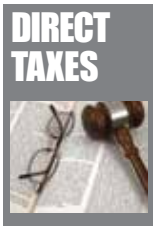
Legal Decisions[1]



Income Tax Act

LD/63/84

Jeyar Consultant and Investment P. Ltd.

vs.

The Commissioner of Income Tax – I, Madras

1st April, 2015

Section 80HHC of the Income-tax Act, 1961– Method of computation of deduction

No deduction u/s 80HHC available where there are losses in the export business but the profits in respect of business carried out within India are more than the export losses. In the first instance, it has to be satisfied that there are profits from the export business. Sub Section (3) of 80HHC comes into picture only for the purpose of computation of deduction; dividend income, interest income, profit or sale of shares and fees received from arranging finance, to be excluded from 'total turnover', as the same are 'income simplicitor', not trading receipts.

The assessee is a company engaged in the business of export of Marine products and also financial consultancy and trading in equity shares. Apart from export turnover, assessee's total business consisted of business within the country as well. The AO did not allow the deduction on the ground that there was no relationship between the Assessee Company and the Processors. The CIT(A) dismissed assessee's appeal whereas the ITAT ruled in favour of the assessee and came to a conclusion that the appellant was entitled to full relief u/s 80HHC.

While giving effect to ITAT's order, the AO found that the appellant had not earned any profits from the export of Marine products and in fact, from the said export business, it had suffered a loss. According to the Assessing Officer, as per Section 80AB, the deduction under Section 80HHC could not exceed the amount of income included in the total income. Thus as the income from export of Marine product business was in the negative i.e. there was a loss, the deduction under Section 80HHC would be nil, even when the assessee is entitled to deduction under the said provision.

[1] *Contributed by CA. Sahil Garud and ICAI's Editorial Board Secretariat.*
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Legal Update

In the second round of litigation, assessee challenged the order passed by the AO before the CIT(A) contending that the formula which was applied by the AO was different from the formula prescribed under Section 80HHC of the Act and it was also in direct violation of CBDT Circular dated 05.07.1990. The CIT(A), however, dismissed the appeal of the assessee principally on the ground that u/s 246, an order of the AO giving effect to the order of the ITAT is not an appealable order. ITAT upheld the orders of lower authorities. High Court ruled in favour of Revenue and held that assessee was not entitled to any benefit u/s 80HHC in the absence of any profits from export business. Aggrieved, the assessee preferred a Special Leave Petition before the Hon'ble Supreme Court of India.

The Hon'ble Supreme Court referred to ratio in the case of *IPCA Laboratory Ltd. vs. Deputy Commissioner of Income Tax, Mumbai* [(2004) 12 SCC 742] and *A. M. Moosa vs. Commissioner of Income Tax, Trivandrum*[(2007) 9 SCR 831]. In IPCA Laboratory (*supra*) it was held that "profit" in Section 80-HHC(3) will mean profits after taking into account losses, if any. The term "profit" in both Sections 80-HHC(1) and 80-HHC(3) means a positive profit worked out after taking into consideration the losses. It follows that if no deduction is available, because there is a loss, then the export house cannot pass on or give credit of such non-existing deduction to a supporting manufacturer. In the case of *A. M. Moosa vs. Commissioner of Income Tax (supra)*, it was held that Section 80AB starts with a *non-obstante* clause and thus would have an overriding effect over Section 80HHC. Section 80-AB makes it clear that the computation of income has to be in accordance with the provisions of the Act. Thus, if the income has to be computed in accordance with the provisions of the Act, then not only profits but also losses have to be taken into consideration. It was further held that under Section 80-HHC (3)(c)(i) the profit is to be adjusted profit of business. The adjusted profit of the business means a profit as reduced by the profit derived from business of exports out of India of trading goods. Thus in calculating the profits under sub-Section (3)(c)(i) one necessarily has to reduce profits under sub-Section (3)(c)(ii). As seen above, the term "profit" means positive profit. Thus if there is loss then those losses in export of trading goods have to be adjusted. They cannot be ignored. A plain reading of Section 80-HHC makes it clear that in arriving at profits earned from export of both self-manufactured goods and trading goods, the profits and losses in both the trades have to be taken into consideration. If after such adjustments there is a positive profit, the assessee would be entitled to deduction under Section 80-HHC(1). If there is a loss he will not be entitled to any deduction. The SC had held that the term "profit" in Section 80-HHC, both in sub-Section (1) and in sub-Section (3), meant a positive profit worked out after taking into consideration the losses, if any. Thus the word "profit" had the same meaning in Sections 80-HHC(1) and (3).

After analysing the ratios in the case of *IPCA Laboratory Ltd. vs. Deputy Commissioner of Income Tax*, and *A. M. Moosa vs. Commissioner of Income Tax*, in the instant case, the Supreme Court came to the conclusion that where there are losses in the export of one type of goods (for example self-manufactured goods) and profits from the export of other type of goods (for example trading goods) then both are to be clubbed together to arrive at net-profits or losses for the purpose of applying the provisions of Section 80HHC of the Act. If the net result was loss from the export business, then the deduction under the aforesaid Act is not permissible.

SC rejected assessee's contention that even if there are losses in the export business, but profits of indigenous business outweigh those losses and the net result is that there is profit of the business, then the deduction under Section 80HHC should be given. SC held that deduction to be provided u/s 80HHC(1) is "in respect of profits retained for export business". Therefore, existence of profits from export business is the pre-requisite. Sub-Section (3) of Sec. 80HHC comes into picture only for the purpose of computation of deduction. SC remarked that *"while computing the 'total turnover', one may apply the formula stated in clause (b) of sub-section (3) of Section 80HHC. However, that would not mean that even if there are losses in the export business but the profits in respect of business carried out within India are more than the export losses, benefit under Section 80HHC would still be available."*

With respect to income earned by the assessee from dividend, interest and brokerage, and profit on sale of shares, the ITAT had observed that these four items are income simplicitor and cannot be covered by the expression "total turnover". ITAT had further noted that the intention of Parliament, was to extend the benefit of Section 80HHC to the extent of the profits generated by exports. As long as the assessee

has cleared profits in a particular year of account, export profits are to be computed by applying to total profits the ratio which export turnover bears to total turnover. The Hon'ble Supreme Court affirmed such a view of the ITAT.

Thus, ruling in favour of the Revenue, SC held where there are losses in the export business, but profits of indigenous business outweigh those losses and the net result is a profit, then the deduction under Section 80HHC should not be given.

LD/63/85

M/s Chennai Properties & Investments Ltd.

vs.

The Commissioner of Income Tax – Central III, Tamil Nadu

9th April, 2015

Rental income from letting of property assessable as 'business income', not 'income from house property' based on facts.

Rental income from letting of property held to be assessable as 'business income', not 'income from house property'; Based on fact that assessee had no other income except income from letting out properties; it was observed that letting of properties was the business of the assessee. The Object clause of the company included holding of properties and earning income from letting of those properties.

The assessee is a company incorporated under the Indian Companies Act. Its main objective as per the Memorandum of Association was to acquire properties in the city of Chennai and to let out those properties. Rental income derived by the assessee was shown as business income by the assessee. The A.O. however taxed the same under income from house property. The CIT(A) as well as the ITAT ruled in favour of the assessee accepting its contention that it was a business income. Aggrieved, the Revenue preferred an appeal before the High Court.

The Hon'ble High Court ruled in favour of the Revenue and held that impugned income was an income to be taxed under 'Income from House Property' and not as business income. In holding such, the High Court placed its reliance upon

judgment in the case of *East India Housing and Land Development Trust Ltd. vs. Commissioner of Income Tax [(1961) 42 ITR 49], and Constitution Bench judgment of this Court in 'Sultan Brothers (P) Ltd. v. Commissioner of Income Tax' [1964 (5) SCR 807]*. Aggrieved, the assessee preferred an appeal before the Supreme Court.

