Legal Decisions[1]

Income-tax Act

LD/62/62

LI and Fung India Pvt. Ltd.

vs.

CIT

16th December, 2013 (DEL)

[Assessment Year 2006-07]

Section 92CA of the Income-tax Act, 1961 - Transfer Pricing - Reference to transfer pricing officer

Where appellant entered into international transactions of buying services for sourcing of garments, handicrafts, leather products, etc. in India for its AE, and was paid service charges of 5% of cost plus mark up incurred for providing these services, Tribunal was not justified in holding that mark up on the FOB value of the goods sourced through the assessee would be the most appropriate method for calculation of arm's length price

The assessee LFIL was a wholly owned subsidiary of Li & Fung (South Asia) Ltd., a company incorporated in Mauritius as a captive offshore sourcing provider. Li & Fung (Trading)(the AE), is a group company incorporated in Hong Kong, which enters into contracts with customers *viz.* retail chains overseas, for rendering sourcing support services for the supply of high volume, time sensitive consumer goods. The appellant entered into an agreement dated 04-12-1997 with the AE, whereby the contract for rendering sourcing services was outsourced or subcontracted to the assessee LFIL, for which it was remunerated at cost plus a mark up of 5% for services rendered to the AE, and ultimately, the AE's customers.

For the international transactions of buying services for sourcing of garments, handicrafts, leather products etc. in India for the affiliate AE, the assessee was paid service charges of 5% of cost plus mark up incurred for providing these services. The assessee had worked out the arm's length of international transaction by applying Transactional Net Margin Method (TNMM) by company operating profit margin of 26 companies and assessee's OP/OC taken at 5.17%. 37. The tax authorities *i.e.* the TPO, and the AO (as well as the DRP) and the Tribunal accepted the application of TNMM by LFIL as *"the most appropriate"* one. Nevertheless, they did not consider the cost plus compensation at 5% at arm's length. The reasoning for not doing so was that LFIL was performing all critical functions, assuming significant risks and used both tangibles and intangibles developed by it over a period of time. Reliance was placed upon the technical capacity, manpower, low cost of product, quality of product in India available to the assessee and the enhanced profit potential the AE. The tribunal held that the cost plus 5% mark up was definitely not on the arms length while working out the compensation for the services rendered by LFIL to the associated enterprise and mark up on the FOB value of the goods sourced through the assessee shall be the most appropriate method for calculation of arm's length price.

The following questions of law arise from the appeal: *a. Whether the assessment of the Revenue of arm's length price applying the TNMM method was contrary to the transfer pricing provisions under the IT Act and Rules? b. Whether the Transfer Pricing Officer's (TPO's) apportionment by considering the cost plus mark up of 5% on FOB value of goods between third party enterprises, sourced through the appellant was in compliance with the law?*

The Delhi High Court held as follows:

In scrutinising Transfer Pricing documents, the TPO undertakes an exercise known as "FAR" (functions performed, assets owned and risks assumed by the associated enterprises involved). This analysis plays a critical role in determining the arm's length price of an international transaction entered into between AEs. The FAR analysis defines roles, responsibilities and risks assumed by the parties involved providing steadfast pointers into the underlying economic substance of the transactions. The OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations too recognise the importance of FAR in the transfer pricing context, with the arm's length compensation between AEs reflecting the functions that each enterprise performs (taking into account the assets used and the risks assumed by either party). In this case, what prevailed with the TPO and all other authorities was the circumstance that LFI, *i.e.* the assessee, according to them, performed all the critical functions, assumed significant risks and used both tangibles and unique intangibles developed by it over a period of time. These intangibles included supply chain management which was important to achieve the

[1] *Readers are invited to send their comments on the selection of cases and their utility at eboard@icai.in. For full judgment, write to eboard@icai.in*

strategic and pricing advantage, as well as human intangibles in the form of technical capacity and owned manpower to perform the critical functions. It was further held that the assessee had performed all critical functions, assumed significant risks and also developed significant supply chain intangibles in India and Li & Fung HK, the AE did not have either any technical expertise or manpower to carry out the sourcing activities in Hong Kong.

The TPO's determination enhanced LFIL's cost base for applying the operating profit over total cost margin. LFIL's compensation model was based on functions performed by it and the operating costs incurred by it and not on the cost of goods sourced from *third party vendors* in India. Allotting a margin of the value of goods sourced by third party customers from Indian exporters/vendors to compute the appellant's profit was unjustified. To apply the TNMM, the assessee's net profit margin realised from international transactions had to be calculated only with reference to cost incurred by it, and not by any other entity, either third party vendors or the AE. Textually, and within the bounds of the text must the AO/TPO operate, Rule 10B(1)(e) does not enable consideration or imputation of cost incurred by third parties or unrelated enterprises to compute the assessee's net profit margin for application of the TNMM. Rule 10B(1)(e) recognises that *"the net profit margin realised by the enterprise from an international transaction entered into with an associated enterprise was computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise ..."* It thus contemplates a determination of ALP with reference to the relevant factors (cost, assets, sales etc.) of the enterprise in question, i.e. the assessee, as opposed to the AE or any third party. The textual mandate, thus, was unambiguously clear.

