring his or her total income during the previous year on or before the due date, for assessment under Section 143 of the Act. Hence, the 'disclosure of income' is the disclosure of the total income in a valid return under Section 139, subject to assessment and chargeable to tax under the provisions of the Act. It is important to bear in mind that ***total*** income is distinct from the ***estimated*** income, upon the basis of which, Advance Tax is paid by an assessee. Advance Tax is based on *estimated* income, and hence, it cannot result in the disclosure of the total income assessable and chargeable to tax Advance Tax is the tax payable on the estimated total income of the relevant financial year which is chargeable to tax in the assessment year but is payable in that very financial year.

According to Section 209(1)(a), the assessee shall first estimate his "current income" and thereafter pay income tax calculated on this *estimated income* on the rates in force in the relevant financial year. It is significant to note that this income is an estimation that is made by the assessee and may not be the exact income, which may ultimately be declared in the return under Section 139 and assessed under Section 143 of the Act. Needless to emphasise that payment of Advance Tax does not absolve an assessee from an obligation to file return disclosing total income for the relevant assessment year. In short, the disclosure of total income by the filing of return under Section 139 of the Act is mandatory even after the payment of Advance Tax by an assessee, since the "current income" which forms the basis of the Advance Tax is a mere estimation and not the final total income for the relevant assessment year liable to be assessed. advance tax when there is variation between advance tax paid and actual liability to tax.

Since the Advance Tax payable by an assessee is an estimate of his "current income" for the relevant financial year, it is not the actual total income, to be disclosed in the return of income. To repeat, the vital distinction being that the "current income" is an estimation or approximation, which may not be accurate or final; whereas the "total income" is the exact income disclosed in a valid return, assessable by the Revenue. The fact that the "current income" is an estimation implies that it is not final and is subject to further adjustments in the form of additions or reductions, as the case may be, and would have to be succeeded by the disclosure of final and total income in a valid return. It will be a misconstruction of the law to construe the undisclosed income for purposes of Chapter XIVB as an "estimate" of the total income, which is assessable and chargeable to tax. Therefore, it cannot be said that payment of Advance Tax based on "current income" involves the disclosure of "total income", as defined in Section 2(45) of the Act, which has to be stated in the return of income. The same is evidenced in the scheme of Chapter XIVB, in particular.

For the purposes of computation of undisclosed income under Chapter XIVB, an assessee can rebut the Assessing Officer's finding of undisclosed income by showing that such income was disclosed in the return of income filed by him before the commencement of search or the requisition. In other words, when Section 158BB(3) is read with Section 158B(b), which defines undisclosed income, the conclusion will be that for income to be considered as disclosed income, the same should have been disclosed in the return filed by the assessee before the search or requisition. On failure to file return of income by the due date under Section 139 of the Act, payment of Advance Tax per se cannot indicate the intention of an assessee to disclose his income.

If the payment of Advance Tax is held to have reflected the intention of the assessee to disclose its income, it could result in a situation where the mandatory obligation of filing a return for disclosure of income under the provisions of the Act, would

not be necessary. It will be open to an assessee to contend that payment of Advance Tax is tantamount to disclosure of income. Such a proposition would be contrary to the very purpose of filing of return, which ultimately leads to assessment of total income for the relevant assessment year. Any anomaly in the return entails serious consequences, which may not otherwise be attracted on estimation of income for the purpose of payment of Advance Tax. It would thus, be difficult to accept the plea that payment of Advance Tax is tantamount to the disclosure of income or that it indicates the intention of the assessee to disclose income.

The Advance Tax payable under Chapter XVII is based on an estimate of the total income of the assessee for the relevant financial year, and is not the final "total income" which must be disclosed for assessment through the filing of a return under Section 139 of the Act in the following assessment year. An estimate always has an element of guesswork. There could be various reasons due to which an estimate may be faulty and inaccurate which is why, there is a provision for payment of interest on deficient or excess payment of tax.

The payment of Advance Tax, which is based upon estimated income, cannot tantamount to the disclosure of the total income, which must be declared in the return.The fact that the assessee had not filed its return of income by the due date, the Assessing Officer was correct in assuming that the assessee would not have disclosed its total income.

Note: Since the tax to be deducted at source is also computed on the estimated income of an assessee for the relevant financial year, such deduction cannot result in the disclosure of the total income for the relevant assessment year. Subject to the monetary limit of the total income, every person is obligated to file his return of income even after tax is deducted at source. Hence, for the reasons stated in the preceding paragraphs, it is to be opined that mere deduction of tax at source, also, does not amount to disclosure of income, nor does it indicate the intention to disclose income most definitely when the same is not disclosed in the returns filed for the concerned assessment year.

Note: Judgment of High Court of Madras in Tax Case (Appeal) No. 238 of 2000, set aside. Answered in favour of Revenue.

Corrigendum

Readers attention is drawn to Page No. 1192 of February 2012 issue of the journal (Volume No. 61, No. 8). In 7th line under the subhead "Number of Members and Students Crossed 2 lakh mark and 10 lakh mark Respectively", please read the word 'members' as 'students'. The typographical error is regretted.