SC observed that the main object of the assessee company was to acquire and hold the properties known as "Chennai House" and "Firhavin Estate" both in Chennai and to let out those properties as well as make advances upon the security of lands and buildings or other properties or any interest therein. The return of Income for the relevant assessment year reflects entire income from rent only and there was no other source of income.

SC placed its reliance on ruling in *Karanpura Development Co. Ltd. vs. Commissioner of Income Tax, West Bengal [44 ITR 362 (SC)]*. In that case, leasing out of the coal fields to the collieries and other companies was the object and the business of the assessee. The income which was received from letting out of those mining leases was shown as business income, whereas the Revenue took the view that it was as Income from House Property. The SC in that case analysed the scheme of the Act and the six heads under which income can be categorised/classified. SC noted that that the deciding factor is not the ownership of land or leases but the nature of the activity of the assessee and the nature of the operations in relation to them. It was also highlighted and stressed that the objects of the company must also be kept in view to interpret the activities.

SC observed that the facts of the instant case were identical to the case of Karanpura Development Co. Ltd. (*supra*).

SC held as follows:

Since letting of the properties was in fact is the business of the assessee, the assessee rightly disclosed the income under the head Income from Business and that the same could not be treated as an 'Income from the House property'.

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LD/63/86

The Commissioner of Income Tax

vs.

M/s. Sri Marikamba Transport Company Tax

13th April, 2015

Filing form 15I/J 'directory' not 'mandatory'; Deletes Sec 40(a)(ia) disallowance, no breach of Sec 194C(3).

Filing of Form No.15I/J is only directory and not mandatory. Disallowance made u/s 40(a)(ia) pertaining to freight charges paid to sub-contractors deleted; Only if there is any breach of requirements of Section 194C(3), the question of applicability of Section 40(a)(ia) arises.

The assessee had filed the return of income for the AY 2009-10 declaring the total income of ₹19,07,890/-. During the regular assessment proceedings, the AO disallowed payments made to sub-contractors towards freight charges amounting to ₹17.63 crore u/s 40(a)(ia). The CIT(A) as well as ITAT ruled in favour of assessee. Aggrieved, Revenue preferred an appeal before Karnataka HC.

HC observed the question requiring consideration was "Whether non-filing of Form No.15-I/J within the prescribed time is only a technical default or the Provisions of Section 40(a)(ia) of the Act are attracted?"

HC analysed Section 194C(3) and Section 40(a)(ia). HC observed that the combined reading of these two provisions made it clear that if there is any breach of requirements of Section 194C(3), the question of applicability of Section 40(a)(ia) arises. The exclusion provided in Sub-Section(3) of Section 194C from the liability to deduct tax at source under sub-Section(2) would be complete when the requirements contained therein are satisfied. Once the declaration forms are filed by a subcontractor, the liability of the assessee to deduct tax on the payments made to the sub-contractor would not arise.

HC observed that since the sub-contractors had filed Form No.15I before the assessee, the assessee was not required to deduct tax u/s 194C or to file Form No.15J. HC affirmed the view of ITAT that non-filing of Form 15J by assessee was only a technical defect.

HC relied on Gujarat High Court's judgment in the case of *Valibhai Khandbai Mankad [(2013) 216 Taxmann 18 (Guj)]* wherein it was held that once the conditions of Section 194C(3) were satisfied, the liability of the payee to deduct tax at source would cease and accordingly, application of Section 40(a)(ia) would also not arise.

HC upheld ITAT order that filing of Form No.15I/J was only directory and not mandatory and thus ruled in favour of the assessee.

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Legal Update

LD/63/87

Shivnandan Buildcon Pvt. Ltd.

vs.

The Commissioner of Income Tax & Anr

30th April, 2015

Notional interest cannot be charged on domestic advances in the absence of any specific provision.

Addition made on account of notional interest on advances made during normal course of business was deleted in the absence of any specific provision to tax it; Books of accounts were not rejected and there was no finding that assessee received any interest on advance.

The assessee had filed its return of income for relevant year declaring a loss. During the regular assessment proceedings, the AO made an addition on account of notional interest earned on advances given to one party on the ground that assessee had furnished no explanation as to why such loan was advanced without charging interest thereon. The assessee argued that such an addition had no factual basis and so preferred an application seeking revision u/s 264 before CIT(A).

Assessee submitted that the impugned assessment was based on assessment of preceding year, and since the assessment of preceeding year was set aside, this instant assessment should also be set aside u/s 264. However, CIT(A) rejected assessee's contention on the ground that earlier orders were set aside by predecessor CIT after considering many issues apart from the instant issue and also the predecessor CIT had noted the correctness of comments of AO. Aggrieved assessee preferred a writ before Delhi HC.

HC noted that the reason behind the impugned addition was that assessee had failed to furnish any explanation as to why the loan was advanced. Only logic that the Revenue applied was that assessee being in a business, it was not prudent to advance a sum of ₹1.6 crore without charging anything in return. HC noted assessee's contention that advances were made in the course of business and that it was not at all necessary that the advance should always be given for an interest since there are various other considerations which come into calculations when a businessman advances money to another.

Events

Forthcoming Events[1]

1.		5th June	Bhubaneswar	6
Topics	One Day Seminar on Reporting under Companies Act, 2013.			
Fees	₹500/-			
Contact Person	Chairman, Bhubaneswar Branch of the EIRC of ICAI- Phone:0674-2392391, bhubaneswar@icai.org			
2.		6th June	Siliguri	6
Topics	One Day Seminar on Reporting under Companies Act, 2013.			
Fees	₹300/-			
Contact Person	Chairman, Bhubaneswar Branch of the EIRC of ICAI- Phone-0353-2560445, siliguri@icai.org			
3.		6th June	Vapi	6
Topics	One Day Seminar on Reporting under Companies Act, 2013			
Fees	Under Finalisation			
Contact Person	Chairman Vapi Branch of the WIRC of ICAI Phone:0260-2468232, vapi@icai.org			

[1] For more details about the forthcoming events, please refer the detailed announcements hosted on the ICAI website www.icai.org

Legal Update

HC took note of assessee's submission that there was no finding in the assessment order or the CIT's order that the assessee had received some amount by way of interest and that such amount was not shown in the accounts. Further, the revenue authorities had not rejected the books of accounts assessee and it was, therefore, submitted that unless and until there was a concrete finding that something was received by the assessee from the party, nothing can be added by way of notional income.

HC noted that Revenue pointed out none other than Section 144 of the Act as an income tax provision which empowered Revenue to add notional interest income. HC observed that Section 144 did not apply to the instant proceedings since the instant proceedings originated from an assessment u/s 143(3) of the Act.

HELD:

In absence of any specific provision to tax the notional income on advances, the impugned interest income could not be brought to tax.

Service Tax

LD/63/88

Delhi Transport Corporation

vs.

Commissioner of Service Tax

17th April, 2015

Service of providing space to display advertisements on bus-queue shelters and time-keeping booths is chargeable to service tax u/s 65(105)(zzzn) of Finance Act; Although service tax burden can be transferred to other party through a contractual arrangement, assessee cannot ask the Revenue to recover the tax dues from a third party or wait for discharge of the liability by the assessee till it has recovered the amount from its contractors; Penalty u/s 78 of Finance Act deleted since there was no "intent to evade payment of service tax" and the financial position being poor on account of providing highly subsidized transport facilities & dependence on Govt grants.

Delhi Transport Corporation, a Central public sector undertaking had entered into contracts with 7 agencies (contractors/advertisers) for providing space to display advertisements, *inter alia*, on bus-queue shelters and time-keeping booths. As per the terms of contract, it was the contractor's/advertiser's/service recipient's responsibility to pay the taxes/levy payable or imposed directly to the concerned authority and such amount was in addition to license fee quoted in the contract.