The TPO's reasoning to enhance the assessee's cost base by considering the cost of manufacture and export of finished goods, *i.e.*, ready-made garments by the third party venders (which cost was certainly not the cost incurred by the assessee), was nowhere supported by the TNMM under Rule 10B(1)(e) of the Rules. Having determined that (TNMM) to be the most appropriate method, the only rules and norms prescribed in that regard could have been applied to determine whether the exercise indicated by the assessee yielded an ALP. The approach of the TPO and the tax authorities in essence imputes notional

adjustment/income in the assessee's hands on the basis of a fixed percentage of the free on board value of export made by unrelated party venders.

LFIL, in the Transfer Pricing documentation, established the international transactions of rendering buying services to be at the arm's length price having regard to the operating profit margin of comparable companies having similar functional profile. LFIL's computation of the operating profit margin (OP/TC per cent) by enhancing the cost base, i.e., by increasing the cost of the sales facilitated by LFIL leads to an arbitrary adjustment of its income, as such an alteration resides plainly outside the Rules and the provisions of the Act.

Moreover, there was considerable merit in the submission that the (finding of the) lower authorities, including the Tribunal, misdirected themselves in holding that LFIL assumed substantial risk. Whilst this Court would neither state that LFIL performed functions with a limited risk component, as it did not engage itself in manufacturing of garments (which was LFIL's stance), apart from broad assumptions made by the Revenue, no material on record testifies to that fact such that it can be the basis for an ALP adjustment. Indeed, LFIL had neither made investment in the plant, inventory, working capital, etc., nor did it claim to have any expertise in the manufacture of garments. More importantly, and given no material to the contrary, LFIL did not bear the enterprise risk for manufacture and export of garments. LFIL's functional and risk profile thus was entirely different and had nothing to do with the manufacture and export of garments by unrelated third party vendors. Simply put, LFIL renders support services in relation to the exports, which were manufactured independently. Thus, attributing the costs of such third party manufacture, when LFIL did not engage in that activity, and more importantly, when those costs were clearly not LFIL's costs, but those of third parties, was clearly impermissible. A contrary conclusion would amount to treating it (the appellant) as the vendor/ exporters' partner in their manufacturing business – a completely unwarranted inference.

Indeed, having done the work, LFIL had developed experience and expertise which the Tribunal had held to be human capital and supply chain intangibles. But such description did not in any way reveal how the appellant bears any risk - either enterprise or economic. LFIL's remuneration on a cost plus mark-up of 5 per cent represents the functions performed, assets utilised and risks assumed by it.

Further, the TPO's determination that LFIL bore significant risks was not borne out from the records. In transactions in which LFIL was a party, it did not bear any financial risk. To the contrary, its costs towards establishment, transportation, salaries, etc. were fully reimbursed, and it was insulated from any economic or financial downside to any particular transaction. In other words, its remuneration was based entirely on the costs borne by it. In essence, it was a low risk contract service provider exclusively rendering sourcing support to the AE. It did not bear any significant operational risks for its functions, rendered to the third party vendor/customers. Rather, it was the AE that undertook substantial functions and in fact assumes enterprise risks, such as market risk, credit risk etc. It also bears the letter of credit associated charges and other expenses.

Another important aspect which could not be overlooked was that the the transfer pricing documentation maintained in terms of section 92D of the Act read with rule 10B of the Income-tax Rules, determined the arm's length price of the *"international transaction"* of the provision of buying services applying the TNMM, by comparing operating profit margin of LFIL with that of the comparable companies, being weighted average OP/OC per cent of 26 comparable companies 4.07 % cent and OP/OC % of LFIL 5.17 %. This exercise had not been discarded. In other words, the TPO and the appellate fora were aware that in accordance with the rules, a comparison of the profit margin of LFIL with that of other similarly functioning companies was shown, and is, at the first instance, relevant to determine the ALP. The profit margin, as well as the cost plus model adopted by LFIL, was not shown to be distorted or of such magnitude as to persuade the tax authorities into discarding the exercise altogether. Having not contradicted this comparison, the Revenue proceeded to its own determination and calculations. This, however, was improper, given that the assessment carried out by the assessee must first be rejected, for any further alterations to take place. Indeed, it cannot be that the Revenue admits to the correctness of LFIL's assessment but nonetheless proceeds to adopt a different method.

Indeed, once the TNMM was deemed most appropriate method, the distortions, if any, had to be addressed within its framework. Here, the

unrelated transactions which were compared by LFIL had not been adversely commented upon, and neither had the choice of the TNMM. The TPO, therefore, ignored the relevant and crucial material, and straightaway proceeded to broaden the base for arriving at the profit margin, for attributed income of the assessee. Not only was this a clear infraction of the terms of the Act and Rules; the TPO went ahead to introduce what was clearly alien to the provisions of law and travelled outside the Rules.