INDIRECT TAXES

Service Tax

LD/61/67

Delhi Chartered Accountants Society (Regd.)
Vs.
Union of India
February 2, 2013 (DEL)

Section 66B read with Section 65(105)(s) of the Finance Act, 1994 read with Rules 4 & 7 of the Point of Taxation Rules, 2011 – Charge of Service tax on and after Finance Act, 2012

CBEC Circular Nos.154 dated 28.03.2012 and 158 dated 08.05.2012 which seek to levy the enhanced rate of service tax of 12% in respect of the 8 specified services (Including Chartered accountant's services) even in cases where services were rendered and invoices were issued but payments were received after 1-4-2012, are ultra virus the Finance Act, 1994 as well as the Point of Taxation Rules, 2011

It is not in dispute that consequent to the insertion of Section 66B, the rate of service tax was enhanced from 10% to 12%. The question is what would be the rate of tax where (a) the service is provided by the chartered accountants prior to 1-4-2012; (b) the invoice is issued by the chartered accountants prior to 1-4-2012 but (c) the payment is received after 1-4-2012.

In such a case, according to the petitioner, Rule 4(a)(ii) of the Point of Taxation Rules, 2011, applies and the point of taxation shall be the date of issuance of the invoice. The service tax authorities, however, rely on two circulars issued by the Tax Research Unit of the CBEC Circular No.154 dated 28.03.2012 and Circular No.158 dated 08.05.2012 which seek to levy the enhanced rate of service tax of 12% in respect of the 8 specified services, though the services were rendered and the invoices were issued but payments were received after 1-4-2012.

Delhi High Court held as follows:

Rule 7 of the Point of Taxation Rules, 2011 was substituted by a new Rule *w.e.f.* 1-4-2012. The new Rule notified on 17.3.2012 by Notification No.4/12-ST.

A comparison of Rule 7 as it existed both before and from 01.4.2012 shows two significant changes. The first change is that while the old Rule referred to recipients of service only in respect of services notified under Section 68(2) and did not make any reference to the recipients of the service in either Clause (a) or Clause (c), the new Rule covers only the recipients of service in respect of services notified under Section 68(2). The second significant change is that the reference to services covered by sub-rule (1) of Rule 3 of Export of Services Rules, 2005 in Clause (a) of the old Rule and the reference to individuals or proprietary firms or partnership firms providing taxable services referred to in sub-clauses (g), (p), (q), (s), (t), (u), (za) and (zzzzm) of clause 105of Section 65 of the Finance Act, 1994 in Clause (c) of the old Rule does not find any mention in the new Rule. The result is that the new Rule 7 inserted w.e.f. 1-4-2012 was not applicable to services rendered by chartered accountants under Section 65(105)(s). Thus the position is that the new Rule 7 with effect from 1-4-2012 does not provide for the determination of point of taxation in respect of services rendered by chartered accountants. Both the circulars which are impugned in the present writ petition proceed on the erroneous basis that Rule 7 inserted w.e.f. 1-4-2012 covers the services rendered by chartered accountants. Circular No.154 when it states that invoices issued on or before 31.3.2012 shall continue to be governed by Rule 7 as it stood before 1-4-2012 is erroneous because on and from 1-4-2012, the old Rule 7 was no longer in existence, having been replaced by new Rule 7. Circular No.158, insofar as it states that in the case of the eight specified services (which includes the services of chartered accountants), if the payment is received or made, as the case may be, on or after 1-4-2012, the service tax needs to be paid at 12% is again without any statutory basis. The new Rule 7 does not cover the services which were earlier referred to in Clause (c) of Rule 7 (including services of chartered accountants) as it existed up to 31.3.2012. The circular seems to have overlooked this crucial aspect.

Rule 4 of the Point of Taxation Rules, 2011 provides for a specific situation namely determination of the point of taxation in case of change in effective rate of tax. The words earlier used in the Rule were "change of rate". In the place of these words, the words "change in effective rate of tax" were inserted w.e.f. 01.04.2011. This was done by the Point of Taxation (Amendment) Rules, 2011 vide notification No. 25/11-ST dated 31.3.2011. The petitioner has pointed out to sub-clause (ii) of Clause (a) of Rule 4. This Rule applies notwithstanding anything contained in Rule 3 which provides for the determination of point of taxation. As per Rule 4, whenever there is a change in the effective rate of tax in respect of a service, the point of taxation shall be determined in the manner set out in the Rule. Clause (a) provides for a case of taxable service which was provided before the change in effective rate of tax has taken place. Clause (b), in contrast provides for a case of a taxable service which has been rendered after the change in the effective rate of tax has taken place. W.e.f. 01.07.2012, there has been a change in the effective rate of tax from the earlier 10% to 12%. In the petitioner's case, the dispute is only with reference to the services provided by the chartered accountants before 1-4-2012. Clause (a) of Rule 4 would therefore govern its case. This clause provides for three further situations under sub-clauses (i),(ii) and(iii).The case of the petitioner is governed by sub-clause (ii). Under this clause where the taxable service has been provided before 1-4-2012 and the invoice was also issued before 1-4-2012, but the payment is received after 1-4-2012, then the date of issuance of invoice shall be deemed to be the date on which the service was rendered and, consequently, the point of taxation.

The result of the discussion will be that where the services of the chartered accountants were actually rendered before 1-4-2012 and the invoices were also issued before that date, but the payment was received after the said date, the rate of tax will be 10% and not 12%. The circulars in question have not taken note of this aspect, and have proceeded on the erroneous assumption that the old Rule 7 continued to govern the case notwithstanding the introduction of the new Rule 7 which does not provide for the contingency that has arisen in the present case.

In view of the foregoing discussion the circulars are quashed as being contrary to the Finance Act, 1994 and the Point of Taxation Rules, 2011. ■