A service tax liability of ₹7.19 crore was raised against the assessee on account of income from service of "sale of space or time for advertisement". Penalties were imposed for non-registration, failure to file service tax returns, intentional failure to pay the service tax to evade the liability. Assessee submitted that it is an autonomous body of Govt. of NCT of Delhi and had no intention to violate provisions of taxing statutes, and that the non-registration was not deliberate or intentional. Assessee submitted that as per the contracts entered into with the 7 agencies (contractors), the agencies were the ones liable to bear the service tax. Assessee placed reliance on the Supreme Court judgment in the case of *Rashtriya Ispat Nigam Limited vs. Dewan Chand Ram Saran* [(2012) 5 SCC 306]. Further it was pointed out that the licence fee, maintenance charges, *etc.* received by the assessee from such agencies (contractors) was being shared with Municipal Corporation of Delhi (MCD) equally and therefore tax liability was also required levied to the extent of 50%. Assessee informed the Revenue that it intended to institute contempt/execution proceedings against the contractors for failure to deposit the service tax in spite of contractual obligation and the directions of the High Court. It added that the amount of service tax to the extent realised from the contractors had been deposited with the service tax department already.

The Commissioner (Adjudication) Service tax confirmed the demand of ₹7.19 crore u/s 73, Section 68 and 95 of Finance Act, alongwith interest u/s 75 and penalties u/s 77 & u/s 78.

The order of Commissioner was challenged before the CESTAT, however the CESTAT ruled in favour of Revenue. CESTAT rejected assessee's claim that Revenue ought not to insist the assessee for payment of tax liability since the same was the burden of the contractors. CESTAT held that such considerations would not transfer the substantive and legislatively mandated liability to service tax from the appellant (the service provider) to the advertisers (the service recipients). CESTAT further held that assessee should have taken care to ascertain whether it was liable to tax. Assessee neither alleged, asserted nor established that there

was any ambiguity in the provisions of the Act which might justify a belief that the assessee was not liable to tax. CESTAT remarked that *"It is axiomatic that no person can harbour a "bona fide belief" that a legislated liability could be excluded or transferred by a contract. The appellant was clearly and exclusively liable to service tax on rendition of the taxable service of "sale of space or time for advertisement"."*

The High Court observed that there was no dispute that services provided were taxable within the meaning of Section 65 (105) (zzzn) and that the assessee was liable to pay service tax thereupon. However, the High Court stated that it disagreed with CESTAT's view that service tax liability could not have been transferred by way of contract. The reliance of assessee on the ruling in Rashtriya Ispat Nigam Limited (*supra*) on this aspect was correct and the CESTAT had not properly appreciated he same. In the case of *Rashtriya Ispat Nigam Limited*, the Hon'ble Supreme Court had observed that as far as the submission of shifting of tax liability was concerned, as observed in para 9 of *Laghu Udyog Bharati vs. Union of India* [(1999) 6 SCC 418] service tax is an indirect tax, and so it was possible that it may be passed on. Therefore, an assessee can certainly enter into a contract to shift its liability of service tax.

The High Court observed that the service tax burden can be transferred by contractual arrangement to the other party. However on account of such contractual arrangement, the Revenue cannot be asked to recover the tax dues from a third party or wait for discharge of the liability by the assessee till it has recovered the amount from its contractors. The HC held that the directions under Arbitration and Conciliation Act would only govern the rights and obligations arising out of the contracts entered upon by assessee with the contractors. It may be that in terms of the said orders, DTC would be in a position to recover the amount of service tax paid by it to the Revenue respecting the services in question. The fastening of liability on such account by such order on the contractors is, thus, a matter restricted to claims of the appellant against such parties. It would have no bearing insofar as the claim of the Revenue against the appellant for recovery of the tax dues is concerned.

On the aspect of the assesseee's submission about its 'bonafide belief', the HC remarked that *"The appellant is a public sector undertaking and should have been more vigilant in compliance with its statutory obligations. It cannot take cover under the plea that contractors engaged by it having agreed to bear the burden of taxation, there was no need for any further action on its part."* The assessee was statutorily bound to not only get registered, but also submit requisite returns as per the prescriptions of law and rules framed thereunder.

Thus, the HC held that the imposition of service tax liability with interest and penalty could not be faulted. The HC accepted assessee's contention and deleted penalty levied u/s 78. It observed that in order to invoke Section 78, Revenue must make out a case of "intent to evade payment of service tax", which may manifest by reason of fraud, collusion, willful misstatement or suppression of facts. From the facts, HC observed that there was no effort to "evade" the payment of service tax by the assessee.

Legal Update

Excise Law

LD/63/89

Commissioner of Central Excise, Goa.
vs.
Cosme Farma laboratories Ltd.
7th April, 2015

Job workers of Medicaments held to be manufacturers.

Job-work agreement was on principal to principal basis and job-workers were not manufacturing drugs as agents/on behalf of assessee but were manufacturing them independently. Job workers held as 'manufacturers' under Central Excise Act. Consequently, holds that assessable value of goods would be sum total of material cost, labour charges and profit of job-workers. Term 'manufacturer' or 'loan licensee' used under Drugs and Cosmetics Act has nothing to do with manufacturing activity/term 'manufacture' under Central Excise Act.

The assessee is a manufacturer of medicaments having license under the Drugs and Cosmetics Act, 1940. The assessee also gets certain medicaments manufactured through other job workers so is a loan licensee-who is also permitted to get drugs manufactured at different places under the provisions of the Drugs and Cosmetics Act, 1940 and Rules made thereunder. Under the agreement with the job workers, raw material and packing material was supplied by assessee and as per its instructions, medicaments were manufactured by job workers, under supervision of the assessee. Show cause notices were issued as to why the assessee, the loan licensee should not be treated as a manufacturer as per the provisions of the Central Excise and Salt Act, 1944 in respect of the medicaments manufactured by the job workers. The assessee was also called upon to make payment of certain duty and the job workers were also called upon to show cause as to why they should not be directed to pay penalty. The Commissioner held that the assessee was a manufacturer of the medicaments manufactured at the premises of its job workers.

There was a difference of opinion in members of the CESTAT and matter was taken up by Third Member, who agreed with views of Member (Technical) allowing assessee's appeals. Against this, Revenue approached the SC.

The questions raised before the Supreme Court were that whether assessee, who was getting medicaments manufactured through job-workers, could be considered as independent manufacturer and what would be the assessable value of job-worked goods under the Central Excise Act.

SC held that manufacturing activity was done only by the job workers in their premises and with the help of their labour force and machinery. Simply because the job workers had to adhere to the quality control or the specification with regard to the quality prescribed by the respondent, it would not mean that the assessee was the manufacturer.

SC observed that the term 'manufacturer' or 'loan licensee' used under the provisions of Drugs and Cosmetics Act had nothing to do with the manufacturing activity or term 'manufacture' under Central Excise Act. Both the Acts were enacted for different purposes. The provisions of the Drugs and Cosmetics Act, 1940 pertain to manufacture of drugs and quality of the drugs etc, where the manufacturer of the drugs has to see that the quality of the drugs manufactured by him is as per prescribed standards. SC observed that there is a provision in the Act with regard to getting the drugs manufactured by someone else. A manufacturer, who is having a license to manufacture, can get the drugs/medicaments manufactured by another person under his supervision and he would be liable if the drugs manufactured by someone else are not as per the prescribed quality. Though the drugs/medicaments might not have been manufactured by the one who is a licensee and the actual manufacturer is guilty of manufacturing substandard drugs, the licensee becomes responsible and liable under the provisions in the said Act.

SC observed that on the other hand, Central Excise Act provisions are for the purpose of imposing duty on the goods manufactured. The manufacturer becomes liable to pay certain duty as per provisions of the Act. The term 'loan licensee' referred by Revenue was not relevant since the quality or standard of drugs/medicaments manufactured by loan licensee or anybody was not of concern in instant case.

From the agreement between the assessee and job-worker, SC further observed that the job-workers were not assigned the work as agents of assessee and that the relationship between the parties was that of principal and principal, not principal and agent. Thus, it was clear that job-workers were not manufacturing the drugs as agents or on behalf of assessee, but were carrying out the manufacturing

activity independently. Therefore, they were manufacturers of drugs as per the provisions of Central Excise Act, held SC.