The order of the TPO, in the instant case, had not provided any substantive reasons for disregarding the TNM method as applied by LFIL. Further, the TPO's arbitrary exercise of adjusting the cost plus mark up of 5% on the FOB value of exports finds no mention in the IT Act nor the Rules. Such an exercise of discretion by the TPO, disregarding the LFIL's lawful tax planning measures with its group companies, was not in compliance with the IT Act and Rules of Income Tax.

The Court summarises its conclusions as follows:

(a) The broad basing of the profit determining denominator as the entire FOB value of the contracts entered into by the AE to determine the LFIL's ALP, as an "adjustment", was contrary to provisions of the Act and Rules;

(b) The impugned order had not shown how, and to what extent, LIFIL bears "significant" risks, or that the AE enjoys such locational advantages, as to warrant rejection of the Transfer pricing exercise undertaken by LFIL;

(c) Tax authorities should base their conclusions on specific facts, and not on vague generalities, such as "significant risk", "functional risk", "enterprise risk" etc. without any material on record to establish such findings. If such findings are warranted, they should be supported by demonstrable reason, based on objective facts and the relative evaluation of their weight and significance.

(d) Where all elements of a proper TNMM are detailed and disclosed in the assessee's reports, care should be taken by the tax administrators and authorities to analyse them in detail and then proceed to record reasons why some or all of them are unacceptable.

(e) The impugned order, upholding the determination of 3% margin over the FOB value of the AE's contract, was in error of law.

In light of the above circumstances, the TPO's addition of the cost plus 5% markup on the FOB value of exports among third parties to LFIL's calculation of arm's length price using the TNMM was without foundation and liable to be deleted.

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LD/62/63

Kathiroor Service Cooperative Bank Ltd.
vs.
Commissioner of Income Tax (CIB)
August 27, 2013 (SC)

Section 133 of the Income-tax Act, 1961 - Search and seizure - Power to call for information

Where only after obtaining approval of Commissioner, Assessing Authority issued notice under Section 133(6) to assessee-financial institution requiring it to furnish information regarding the account holder with cash transactions or deposits of more than ₹1,00,000, said notice was valid

The appellant-assessee was a Service Co-operative Rural Bank. The Income Tax Officer issued a notice to the assessee under Section 133(6) of the Act calling for general information regarding details of all persons (whether resident or non-resident) who had made (a) cash transactions (remittance, transfer, etc.) of ₹1,00,000 and above in any account and/or (b) time deposits (FDs, RDs, TDs, etc.) of ₹1,00,000 or above for the period of three years between 01-04-2005 and 31-03-2008, dated 02-02-2009. It was expressly stated therein that failure to furnish the aforesaid information would attract penal consequences. The assessee objected to the said notice on grounds, inter alia, that such notice seeking for information which was unrelated to any existing or pending proceeding against the assessee could not be issued under the provisions of the Act and requested for withdrawal of the said notice. The Assessing Authority addressed to the objections raised by the assessee and accordingly rejected them. On writ, the Single Judge dismissed the said petition. On writ appeal, the Division Bench had observed that the questions raised was covered by the decision of the Supreme Court in *Karnataka Bank Ltd. vs. Secretary, Government of India and Ors., (2002) 9 SCC 106* and accordingly, dismissed the said appeal.

The Supreme Court held as follows:

In common parlance, "to enquire" would mean to seek information and "enquiry" would refer to the process of gathering such information.

Since the language of the Section 133(6) was wholly unambiguous and clear, reliance on interpretation of statutes would not be necessary. Before the introduction of amendment to Section 133(6) in 1995, the Act only provided for issuance of notice in case of pending proceedings. As a consequence of the said amendment, the scope of Section 133(6) was expanded to include issuance of notice for the purposes of enquiry. The object of the amendment of section 133(6) by the Finance Act, 1995 as explained by the CBDT in its circular shows that the legislative intention was to give wide powers to the officers, of course with the permission of the CIT or the Director of Investigation to gather general particulars in the nature of survey and store those details in the computer so that the data so collected can be made use of for checking evasion of tax effectively. The assessing authorities are now empowered to issue such notice calling for general information for the purposes of any enquiry in both cases: (a) where a proceeding was pending and (b) where proceeding was not pending against the assessee. However in the latter case, the assessing authority must obtain the prior approval of the Director or Commissioner, as the case maybe before issuance of such notice. The word "enquiry" would thus connote a request for information or questions to gather information either before the initiation of proceedings or during the pendency of proceedings; such information being useful for or relevant to the proceeding under the Act.