SC held that the assessable value of goods would be the sum total of cost of raw material, labour charges and profit of the job-workers, as per Circular No. 619/10/2002-CX dated February 19, 2002 and the law laid down in *Pawan Biscuits Co. Pvt. Ltd. vs. Collector of Central Excise, Patna [2000 (6) SCC 489]*. The price at which assessee (brand owner) sold its goods would not be the assessable value because duty is payable at the stage of manufacture and not, when goods are sold.

LD/63/90

Commissioner, Customs and Central Excise, Aurangabad

vs.

Roofit Industries Ltd.

23rd April, 2015

Expenditure incurred upto stage of transfer of ownership would form part of assessable value.

Freight, insurance and unloading charges to be included to arrive at assessable value in terms of Sec 4 of Central Excise Act, where goods are delivered at buyers' premises as per work orders; Expenditure incurred upto stage of transfer of ownership would form part of assessable value. The point of time when sale is effected must be seen, i.e. whether at factory gate or at later point of time. Provisions of the Sale of Goods Act also considered.

Assessee, Roofit Industries Ltd, entered into four agreements for designing, manufacturing, providing at site, laying, jointing and testing of PSC pipes of specified sizes. Revenue argued that assessee was indulging in evasion of central excise duty by not computing the assessable value of finished goods properly to the extent that it was not deducting the amount of freight, insurance and unloading charges from the price of excisable goods, though the place of removal of finished goods was different from the factory gate. The Adjudicating authority held that place of removal finished goods was the buyer's premises and not at the factory gate and therefore confirmed the demand.

CESTAT ruled in favour of the assessee on the ground that the issue was settled in the judgment of *Escorts JCB Ltd. vs. CCE, Delhi-II* [(2003) 1 SCC 281]. Aggrieved, the Revenue filed the present appeals.

SC analysed Section 4 of the Central Excise Act, 1944 (Act), and observed that 'place of removal' is a determinative factor for the purpose of valuation. If the goods are cleared at the factory gate, then the excise duty has to be charged on the valuation of the goods to be arrived at the factory gate as that would be the place of removal of goods, implying that the expenses incurred after removal of goods from factory gate namely freight, insurance and unloading charges *etc*. are not to be included in the valuation of the goods for the purposes of excise duty. SC noted that this aspect was considered in ruling of Escorts JCB Ltd., wherein it was held that, insurance charges, or for that matter, transport charges would not be included even if the assessee had arranged for the transit insurance. The Court found that the terms and conditions of sale clearly stipulated that it was ex-works at the factory gate of the assessee. The payment was to be made before discharge of the goods from the factory premises.

In the instant case, SC observed that from the terms and conditions of the work order that goods were to be delivered at the place of the buyer and it is only at that place where the acceptance of supplies was to be effected. Price of the goods was inclusive of cost of material, central excise duty, loading, transportation, transit risk and unloading

charges *etc*. Even transit damage/breakage on the assessee account which would clearly imply that till the goods reach the destination, ownership in the goods remain with the supplier namely the assessee. As per the 'terms of payment' clause contained in the procurement order, 100% payment for the supplies was to be made by the purchaser after the receipt and verification of material. Thus, the sale of goods did not take place at the factory gate of the assessee but at the place of the buyer on the delivery of the goods in question.

Therefore, SC held clear intent of the aforesaid purchase order was to transfer the property in goods to the buyer at the premises of the buyer when the goods are delivered and by virtue of Section 19 of Sale of Goods Act, the property in goods was transferred at that time only.

SC thus set-aside the order of CESTAT and restored the order of the Adjudicating Authority.

LD/63/91
K.R.C.D. (I) PVT. LTD
vs.
Commissioner of Central Excise, Mumbai
23rd April, 2015

Royalty paid by distributor towards music-copyright, not part of assessable value since Job-worker not 'using' the copyright

Assessee was a job-worker duplicating music CDs and supplying to distributor. Royalty paid by distributor towards music-copyright, not part of assessable value (AV) of duplicate CDs produced by assessee. Since, entire sales were made to distributor i.e. copyright holder, copyright not "used" while 'selling' duplicate CDs to distributor.

The assessee is a manufacturer of duplicate CDs from a master tape/CD issued to it by a distributor who had copyright in the contents of the CD. The artist/lyricist who is the owner of copyright, parts with the copyright for a certain consideration to a producer of music, which music/picture is then captured on the CD. The producer in turn parts with such copyright in favour of a distributor who, ultimately, gets the said CDs duplicated from the assessee on job work basis, and who then sells the CDs in the market to the ultimate customer. Assessee is only given the master CD from which it duplicates such master tape/CD on blank CDs that are owned by it and then sold to the distributor copyright holder, having paid a lump sum royalty to the producer of the music which is on the CD. The entire stock of duplicate CDs can only be sold to the distributor/copyright holder and to nobody else.

Based on a price declaration alongwith cost breakup filed by the assessee, the assessee was made to pay differential excise duty at the rate of ₹1/- per CD for CDs cleared during 1995 to 2000. Subsequently, the Asst. Commissioner issued a show-cause notice to pay differential duty of 5.91 Cr for CDs cleared during Nov. 2000 to Oct. 2001. Such duty consisted of royalty payable to distributor/copyright holder calculated at ₹54.81/- per CD. The Commissioner held that royalty charges incurred by the distributor/copyright holder are liable to be included in the assessable value of the CDs. CESTAT confirmed the order of the Commissioner.

Aggrieved, the assessee preferred the present appeal. The assessee argued that It is the distributor and others who are the copyright holders who then sell these duplicate CDs in the market loading on to them the royalty cost paid by the distributor and others in lump sum to the music producer. Since no part of the royalty had in fact passed, no amount of royalty could be included in the assessable value.

Revenue argued that master tape could not be given to the appellant for duplication unless royalty had been paid, which royalty would form part of the cost of the goods to be produced by the assessee and then sold to the distributor/copyright holder. Thus, the royalty that is payable would also have to be loaded on to the duplicate CDs produced by the assessee and apportioned in a manner stated in the circular dated 19.2.2002.

SC noted that Section 4(1)(a) was not applicable in the present case since price is not the sole consideration for the sale as a master tape had to be handed over by the distributor/copyright holder to the appellant. Section 4(1)(b) and Rule 6 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 were applicable. SC observed that a reading of Rule 6 shows that the value of the goods referred to in the Rule shall be deemed to be the aggregate of the transaction value and the amount of money value of any additional consideration that may flow directly or indirectly from the buyer to the assessee. SC stated that it was important to note that where the master tape is supplied by the distributor who is the copyright holder to the assessee, whether free of charge or at a reduced cost, such master tape must be used in connection with the production and sale of goods by the assessee. What was clear from the present transaction was that the master tape contained within it music/picture in digital form. There was no doubt whatsoever that the music/picture supplied

on the master tape ought to be valued and had been valued as additional consideration that flowed from the buyer to the assessee, and its value had been accepted at ₹1/- per CD.

The entirety of the duplicate CDs was sold only to the distributor who was the copyright holder. Therefore the copyright value in the duplicate CD was not used in connection with the sale of such goods inasmuch as no part of the copyright which may have been passed on by the distributor to the assessee was used by the assessee in selling the duplicate CDs to the distributor who himself was the copyright-owner. Therefore on the assumption that the music/picture embedded in the master tape was inextricably bound with the copyright thereof, the copyright was not "used" by the assessee while selling the duplicate CDs to the distributor. After the job work was done by the appellant, the distributor having paid a lump sum royalty to the producer of the music, then sold the duplicate CDs in the market with the cost of the royalty loaded thereon.

SC held that since no part of the royalty could be loaded on to the duplicate CDs produced by the appellant, the circular dated 19.2.2002 which dealt with apportionment of royalty had no application to the facts of the present case.

Customs Law

LD/63/92

Commissioner of Customs, Ahmedabad.
vs.
Essar Steel Ltd.
13th April, 2015

Fees for technical services towards setting up & commissioning of manufacturing unit in India are not to be included in import value.