The powers under Section 133(6) are in the nature of survey and a general enquiry to identify persons who are likely to have taxable income and whether they are in compliance with the provisions of the Act. It would not fall under the restricted domains of being "area specific" or "case specific". Section 133(6) does not refer to any enquiry about any particular person or assessee, but pertains to information in relation to "such points or matters" which the assessing authority issuing notices requires. This clearly illustrates that the information of general nature can be called for and names and addresses of depositors who hold deposits above a particular sum was certainly permissible.

In the instant case, by the impugned notice the assessing authority sought for information in respect of its customers which had cash transactions or deposits of ₹1,00,000 or above for a period of

three years, without reference to any proceeding or enquiry pending before any authority under the Act. Admittedly, in the present case notice was issued only after obtaining approval of the Commissioner of Income Tax, Cochin. In light of the aforesaid, the Assessing Authority had not erred in issuing the notice to the assessee-financial institution requiring it to furnish information regarding the account holder with cash transactions or deposits of more than ₹1,00,000 .

Therefore, the High Court was justified in its conclusion that for such enquiry under Section 133(6) the notice could be validly issued by the Assessing Authority.

Note: Judgment and Order passed by the High Court of Kerala in Writ Appeal No. 1854 of 2009 dated 24-11-2009, upheld.

LD/62/64

Motorola Solutions India (P.) Ltd.
vs.
CIT, Faridabad
October 11, 2013 (P&H)
[Assessment Year 2005-06]

Section 221 of the Income-tax Act, 1961 - Collection and recovery of tax – Penalty payable when tax in default

Where stay on demand was granted on furnishing bank guarantees which clearly envisages automatic renewal provision, proceedings for recovery of stayed tax demand could not be initiated after date of expiry unless bank guarantees are withdrawn

The petitioner Indian company is a subsidiary of Motorola Solutions International Capital LLC, USA and Motorola Solutions Inc. USA. The petitioner's case was taken up for scrutiny. A notice was served upon the petitioner under Section 143(2) and the matter was, thereafter referred to the Transfer Pricing Officer under Section 92CA. The Assessing Officer made certain additions to the income declared by the petitioner and raised a tax demand of ₹8,56,91,161/-, which led to the issuance of a demand notice under Section 156 . The petitioner filed an appeal before the Commissioner (Appeals), Bangalore. A further demand of ₹13.06 crore was raised by a rectification order dated 10-02-2009.

Article 27 of the Indo-US provides for a Mutual Agreement Procedure (MAP). The CBDT has issued

Instruction No. 2, dated 28-04-2003, directing that the tax would remain suspended during pendency of MAP. Vide Instruction No. 10/2007, dated 23-10-2007, the CBDT extended applicability of the MOU to Indian resident entities during the course of pendency of MAP.

Motorola Solutions Incorporated USA, of which the petitioner is a 100% subsidiary, admittedly, invoked MAP. The invocation of MAP was brought to the notice of the Indian competent authority i.e., the Joint Secretary (FT & TR-1), CBDT. The Joint Secretary has admitted the pendency of MAP proceedings. The petitioner filed an application for stay before the Assistant Commissioner of Income Tax, Bangalore. The petitioner was required to deposit ₹4 Crores in two instalments, of ₹2 Crore each and till such time as the MAP application is not decided, to furnish a bank guarantee, before 16-03-2009.

The petitioner paid ₹4 crore in two equal instalments, without prejudice to its rights and furnished a bank guarantee of ₹17.63 crore, in terms of the MOU as well as the stay order. It is, therefore, apparent that at the time of passing of order dated 22-02-2009, the pendency of MAP was accepted by the revenue.

The proceedings were, thereafter, transferred to Gurgaon, where respondent No. 2, despite the stay order accepting the pendency of MAP, issued notice under Section 221(1), calling upon the petitioner to show cause why penalty should not be levied as tax determined has not been paid and it is not clear whether MAP has been admitted. Another letter asked the petitioner to deposit outstanding tax.

The letter did not refer to failure of the petitioner to renew the bank guarantee but is confined to seeking information whether MAP had been admitted by the Indian Competent Authority. It, however, appeared that in proceedings, in the office of respondent no. 2, certain objections were raised with respect to validity of the bank guarantee furnished by the petitioner.

The petitioner's letter reveals that the petitioner asserted that it has already furnished bank guarantee and invoked MAP in accordance with the Indo-US treaty and a bank guarantee of ₹9 crore is already on the file. The letter also records that the petitioner's banker (CITI Bank) has sent confirmation that the second bank guarantee of ₹17.63 crore is valid and continuing. It is further asserted that MAP application has been filed in accordance with the Indo-US treaty and is pending. The CITI Bank also addressed letter to the Assistant Commissioner confirming the validity of the bank guarantee.

After receipt of the letter, respondent no. 2, issued notice, dated 26-03-2013, under Section 226(3), calling upon the petitioner to forthwith deposit ₹26,26,87,000/- in favour of Deputy Commissioner of Income Tax, Circle-2, Gurgaon, followed by another notice dated 28-03-2013, under Section 226(3), to the Standard Chartered Bank, i.e. the petitioner maintained its account requiring it to remit ₹26,26,87,000/-. The bank issued a Demand Draft of ₹26,26,87,000/- in favour of the revenue.