Fees for technical services towards setting up & commissioning of manufacturing unit in India are not to be included in import value of steel plant. Only those costs & services actually paid or payable pre-import are to be added for determining value of imported goods. Since rendering of such services was not a pre-condition for sale, Rule 9(1)(e) of Customs Valuation (Determination of Price of Imported Goods) Rules of 1988 was not applicable.

The assessee entered into an agreement with Met Chem Canada Inc. for supply of technical services required for setting up and commissioning a plant for the manufacture of Hot Rolled Steel Coils in India. The technical consultant was to be paid a fee of DM 78 million. As per the supplementary agreement, the lumpsum fee payable was increased to DM 94 million and the plant capacity was also doubled.

The services agreement is separate from the main agreement for setting up the said plant in India. The main agreement was contained in a purchase order as per which the CIF value was USD 163 million. This purchase order was amended by which CIF price of said steel plant was revised to USD 169.70 million. Revenue sought to add the sum of DM 78 million, being technical knowhow charges, to USD 169.70 million. In reply, assessee submitted that none of the provisions of Rule 9 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 would apply as no payment for technical services was made as a condition of sale of imported goods. In any event, the agreement for technical services was to be performed in India post-importation and therefore, would have to be excluded from value to be taken into account at the time of import.

The Adjudicating Authority added the sum observing that the two payments were not independent to each other and the buyer had no option but to buy machinery once they have made commitment for technical services. CEGAT ruled in favour of the assessee observing that the plant could have been set up and could run without

supply of technical knowledge and that that the fact that technical supply agreement was signed prior to the agreement for supply of machinery was not relevant. Apex court's judgement in *Collector of Customs (Preventive) vs. Essar Gujarat Ltd. [(1997) 9 SCC 738*] was distinguished on facts. Aggrieved, the Revenue appealed before SC.

Perusing Section 14 of the Customs Act, SC observed that customs duty is chargeable on goods by reference to their value at a price at which such goods or like goods are ordinarily sold or offered for sale at the time and place of importation in the course of international trade. This would mean that any amount that is referable to the imported goods post-importation has necessarily to be excluded. It is with this basic principle in mind that the rules made under sub-clause 1(A) have been framed and have to be interpreted.

Under Customs Valuation (Determination of Price of Imported Goods) Rules of 1988, Rule 2(f) defines "transaction value" as the value determined in accordance with Rule 4. Rule 4(1) in turn states that the transaction value of imported goods shall be the price actually paid or payable for goods when sold for export to India, adjusted in accordance with provisions of Rule 9 of these rules. SC observed that a reading of Rule 4 and Rule 9 made it clear that that only those costs and services that are actually paid or payable for imported goods pre- import are to be added for the purpose of determining the value of the imported goods.

From the technical services agreement, SC noted that the assessee had associated Met Chem Canada Inc. as a technical consultant only. Technical services to be provided by Met Chem Canada Inc. were basically to coordinate and advise the assessee so that it could successfully set up, commission and operate the plant in India. The coordination and advice was to take place post-importation in order that the plant be set up and commissioned in India. Thus the services were only post-importation. Ownership of patents, know-how, copyright and other intellectual property rights remained vested in the technical consultant and none of them were transferred to assessee. Assessee became owner of that portion of documents, drawings, plans and specifications originally created by the technical consultant, pursuant to the agreement. Further, the liquidated damages were only payable for delay in commissioning the plant and for failure to achieve stipulated performance, both of which were post importation activities.

SC observed that a conjoint reading of the technical services agreement and the purchase order did not lead to a conclusion that the technical services agreement was in any way a pre-condition for the sale of the plant itself. On the contrary, the technical services agreement read as a whole was regarding only to successfully set up, commission and operate the plant after it has been imported into India.

SC therefore held that clause 9(1)(e) was not attracted and consequently the consideration for the technical services to be provided by Met Chem Canada Inc. was not to be added to the value of the equipment imported to set up the plant in India.

SC relied on judgments in the case of *Tata Iron & Steel Co. Ltd. vs. Commissioner of Central Excise & Customs, Bhubaneswar, Orissa [(2000) 3 SCC 472], Commissioner of Customs (Port), Kolkata vs. J.K. Corporation Limited [(2007) 9 SCC 401], Commissioner of Customs vs. Ferodo India (P) Ltd. [(2008) 4 SCC 563], and Commissioner of Customs (Port), Chennai vs. Toyota Kirloskar Motor (P) Ltd. [(2007) 5 SCC 371]* to state that facts of the instant case did not attract Rule 9(1)(e).

LD/63/93
Wipro ltd.
vs.
Assistant Collector of Customs & Ors.
16th April, 2015

Provision fixing notional loading/unloading/handling charges at 1% even when actual cost is ascertainable struck down.

Proviso (ii) to Rule 9(2) of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, which provides for addition at 1% of FoB value of goods plus transport and insurance charges as handling/loading/unloading charges even when actual cost ascertainable, is 'ultra vires' Sec 14(1) and Sec 14(1)(A) of Customs Act; Only when actual cost cannot be arrived, notional cost should be made applicable; When the actual charges paid are available and ascertainable, introducing a fiction for arriving at the purported cost of loading, unloading and handling charges is clearly arbitrary with no nexus with the objectives sought to be achieved.

Assessee is engaged in the manufacture and marketing of Mini and Micro Computer Systems and peripheral devices like printer, drivers *etc.* It, inter alia, imported various components including

software from time to time. Assessee presented a Bill of Entry No. 15020 dated April 15, 1993. The chargeable weight of the consignment was 315 kgs. and the actual loading, unloading and handling charges amounted to ₹65 paisa as per the tariff of the International Airport Authority of India, Madras. The Custom Authorities (Revenue) on the basis of Notification No.39/90 dated 05/07/1990 added a sum of ₹15,214.69/- to the value of the goods as handling charges as the impugned provision entitles the authorities to add 1% of the F.O.B. value of goods on account of loading, unloading and handling charges.

HC dismissed the writ petitions and writ appeals in which the constitutional validity of *proviso* (II-i) of Rule 9(2) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 was challenged. Assessee had argued that the *proviso* (II-i) was not only *ultravires* Section 14(1) and Section 14(1-A) of the Customs Act, 1962 but was also violative of Article 14 and Article 19(1)(g) of the Constitution of India. The *proviso* (II-i) of Rule 9(2) (hereinafter referred to as "Proviso") was inserted by Notification No. 39/90 dated July 05, 1990 issued by the Ministry of Finance.

The assessee submitted that notional fixation of the handling charges with the addition of one per cent of FOB value of the value of goods, irrespective of the nature of goods, size of the cargo, was in total disregard to the total handling charges, even when such actual handling charges could be ascertained. The assessee argued that such an addition was totally irrational and arbitrary, thus violative of Article 14 of the Constitution and was also *ultravires* Section 14(1) and Section 14(1)(A) of the Customs Act.

Assessee submitted that, that prior to the impugned notification dated 05.07.1990, the Rule in this regard was to the effect that the handling charges were reckoned on the actuals and only where the actual cost could not be ascertained, one per cent of the F.O.B. of the goods was to be added as charges on this account. However, with the impugned amendment in the Rules, the actual cost incurred and or ascertainable is totally ignored in the matter of "handling charges" and is to be arrived at fictionally by adding one per cent of the F.O.B. value of the imported goods and its transportation and insurance charges. It was pointed out that the assessee is engaged in the manufacture and marketing of computer systems and peripherals, and in the course of its business, imports various components worth crores of rupees, which are of high value but of low weight and dimensions. Further, the actual cost incurred towards the handling charges in accordance with the prescribed charges by the international Airport Authority of India was not even a fraction of the "notional handling charges" arrived at by applying the formula contained in the amended Rule. Assessee argued that only in those cases where actual cost could not be arrived at, the impugned fictional formula should be made applicable.

Assessee also argued that there was no rationale in adding one per cent of the F.O.B. value in such cases and this smacked of arbitrariness making it violative of Article 14 of the Constitution as well.

SC analysed the scheme of the Customs Act. SC observed that the valuation rules were made in exercise of powers conferred under Section 156 of the Customs Act, 1962, read with Section 22 of the General Clauses Act, 1897. SC observed that the purpose of the Rules was to arrive at the valuation of the imported goods to enable the customs authorities to levy duty thereupon, on the basis of the value so arrived at. Rule 2 was the "definition" clause, and Rule 2(f) therefore defined "transaction value" to mean the value determined in accordance with Rule 4 of these Rules, which was to be read along with Rule 3. A conjoint reading of the Rule 3 and Rule 4 provisions made it clear that the value of the imported goods was to be the transaction value, and in those cases where transaction value cannot be determined, such a value was to be determined by resorting to Rules 5 to 8 thereof in a sequential order. Therefore the first attempt must be to ascertain the transaction value. As per the formula contained in sub-rule (1) of Rule 4, the authorities were to find out the price actually paid or payable for the goods when sold for exports to India, to arrive at the value of the goods. Further, SC pointed out that once the value was arrived at, it was to be adjusted in accordance with the provisions of Rule 9 of the Rules. The final outcome, after such an adjustment made, is to be treated as transaction value to attract the import duty thereupon.

SC observed that the value of imported goods was to be the transactional value which means the price "actually paid" or "payable" for the goods imported. The value as specified in sub-rule (1) is to be generally accepted with the exception of certain contingencies stipulated in proviso to sub-rule (2) of Rule 4. Only when such a value cannot be determined, one has to resort to Rules 5 to 8, in a sequential manner which would mean that the

authorities would first refer to Rule 5 and in case it is inapplicable, then Rule 6 and so on. As per Rule 5, in those cases where the transaction value was indeterminable, transaction value of "identical goods" was to be taken into consideration.

SC analysed clause (b) of sub-rule (2) of Rule 9 which deals with loading, unloading and handling charges associated with the delivery of imported goods at the place of importation, which are to be included to arrive at the value of such imported goods. SC observed that the provision of sub-rule (2) of Rule 9, as originally stood, made it clear that wherever loading, unloading and handling charges are ascertainable *i.e.* actually paid or payable, it is those charges that would be added. Proviso to the said Rule contained the provision that only in the event the same are not ascertainable, it shall be 25% of the free on board value of such goods. In fact, sub-rule (3) of Rule 9 leaves no manner of doubt when it mentions that additions are to be made on the basis of objective and quantifiable data.

SC observed that impugned amendment dated 05.07.1990 has changed the entire basis of inclusion of loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation. SC observed that the proviso which stipulates 1% of the FOB value of the goods irrespective of the fact whether actual cost is ascertainable or not introduces fiction as far as addition of cost of loading, unloading and handling charges is concerned even in those cases where actual cost paid on such an account is available and ascertainable. Obviously, it is contrary to the provisions of Section 14. Thus, SC stated that when the actual charges paid are available and ascertainable, introducing a fiction for arriving at the purported cost of loading, unloading and handling charges is clearly arbitrary with no nexus with the objectives sought to be achieved.

SC remarked that though the rule making authority has the power to make Rules but such power had to be exercised by making the rules which were consistent with the scheme of the Act and not repugnant to the main provisions of the statute itself. The impugned provision would be valid and 1% F.O.B. value in determining handling charges *etc.* could be justified only in those cases where actual cost was not ascertainable.

SC observed that in the instant case the only justification for stipulating 1% of the F.O.B. value as the cost of loading, unloading and handling charges was that it would help customs authorities to apply the aforesaid rate uniformly. SC held that this can be a justification only if the loading, unloading and handling charges are not ascertainable. Where such charges are known and determinable, there is no reason to have such a yardstick.

SC thus held that HC missed the point that Garden Silk Mills Ltd. case was decided by this Court in the scenario where actual cost was not ascertainable. That is why first amendment to the proviso to sub-rule (2) of Rule 9 which was incorporated in 1988 *vide* notification dated December 19,1989, was justified, however, amendment introduced vide provision in 1990 has changed the entire basis of inclusion of loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation. SC was not impressed with the reason given by the authorities to have such a provision and opined that the authorities have not been able to satisfy as to how such a provision helps in achieving the object of Section 14 of the Act.

HELD:

Impugned Proviso (ii) to sub-rule (2) of Rule 9 regarding addition of 1% for loading, unloading, and handling charges, introduced *vide* Notification dated 05/07/1990 was unsustainable and bad in law as it exists in the present form. The proviso has to be read down to mean that the clause would apply only when actual charges referred to in Clause (b) were not ascertainable.

LD/63/94

IVRCL Infrastructure & Projects Ltd.
vs.
Commissioner of Customs, Chennai.
15th April, 2015

Exemption benefit unavailable since entire plant was not imported but only some of the essential components unassembled were imported.

Exemption of imported components of 'hot mix plant' for construction of road for NHAI, under exemption Notification dated 01.03.2001 was denied since complete plant in unassembled form not imported. Un-retracted statements made voluntarily by representatives of assessee and NHAI indicated that what was imported was "the basic character" of hot mix plant and not complete plant. Statements made to an Officer of Customs is admissible as evidence u/s 108 of Act and Court has to merely scrutinize whether same was been made voluntarily or not. Assessee's reliance on Rule 2(a) of General Interpretative Notes had no application to

exemption notification issued u/s 25 of Customs Act, since, test is not whether unassembled plant which is incomplete has essential character of complete plant, but, whether plant in its entirety is imported, albeit in unassembled form.

The assessee entered into a joint venture (JV) agreement with M/s Shapoorji Pallonji & Company Ltd. for the purpose of construction of roads in State of Andhra Pradesh. The Joint Venture was awarded a contract by the National Highways Authority of India for construction of roads as a part of the Golden Quadrilateral, Phase-2 Project in Andhra Pradesh. Goods required for construction of roads were exempted from customs duty *vide* Notification dated March 1, 2001, provided that goods were 'Hot mix plant' of specified description and subject to other conditions.

A purchase order was placed by the appellant on M/s Lintec GmbH & Co.KG, Germany, for supply of a hot mix plant. Lintec and the assessee decided to split the purchase order between Lintec, Germany and M/s Marshalls, Chennai. Lintec was to supply the "critical items" required for the setting up of the said plant, whereas Marshalls was to supply various containers, frames, ducting, tanks and a thraw belt conveyer apart from agreeing to set up the plant after it is imported.

Assessee made import of the material from Lintec and claimed exemption from Custom Duty claiming that the impugned items fell within scope of notification dated 01.03.2001. Revenue Authorities denied assessee's claim.

Commissioner held that the exemption notification was not applicable to the assessee for two reasons: (a) imports have to be made by a Joint Venture Company and not by one of the partners of the said company and (ii) Exemption applied to a complete plant that is imported and not to parts/components of such a plant.

CESTAT recorded that there was no JV Company formed and JV between assessee and M/s Shapoorji Pallonji & Co. Ltd. was in nature of a partnership, in which case any of the partners could import goods covered by the exemption notification. However, it agreed with the Commissioner that what had in fact been imported was not a complete plant and, therefore, it would follow that the exemption notification would not be available to the assessee.

From various admissions made by assessee as well as by persons who deposed on its behalf, it was revealed that all essential portions of plant had not been imported and therefore the assessee's argument that the imported items should be considered as 'hot mix plant unassembled' was rejected. However the assessee relied upon Rule 2(a) of General rules for Interpretation of Schedule to Customs Tariff Act and argued that so long as essentially the plant in question had been imported, merely because all items that go into making of such plant were not imported would not matter. It was contended that such imports can be made in unassembled form as well. Assessee further argued that, plant as a whole has been imported and only structural work has to be done by Marshalls in India and, therefore, benefit of exemption notification would be available.