The question that arises for adjudication from these facts is *whether the revenue is justified in appropriating ₹26,26,87,000/-from the account of the petitioner and as a corollary whether order dated 22.02.2009 stood vacated for non-admission of MAP and or for failure to re-renew the bank guarantee.*

The Punjab and Haryana High Court held as follows: The controversy with respect to admission or pendency of MAP stands conceded in favour of the petitioner by the affidavit/reply filed by the Joint Secretary (Foreign Tax and Tax Research Division), Department of Revenue, Ministry of Finance, Central Board of Direct Taxes. The affidavit also clarifies the status of MAP, the mode and manner of filing an application, the procedure of the Double Taxation Agreement/Convention and the mode and manner of considering and deciding a MAP application.

The affidavit, contains an unequivocal admission that MAP proceedings were taken to be pending and discussions were held by the Indian Competent Authority with US Competent Authority on 16/18-09-2009 and 05/08-01-2010. It is also averred that collection of demand was required to be suspended on satisfaction of conditions, namely, furnishing of bank guarantee, and confirmation of pendency of MAP from the Foreign Tax and Tax Research Division of the Central Board of Direct Taxes. The Indian competent Authority having admitted pendency of MAP, puts at rest this part of the controversy thereby negating contents of the show cause notice, based upon failure to intimate "admission of MAP". It would be appropriate to once again point out that relating to this very demand of tax, the Assistant Commissioner of Income Tax, Circle 12(1), Bangalore, had already accepted pendency of MAP while granting stay of recovery of demand vide order dated 22-02-2009. It is rather

surprising or let us say distressing that respondent no. 2 drew an artificial distinction between "pendency" and "admitted" and using it as a device, proceeded to appropriate an amount, recovery whereof had already been stayed. The assumption of jurisdiction by respondent no. 2, in violation of the treaty is clearly erroneous and bordering on the *malafide*.

The matter, however, does not rest here as the respondents assert and it is apparent from proceedings in the office of the concerned officer and reply filed by the petitioner to the notices that the department had also asserted, though, not in their letters or notices that as the bank guarantee No. 5679063528, dated 04-03-2009, had expired on 28-02-2012, its confers a right upon the revenue to raise a demand and recover ₹26,26,87,000/- from the petitioner.

The question that remains is whether bank guarantee No.5679063528, dated 04-03-2009, had expired and the affect of letter dated 25-03-2013, issued by the CITI Bank to the respondents, confirming validity of the bank guarantee.

The show cause notice, issued under Section 226(3), does not refer to expiry of the bank guarantee as it is based upon failure to intimate "admission" of MAP. However, in proceedings in the office, the respondents pointedly referred to expiry of the bank guarantee. In response, the petitioner addressed letter dated 26-03-2013 specifically asserting that the bank guarantee is in force and CITI Bank has addressed letter dated 25-03-2013, confirming validity of the bank Guarantee.

The letter bearing the title "Confirmation for Issuance of Bank Guarantee No: 5679063528 dated 04.03.2009" contains an unequivocal statement, by and on behalf of Citi Bank, affirming the validity of bank guarantee. The respondents, however, seek to interpret this letter as a mere confirmation of issuance of bank guarantee and not a renewal of the bank guarantee. The respondents asserts that a perusal of the bank guarantee furnished on behalf of the petitioner reveals that the bank guarantee expired on 28-02-2012 and required the assessee and the bank to furnish a fresh bank guarantee. The absence of fresh bank guarantee or renewal, after 28-02-2012, establishes that the bank guarantee expired on 28-02-2012, thereby conferring a right upon the revenue to demand and recover tax from the petitioner.

The petitioner per-contra submits that a perusal of the bank guarantee reveals that the CITI Bank has undertaken that the bank shall renew the bank guarantee for another three years and in case the tax payer does not renew the agreement between the assessee and the bank, it shall inform the government 60 days prior to the expiry of the bank guarantee. The bank has, admittedly, addressed letter dated 25.03.2013, informing the respondents that bank guarantee remains in force, and is valid.

A perusal of these paragraphs reveals that the bank guarantee was valid between 04-03-2009 and 28-02-2012. The bank, agreed that the bank guarantee would stand renewed for another three years except if "the bank will provide the government with written

notice no later than 60 days prior to the expiration date of this bank guarantee if the taxpayer has not renewed the agreements between the assessee and the bank that underlie this bank guarantee for an additional period of 3 years. If the government does not receive a renewal of this bank guarantee or a substitute bank guarantee for the amounts of tax and interest in dispute prior to 30 days before the expiration date of this bank guarantee, the government may instruct the bank to pay the guaranteed amounts prior to expiration of the bank guarantee....." The bank has not sent any communication to the revenue that the assessee did not execute necessary documents in favour of the bank with respect to the bank guarantee, 60 days prior to expiry of the bank guarantee, thereby clearly proving that the bank guarantee stood renewed for a further period of three years. Clause 4 of the Bank Guarantee enumerates the circumstances in which obligation of the bank shall terminate upon events. The revenue does not allege any of these events. It is, thus, apparent that the bank guarantee would be automatically renewed for a period of three years except if the assessee does not execute documents in favour of the bank that underline the bank guarantee or on the happening of events enumerated in Clause 4 of the Bank Guarantee. The revenue does not allege or assert that it received any communication from the bank at any time before the expiry date of 28-02-2012, informing it that the assessee has not executed documents in favour of the bank and the bank guarantee is to expire on 28-02-2012. The revenue does not allege or assert that even between 28-02-2012 and 25-03-2013 when the revenue issued notice of demand, though, not based upon expiry of the bank guarantee, it received any communication from Citi Bank that the assessee has not executed any document in favour of the bank with respect to the bank guarantee. The revenue does not allege the happening of any event referred to in Clause 4 of the Bank Guarantee. The CITI Bank has instead addressed a letter dated 25-03-2013, to the revenue, before the revenue appropriated the amount from the petitioner's account with Standard Chartered Bank, reiterating the validity of the bank guarantee. A reference to the letter, cannot, as urged by counsel for the respondents, be read as a mere confirmation of issuance of the bank guarantee. A perusal of the letter reveals that the CITI Bank has clearly stated that the bank guarantee No. 5679063528, dated 04-03-2009, for ₹17,63,46,462/- is valid in their records and has been issued on behalf of the "Motorola India Private Limited." It is not denied by the respondents that letter dated 25.03.2013, was received by the respondents before they appropriated money from the petitioner's account. It is, therefore, rather surprising as to how and why notices were issued, under Section 226(3), treating the petitioner as an assessee in default and, thereafter, directing the Standard Chartered Bank to remit an amount of ₹26,26,87,000/- to the department.

A further perusal of the aforesaid bank guarantee reveals that renewal does not require any formal format, as the clauses reproduced above clearly envisage an automatic renewal for a period of three years except if the assessee does not furnish requisite documents regarding the bank guarantee to the bank and the bank, thereafter intimates the government 60 days before expiry of the bank guarantee that the guarantee shall expire on 28-02-2012 or on the happening of events enumerated in Clause 4 of the bank guarantee. In the absence of any intimation by the bank to the respondents that the assessee has not furnished documents in favour of the bank regarding the bank guarantee. The bank guarantee, therefore, stood automatically renewed for a further period of three years. The plea of not furnishing a bank guarantee in the prescribed format appears to be a mere after thought.

Service Tax

LD/62/65

Commissioner, Customs & Central Excise

vs.

Hindalco Industries Ltd.

July 23, 2013 (ALL)

Section 65(25) read with Sections 71A & 73 of the Finance Act, 1994 - Clearing and Forwarding Agents Services

Where assessee received services of clearing and forwarding agents during period 16-7-1997 to 31-8-1999 and did not fulfil service tax liability and show-cause notice for realisation of service tax was issued on 11-10-2002 i.e., after retrospective amendment made by Finance Act, 2000, but before amendment made by Finance Act, 2003 and 2004 and show-cause notice was not revised and same was adjudicated after amendment of provisions of erstwhile Section 73, substantial liability of service tax based on

said show-cause notice would be invalidated as liability to file return was cast on the appellants only under Section 71A and class of persons who come under Section 71A was not brought under net of Section 73

During period 16-07-1997 to 31-08-1999, assessee received services of clearing and forwarding agents. However, the assessee did not fulfill service tax liability. Service tax demand was raised under provisions of Rule 2(1)(d) on assesssee along with interest and penalty under sections 76, 77 and 75A.

The Tribunal found that the show-cause notice in this case was issued after the retrospective amendment made by the Finance Act, 2000, but before the amendment made by Finance Act, 2003 and 2004. The retrospective amendment by Finance Act, 2000 had raised a question as to whether the amendment was good enough to issue demands under Section 73 of Finance Act, 1994 on persons, who had not paid tax during the period as per Rule 2 (1) (d). The dispute related to the period when the transport service recipients were not required to file any return under Section 70 nor they were required to disclose any information because they were not assessees within the meaning of the word under Sections 70 and 71.

The Allahabad High Court held as follows:

The Finance Act 1994 was amended again by Finance Act, 2003 to insert a clause 71A retrospectively from 16-7-1997 and ending with 16-10-1998.

The Tribunal was of the opinion supported by the decisions of Delhi High Court in *L.H. Sugar Factories Ltd vs. CCE*, [2007] 8 STT 295 (New Delhi-CESTAT) which was affirmed by the Apex Court in *CCE vs. L.H. Sugar Factories Ltd., [2005] 2 STT 282* in favour of the service recipients. It was held that the demand issued in the year 2002 for the period from 16-11-1997 to 6-2-1998 under Section 73 of the Finance Act was not sustainable.