SC held that Rule 2(a) of Interpretative Notes has no application to the exemption notification issued u/s 25 of Customs Act. Therefore, the fact that an unassembled plant which is incomplete but which has the essential character of a complete plant is not the test to be applied in the present case. Placing reliance upon judgments in the case of *Commissioner of Customs (Imports), Mumbai vs. Tullow India Operations Ltd., [(2005) 13 SCC 789]* and *G. P. Ceramics Private Limited vs. Commissioner, Trade Tax, Uttar Pradesh [(2009) 2 SCC 90]*, SC stated that the test to be applied was whether plant in its entirety is being imported albeit in an unassembled form.

SC thus held that, the concurrent findings of Commissioner and the CESTAT required no interference by this Court inasmuch as both authorities have held that a complete plant in an unassembled form was not imported. SC observed that representatives of the assessee, Marshalls (India) as well as NHAI had accepted the fact that a complete plant was not imported and only components of such plant have been imported which did not have essential characteristics of hot mix plant.

Placing reliance upon judgment in the case of *Gulam Hussain Shaikh Chougule vs. S. Reynolds, Supdt. Of Customs, Marmgoa [(2002) 1 SCC 155]*, SC noted that it is a settled law that statements made to an Officer of Customs are admissible in evidence under Section 108 of the Customs Act, 1962. The Court has merely to scrutinise whether same were made voluntarily or otherwise. In the instant case, it was clear that unretracted statements made by none other than the Vice President of the appellant company, representatives of Marshalls, and a representative of National Highways Authority of India, having never been

retracted later, were made voluntarily. Revenue's reliance on these statements was therefore not unwarranted in law.

The assessee also relied upon letters written by its representative and representative of NHAI to the Commissioner of Customs. From the perusal of these letters, SC observed that what was imported was "the basic character" of the hot mix plant and not a complete plant and that it is clear that what is manufactured indigenously would alone ultimately complete the plant. Thus, SC held that, both oral evidence and documentary evidence ultimately leaded to the conclusion that, what was imported was not a hot mix plant that was complete in itself. SC thus dismissed assessee's appeal.

Sales Tax

LD/63/95

Voltas Ltd.

Vs.

State of Gujarat

8th April, 2015

"Fabrication" is not synonymous to "installation". Water chilling plant fabricated as per customers works orders taxable at composition rate of 5%.

'Fabrication' is not synonymous to 'installation'. Water chilling plant fabricated as per customers works orders taxable at composition rate of 5%, as applicable to "fabrication and installation of plant and machinery" under Entry 5 of Gujarat VAT Notification dated October 18, 1993; 15% composition rate as applicable to "installation of air-conditioners and A.C. coolers" under Entry 2 of Notification was not applicable.

The Assessee, Voltas Ltd., is engaged in the business of execution of jobs design, supply and installation of air-conditioning plants construed to be indivisible works contracts. One Anupam Colours and Chemicals Industries placed an order for water chilling plant with the assessee, for its Vapi factory. The specifications pertaining to the water chilling plant were to be in conformity with the assessee's offer and the work order insisted on the requirement of chilled water to be used directly for its process of manufacturing pigments with the assertion that sufficient precautions be taken to ensure that chilled water at 5 to 6 degree centigrade is available for such process. It was also emphasised that assessee would provide the customer with the lay-out details, foundation drawing and other necessary information required for the erection of the plant.

Vide notification dated 18.10.1993, the composition rate prescribed for 'installation of air-conditioners and A.C. Coolers' was 15%, for 'Fabrication and installation of plant and machinery' was 5%, and for general 'Works contracts' was 12%. Assessee, under the impression that the works contract ordered by customer would attract 5% rate and not 15% or 12%, filed an application before the Deputy Commissioner of Sales Tax Gujarat under Section 62 of the Act and insisted that the works contract involved came within the purview of 5% rate only. Revenue rejected assessee's plea and held that the works contract was covered by Entry No.2 as the assessee had to air-condition the plant to be erected by it. The commissioner and the Tribunal dismissed assessee's appeal. Aggrieved, the assessee filed a Special Civil application invoking Writ jurisdiction, before the Gujarat HC. High Court ruled in favour of Revenue holding that assessee's works contract fell under 15% rate slab. Aggrieved, the assessee preferred an appeal before the Supreme Court.

The assessee argued that having regard to the inalienable and essential constituents of the works contract as per the work order, fabrication as well as the installation of the water chilling plant were distinctly different items of works and thus assessee was taxable at the composition rate of 5%. Further, assessee whilst drawing support from the work order argued that the water chilling plant of the customer was to be configured in conformity with the design parameters referred therein and not on readymade specifications on the election or discretion of the assessee.

Assessee further argued that design parameters prescribed by the customer, to cater to its requirement amongst others of the temperature of the chilled water and the volume thereof to be used for its process of manufacturing pigment did assuredly involve design and fabrication of the essential composition of the system which by no means could be equated with the installation thereof simplicitor as the end device. Further, the customer was persistently particular on the adherence to its prescribed design parameters which was apparent from the work order, demonstrated that the works contract could not be drawn within the contours of 15% rate.

Revenue argued that as the supply of the water chilling plant as per the works contract did not envisage any process of fabrication, the appellant

was liable to be taxed at the composition rate of 15%. It was further argued that the basic and functional components of the water chilling plant being identical to that of an air-conditioning plant, the appellant's plea of application of 5% composite rate was wholly misplaced.

SC observed the scheme of the Sales Tax Act and noted that the Notification issued by the Government of Gujarat was in exercise of powers conferred by u/s 55A of the Act and therefore the interpretations sought by rival contentions were to be in furtherance of the underlying objective of the said provision. SC further observed that since a dealer has been given the option to pay in lieu of the amount of tax payable, a lump sum by way of composition, at the rate fixed by the State Government, the State Government has to be mindful about the nature of the works contract executed while fixing the composition rate of tax. SC remarked that *"The scheme of composition as envisaged by Section 55A therefore in our comprehension does not admit of any synonymity with that of exemption as contemplated in law. This pre-supposition of the High Court as one of the contributing factors in concluding that the works contract in question did fall within the framework of Entry No.2 of the Notification is apparently erroneous."*

SC observed that the work order in clear terms did enjoin that the design parameters pertaining to tonnage of refrigeration, final temperature of the water to be made available for the process of manufacturing pigments and the quantity of the chilled water essential therefore, were indispensable and were in addition to the other specifications as offered by assessee. The rigour of the insistence for the adherence to the design parameters was patent also from the request of the customer requiring assessee to provide it with the lay out detail, foundation drawing and other necessary information essential for the erection of the water chilling plant. Thus, the exercise as a whole as contemplated by the work order was neither intended nor could be reduced to mere installation of the finally emerging apparatus. The work order noticeably did not refer to any readymade or instantly available devices, meeting the requirements of the customer so much so to be only installed at its factory. Instead, the work order was apparently tailormade to the requirements from which no departure was intended or comprehended. SC stated that in this perspective, the word "fabrication" appearing in Entry No.5 [5% rate] of the Notification assumed a decisive significance.

SC noted that the Aiyan's Advanced Law Lexicon (Vol.II), 3rd Edition 2005, defined the word "fabrication' as "to manufacture" whereas the Oxford Dictionary defined the same to mean 'to construct or manufacture an industrial product'. SC stated that the word "manufacture" as per the Aiyan's Advanced Law Lexicon (Vol.II) in its plainest form and shorn of other details was the process of transforming or fashioning of raw materials into a change of form for use. Thus, the process of fabrication therefore conceptually would involve a lay out for the ultimate device to be installed, preceded by a design of the parameters prescribed, configuration of the resultant components, and integration thereof to structure the ultimate mechanism or product. Installation would be a subsequent step to finally position the plant to complete the works contract. Since fabrication in terms of the work order in the instant case was a distinctly independent yet integral segment of the works contract contributing to the final physical form of the water chilling plant with the characteristics intended, it was not to be construed to be, synonymous to the installation.

SC stated that any endeavour to drag the works contract involved within the framework of Entry No.2 would be repugnant to the basic principles of interpretation of statutes and subordinate legislations like the statutory Notification under Section 55A of the Act. To exclude the work of fabrication from the works contract as per the work order would render the works contract truncated to a form not intended by the customer.