Apex Court in *CCE vs. Gujarat Carbon & Industries Ltd., [2008] 16 STT 108* in which it was held relying upon *L.H. Sugar Factories Ltd. (supra)* that the amended Section 73 takes in only the case of assessees, who are liable to file return under Section 70. The liability to file return is cast

on the appellants only under Section 71A, which was introduced in the Finance Bill, 2003. The class of persons, who come under Section 71A was not brought under the net of Section 73 and, thus, a show-cause notice invoking Section 73 was not maintainable. In *L.H. Sugar Factories Ltd., [2007] 8 STT 295 (New Delhi-cestat)* the conclusions drawn by the Tribunal were upheld. In the said case the Tribunal had held that even the amended Section 73 takes in only the case of assessees who were liable to file return under Section 70. Admittedly, the liability to file return was cast on the appellants only under Section 71A. The class of persons who come under Section 71A was not brought under the net of Section 73. The above being the position show-cause notices issued to the appellants invoking section 73 were not maintainable.

In the present case it was not denied that the respondent was not required to file the return nor any show-cause notice or demand was issued or was outstanding when the amendment in the Act came into force.

In view of the above discussion and the judgment of the Apex Court there was no error in the judgment of the Tribunal. The question on the facts and circumstances of the case decided against the revenue and in favour of the assessee.

LD/62/66
AIMS Industries Ltd.
vs.
Union of India
August 1, 2013 (GUJ)

Rule 6A of Customs Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982 read with Section 85 of the Finance Act, 1994– Number of Appeals to be Filed

Where petitioner filed common appeal before the Commissioner (Appeals) in respect of two different orders-in-original within limitation period, petitioner should be allowed to file separate appeals

Being aggrieved by and dissatisfied with the Order-in-Original dated 23-11-2012 passed by Additional Commissioner passed in Order-in-Original No.62-63/2012-13, the petitioner had filed common appeal before the Commissioner (Appeals). It is not in dispute that as such the said appeal is within the prescribed period of limitation. However, it appears that the Commissioner (Appeals) was of the opinion that though the appeal has been preferred against the common order, there were two different Orders-in-Original i.e. Order-in-Original No. 62/2012-13 and Order-in-Original No.63/2012-13. The Commissioner (Appeals) was of the opinion that two separate appeals were required to be filed and, therefore, the Commissioner (Appeals) is considering the appeal already preferred, treating it as challenging the Order-in-Original No.62/2012-13 and has refused to consider the appeal against the Order-in-Original No.63/2012-13. Hence, the petitioner has preferred the present Special Civil Application.

The petitioner has submitted that considering Rule 6A of the Customs Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982 and relying upon the same, the petitioner was under a bona fide impression that a common appeal would suffice.

Assuming that Rule 6A would not be applicable to the Commissioner (Appeals), considering the aforesaid bona fide mistake, the petitioner is ready and willing to file separate appeal.

The Gujarat High Court held as follows:

Without further entering into the larger question whether Rule 6A would be applicable to the proceedings before the Commissioner (Appeals) or not, in the instant case, if the petitioner prefers separate appeal before the Commissioner (Appeals) within the period of two weeks, the Commissioner (Appeals) shall decide the same.

Companies Act

LD/62/67
R. P. Khosla
vs.
Company Law Board
October 1, 2013 (DEL)

Regulation 32 of the Company Law Board Regulations, 1991 read with Section 10F of the Companies Act, 1956 corresponding to Section 421 of the Companies Act, 2013 and Section 148A of the Code of Civil Procedure, 1908 - Powers and duties of the Bench Officer

Failure by the CLB to provide notice to the petitioners as caveators under Section 148A of the CPC renders those proceedings, and the orders passed therein, a nullity

The petitioners claim to have filed a caveat before the CLB on 10.09.13 in the case of *Vikram Bakshi vs. Connaught Plaza Restaurants* for notice of any hearings scheduled to take place in the matter, and for the provision of all documents tendered by the parties to the CLB. In the caveat application under Section 148A of CPC the caveat petitioners also sought to establish their interest in the matter, as also indicating an intention to request for impalement as an intervenor.

The CLB heard the matter and made orders without the requisite papers being served or made available to the caveators. It is argued that a Judicial Member of the CLB noted in open court that the petition would not be served upon the caveators. This, contend the caveator petitioners, amounted to an impermissible review of the earlier decision of the Bench Officer to register the caveat, which carried with it the requirement that the petition be served upon the caveator. The petitioners argue that this amounted to the orders of the CLB being a nullity and consequently without force of law.

The limited question requiring consideration for the purposes of this Petition is *whether a failure by the CLB to provide notice to the petitioners as caveators under Section 148A of the CPC renders those proceedings, and the orders passed therein, a nullity*.

The Delhi High Court held as follows:

There is no specific provision with regard to applicability of Section 148A of the CPC. Therefore, the petitioners contend that the CLB should be directed to frame regulations in that regard. A look at the The Company Law Board Regulations, 1991 would clarify that they cater to a specific class of proceedings; there is no indication of the applicability of provisions pertaining to caveats. Yet, Regulation 44 entitles the Bench of the CLB, in the given facts of any particular case, to make such orders as it may deem expedient to secure the ends of justice:

The phraseology employed in Section 148A CPC is wide enough to enable the lodging of a caveat, on behalf of a third party litigant, who may not be impleaded in a particular proceeding. However, the lodging of that caveat itself would only entitle the caveator under such circumstances to bring to the notice of the court that such caveat is lodged. As to whether he is entitled to be heard, especially when the parties to the litigation do not admit or recognise his right to be heard, is a matter to be determined by the concerned court. Analogically, therefore, even if it is assumed that the petitioner's caveat was indeed lodged with the CLB, as is contended here, it would not automatically follow that the caveators would have a right to be heard, when they are not shown as parties.

A general proposition of law is that the failure to provide notice under Section 148A does not, *ipso facto*, render the order a nullity. One must also see whether any special prejudice has been caused to the caveator apart from the mere fact of not being served, which is in itself insufficient to vitiate the entire proceedings.

Where the caveators have not disclosed any special damage or prejudice caused to them by the proceedings undertaken by the CLB warrant no interference by this Court under Article 226 of the Constitution of India. In such a case, holding that the entire proceedings before the CLB in which the litigating parties themselves have been represented are a nullity would be inapposite.

Indeed, the writ petitioners in this case also have an alternate remedy available under Section 10F of the Companies Act, 1956 for any grievances that may arise from the orders of the CLB. In such a case, to bypass the relevant statutory framework and engage the High Court's writ jurisdiction would be incorrect.

LD/62/68

Swapna Bhattacharya
vs.
M-Tech Developers Ltd
January 22, 2014 (DEL).

Section 433 of the Companies Act, 1956 – Winding Up – Circumstances in which a Company may be Wound Up

Where petitioner deposited booking amount for purchase of residential flat, but developer had not yet initiated construction of building in question respondent-company should be ordered to pay booking amount along with interest; otherwise winding up petition would stand to be admitted

The respondent company was engaged in the business of developing real estate and housing projects. The respondent company issued receipt in favour of the petitioner confirming the payment of the booking amount. The petitioner further paid a sum of ₹2,25,000/- to the respondent company as the first installment and the respondent company also issued a receipt confirming the receipt of payment as the first installment. The respondent company provisionally allotted a flat vide allotment letter. The respondent company issued another letter demanding the balance payment from the petitioner stating that petitioner could take possession of the flat in question and get the title deed registered. However, on visiting the site, the petitioner found that construction of the relevant tower had not commenced at all and, therefore, there was no possibility of the petitioner being given the possession of a flat in the said Tower. The petitioner issued a statutory legal notice under Section 433 & 434 of the Companies Act, 1956, calling upon the respondent company to pay the sum of ₹,75,000/- along with interest.

The Delhi High Court held as follows:

Admittedly, the respondent received the payment of the booking amount and the first installment. The respondent was obliged to carry out the construction and demand further payments according to the schedule as agreed. However, admittedly, the respondent did not carry out any construction in respect of the relevant tower and no further demands were made on the petitioner till 09-01-2012 The respondent invited the petitioner to make the balance payment immediately by its letter dated 09-01-2012. It was apparent that the said demand was completely unjustified as the respondent had not even commenced construction of the tower in question. The respondent had also not issued any other communication with regard to altering the previous provisional allotment. In the circumstances, the contention that cause of action arose in 2007 and was barred by limitation was wholly erroneous.

There was no justifiable reason or ground on which the respondent could resist the claim of the petitioner and withheld the payment of ₹3,75,000. The said amount had been paid by the petitioner for purchase of the flat, which the respondent was, admittedly, not in a position to deliver and consequently could not withhold the amount paid by the petitioner. The contention that the allotment was only a provisional one and the respondent could amend the same also cannot be accepted as, admittedly, there was no flat measuring 1,500 Sq. ft. that had been built and was available with the respondent in the residential development. The respondent could not now compel the petitioner to accept a smaller flat in another tower. The contention canvassed on behalf of the respondent was clearly without any merit and was *ex-facie* a sham defence raised only to avoid the obligation to refund the amount collected by the respondent.

The petitioner would also be entitled to a reasonable interest as the sums paid by the petitioner had been utilised by the respondent. The respondent had itself demanded interest at the rate of 20% in the event the first installment of ₹2,25,000 was not paid within a period of 30 days from the date of the demand. Further, interest at the rate of 12% p.a. would be reasonable and the respondent was liable to pay the same. ■