HELD:

Assessee's works contract for fabrication and installation of water chilling plant at the factory of Anupam Colours and Chemicals at Vapi would fall under Entry 5 [5% rate] of the Schedule to the Notification dated 18.10.1993 issued under Section 55A of the Act.

Company Law

LD/63/96

K. M. Capital & Ors

vs.

Registrar of Companies & Ors

17th April, 2015

Complaint for non-receipt of dividend quashed for being time barred

Criminal proceedings alleging non-receipt of

Legal Update

dividend by investors declared for 1995-96, u/s 205/205A of Companies Act, 1956, quashed as they were filed beyond limitation period of one year; Respondent had not filed any application for condonation of delay. Without condonation of delay cognizance of offence cannot be taken. Also no charges were framed for 12 years after filing of the complaint by the Respondent.

The Registrar of Companies (RoC) [Respondent] had filed a complaint u/s 205/205A against the petitioner company alleging that for the year 1995-96, the petitioner had declared an interim dividend @12.5% which was to be paid within stipulated period of 42 days from the date of declaration and the petitioner failed to pay the same within the stipulated time. The petitioners filed instant petition u/s 482 of CrPC before Delhi HC for quashing of above complaint pending before Tis Hazari Court. Section 482 of CrPC gives inherent powers to High Courts to quash criminal complaints to prevent abuse of the process of any court or otherwise to secure the ends of justice.

The petitioners referred to Section 468 of CrPC which bars Courts to take cognisance of an offence after the expiry of the period of limitation. However, respondent contended that in absence of any instruction/directions from Department of Company Affairs the complaint could not have been filed in the Court in time. Respondent stated that since the necessary direction was accorded on January 31, 1999, the complaint could only be filed on November 3, 1999.

HC analysed Section 205/205A and also Sec 207 which provided for penalty, for not paying interim dividend within 42 days of its declaration, in form of simple imprisonment for a term extending upto seven days alongwith fine. HC observed that of the the Respondent ought to have filed the complaint within one year of occurrence of the alleged offence whereas the Respondent had actually filed the complaint after three years and therefore the complaint was hopelessly time barred.

HC noted that as per the complaint, dividend was allegedly declared for the year 1995-96 whereas the respondent did not mention the date of such declaration of dividend. The complaint was filed on 3rd November, 1999 *i.e.* after a delay of more than three years.

HC observed that respondent had not filed any application for condonation of delay. HC referred to judgment in case of Hindustan Wire And Metal Products [(1983) 54 Comp. Cas 104(Cal.)] wherein it was held that that without the condonation of delay cognizance of offence cannot be taken and unless the bar of limitation was lifted by condonation of delay through an order of the magistrate under Section 473 Cr.P.C, cognisance of an offence cannot be taken by mere filing of the complaint.

HC noted that Section 5 of the Act provided that the liability in respect of offences committed under the Act devolved upon the officer in default but the Respondent had not mentioned the name of any officer in default. It had arrayed all the directors including directors who had resigned before the alleged declaration of dividend for the year 1995-96. Section 207 of the Act mentioned that only the directors who are knowingly a party to the default are liable for the offence. There was no allegation as to which director was knowingly a party to default. Further, in the complaint no averments were made as to whether the non recipients of the dividend were the shareholders of the Company. Therefore, in the absence of primary evidence no offence could be deemed to have been made out.

Further, the HC noted that respondent had not mentioned as to which director was in default. Perusing Section 207 read with Section 5 of the Act (which provides that the liability in respect of offences committed under the Act devolves upon the officer in default), HC observed that instead of mentioning name of officer in default, respondent had arrayed all the directors including directors who had resigned before the alleged declaration of dividend for the year 1995-96. HC also noted that, "In the complaint no averments have been made as to whether the non recipients of the dividend were the shareholders of the Company as the copy of the share certificate were not placed on record. In the absence of primary evidence no offence can be deemed to have been made out."

Petitioner also submitted that the Respondent had failed to frame any charges for more than 12 years after filing the complaint.

HELD:

Proceedings were quashed due to delay in filing of complaint and on account of delay of 12 years in framing the charges.

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Banking Law

LD/63/97

HMT Watches Ltd.
vs.
M. A. Abida & Anr.
19th March, 2015

Cheque dishonour due to "stop payment" instruction also attracts Section 138 of Negotiable Instruments Act, 1881; SC discussed parameters of jurisdiction of the High Court in exercising its jurisdiction u/s 482 Cr.P.C; High Court erred in quashing the criminal complaints filed by the appellant in respect of offence punishable u/s 138, in exercise of powers under Section 482 of the Code of Criminal Procedure by accepting factual defences of the respondent/ accused which were disputed ones. Such defences, if taken before trial court, after recording of the evidence, can be better appreciated.

Negotiable Instruments Act, 1881-Section 138, 139 and 140

The appellant, HMT Watches Ltd. filed criminal complaint cases against respondent M.A. Abida stating that as many as 57 cheques were issued by her in discharge of outstanding liability towards the appellant HMT Watches Ltd. and when the same were presented for collection they were received back, dishonoured by bankers with the endorsement- "payment stopped by the drawer". When a notice of demand was sent to the respondent, the liability to pay was disputed by her. In the petitions filed before the High Court, the respondent submitted that the respondent submitted that business with the appellant was done till September, 2003 on "cash and carry" basis. After 2003 the appellant company used to collect cheques towards the amount covered by distinct invoices with respect to various consignments for securing payment of amount covered by the invoices. High Court accepted the plea of the respondent and quashed the criminal complaint cases. Aggrieved, the appellant preferred the instant appeal before the Supreme Court.

Before the Supreme Court, the appellant argued that High Court committed a grave error of law in quashing the proceedings of the criminal complaint cases whereas the respondent contended that since the cheques were given as security, as such there was no liability to make the payment, and the ingredients of the offence punishable u/s 138 of the Negotiable Instruments Act were not made out.

SC analysed Section 138 of Negotiable Instruments Act, 1881. It further observed that Section 139 of the Negotiable Instruments Act, 1881 provides that there shall be a presumption in favour of holder of a cheque as to the debt or liability, whereas Section 140 of the Negotiable Instruments Act, 1881 prohibits what cannot be a defence in a prosecution in respect of offence punishable u/s 138 of the Act.

SC remarked that the High Court should not have expressed its view on the disputed questions of fact in a petition u/s 482 of the Code of Criminal Procedure, to come to a conclusion that the offence is not made out. The High Court has erred in law in going into the factual aspects of the matter which were not admitted between the parties. The High Court further erred in observing that Section 138(b) of Negotiable Instruments Act stood uncomplied, even though the respondent had admitted that he replied the notice issued by the complainant. Also, the fact, as to whether the signatory of demand notice was authorised by the complainant company or not, could not have been examined by the High Court in its jurisdiction u/s 482 of the Code of Criminal Procedure when such plea was controverted by the complainant before it.

SC rejected Respondent's contention that the instant case was not a case of insufficiency of funds. Placing reliance upon ruling in *Pulsive Technologies P. Ltd. vs. State of Gujarat*[(2014) 9 SCALE 437], SC stated that an instruction of "stop payment" issued to the banker could be sufficient to make the accused/respondent liable for an offence punishable under Section 138 of the Negotiable Instruments Act. Further reliance was also placed on ruling in *Modi Cements Ltd. vs. Kuchil Kumar Nandi*[(1998) 3 SCC 249] in which it was held that if a cheque is dishonoured because of stop payment instruction even then offence punishable u/s 138 gets attracted.

Thus, allowing the appeals, SC held that the High Court has committed grave error of law in quashing the criminal complaints filed by the appellant in respect of offence punishable u/s 138, in exercise of powers under Section 482 of the Code of Criminal Procedure by accepting factual defences of the accused which were disputed ones. SC directed the trial courts to proceed with the trial in the criminal complaint cases and abstained itself from expressing any opinion on the correctness of the defence pleas taken by the Respondent. ■