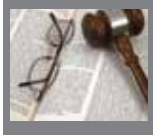
Legal Decisions[1]

DIRECT TAXES



Income Tax Act

LD/64/18

Dy. Commissioner of Income Tax
vs.
M/s Crane Software International Ltd.
9th June, 2015

Rectification powers under section 154 of the Income-tax Act, 1961

The question as to whether the interest received on Fixed Deposits kept apart for business purposes falls within the business income or income from other sources is debatable point and is beyond the scope of Section 154 of the Income-tax Act, 1961

The assessee had earned interest on Fixed Deposits amounting to ₹2,28,80,959/- and TDS was also deducted. The Fixed Deposits were given as security by the assessee for Term Loans and Overdrafts used for business and payment of interest on such Overdrafts and Term Loans far exceeds the receipt of interest received on Fixed Deposits.

The assessee filed return of income on 28.11.2003 and the assessing officer passed the assessment order under Section 143(3) of the Act on 16.12.2005. On later verification of records, the revenue was of the impression that the interest income being *'Income from other sources'* needs to be reduced from the profit of business to arrive at the deduction under Section 80HHE of the Act. Accordingly, the revenue concluded that the same resulted in excess allowance of 80HHE of the Act and held, by issuing an order under Section 154 of the Act, that assessee is not entitled to deductions under Section 80HHE of the Act.

The Appellate Commissioner, having considered the issue involved, concluded that the issue of characterisation of interest as *Business income* or *Income from other sources* was contentious one and accordingly, annulled the order passed by the assessing officer under Section 154 of the Income Tax Act, 1961. The Tribunal accepted the order issued by the Appellate Commissioner.

The High Court held:

The question as to whether the interest received on Fixed Deposits kept apart for business purposes falls within the business income or income from other sources is debatable point. At an earlier point of time, the Assessing Officer had taken one particular view, since two views were possible. Such debatable point is beyond the scope of Section 154 of the Act. Hence, this is not the case wherein the Authority would have exercised power under Section 154 of the Income-tax Act, 1961.

HC thus dismissed Revenue's appeal.

LD/64/19

Commissioner of Income Tax-8
vs.
Industrial X-Ray and Allied Radiographers (India) Pvt. Ltd.
23rd June, 2015

Section 28(iv) read with Section 41(1) of the Income-tax Act, 1961–revenue recognition

The sales made in assessment year 1996-97, which was not offered to tax then, cannot be chargeable to tax in assessment year 2006-07 by adding the amount of outstanding creditors

The assessee had shown an amount of Rs.64.29 lakh in the name of M/s. Hi-Tech Trading Company as sundry creditors in earlier assessment years. The contract with M/s. Hi-Tech Trading Company was completed in 1998-99 and payment was received through M/s. X-Ray Accessories Mfg. Company, its sister concern. The amounts so received were credited towards advance instead of sales.

During the assessment proceedings relevant to AY 2006-07, the assessing officer noted that the limitation period was over, and therefore could not demand information from the creditor. The assessing office consequently added the same income under Section 28(v) read with Section 41(1) of the Act for the subject assessment year.

The Commissioner of Income-tax (Appeals) remanded the matter back to the assessing officer. In the remand report, the assessing officer noted that 'an amount of ₹64,29,570/- out of the sundry creditors was treated as 'Liabilities No Longer Payable'. The assessee has not filed statement of bank account of M/s. X-Ray Accessories Mfg. Company, an associate concern of assessee where a credit for inward remittance of ₹75,01,065/- is appearing on 15.4.1999. The assessee had filed a Ledger Account of M/s. X-Ray Accessories Mfg. Company, from which it is seen that an amount of ₹65,66,686/- has been transferred to the assessee company's

[1] *Contributed by CA. Sahil Garud, ICAI's Editorial Board Secretariat and Indirect Taxes Committee*
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account on 31.3.2000 for the reason that the same was received by them on assessee's behalf from Hi-Tech Trading Oman. The same has been shown as credit to the account of HiTech Trading Company as on 31.3.2000 by assessee in its books account. This credit continued in the books of account from 2000 to 2006 as a current liability. The above fact is confirmed by Hi-Tech Inspecting Services LLC, Oman vide their letter dated 30.11.2009 certifying that the work was completed during 1996-97 or thereabout. From the Ledger Account and other documents now furnished, it is observed that the credit is appearing from 2000 or thereabout. Assessee has also furnished some circumstantial evidence in support of the fact that the work was done in or around 1996-97. Hi-Tech Inspection Services LLC, Oman has also confirmed this fact. However, the sales remained to be accounted in that year. On the basis of the evidences now submitted, it appears that the amount is not taxable in the assessment year 2006-07.

On the basis of the above remand report the Commissioner of Income-tax (Appeals) deleted the additions holding that though the work was done in or around 1996-97, the sales remained to be accounted. However, the sum was not taxable in the relevant assessment year. The Tribunal adopted the order of the Commissioner of Income-tax (Appeals).

The Hon'ble High Court dismissed the appeal by noting that the amount of Rs.64.29 lakh was not chargeable to tax in the Assessment Year 2006-07.

LD/64/20

The Commissioner of Income Tax, Chennai

vs.

M/s MIL Industries Ltd.

08th June, 2015

Land uncovered by factory building is not a vacant land so as to be taxed under Wealth Tax; There is no substantial question of law to be considered by the High Court.

The issue arising in the instant case was whether land (comprising of factory building) sold by assessee, located as Ambattur, would fall within exclusion clause of Section 2(ea) of Wealth Tax Act. The assessee contended that every part of the land sold comprised of factory building i.e. administrative and research and development block and considering the nature of use to which the land sold prior to the sale, it cannot be treated as urban land and the levy of wealth tax on the entire portion of the land was hence against law. Whereas Revenue argued that the constructed area was very less and highly disproportionate as compared to the total area of the land, and so the land did not come under exclusion clause of Section 2(ea) of the Wealth Tax Act.

The CIT(A) set aside the order of the Assessing officer, on the basis of the remand report of the Assessing Officer. CIT(A) held that impugned lands were not urban or unused lands. The assessee had put up its factory building on the said land and the contention of the AO that balance land which was not covered by the factory building was to be treated as vacant land, was misconceived. Noting that the order of CIT(A) was a well reasoned one, the tribunal upheld the order of CIT(A).

HC observed that the issue involved was a pure question of fact and that no question of law much less any substantial question of law arose for consideration in these appeals. HC thus dismissed the appeals.

Service Tax

LD/64/21

The Narasimha Mills Pvt. Ltd.

vs.

The Commissioner of Central Excise (Appeals)

11th June, 2015

Service Tax Voluntary Compliance Encouragement Scheme, 2013 is not a self contained code but to be construed as a part and parcel of the Chapter V of the Finance Act, 1994.

In the instant case, the VCES declaration made by the Narasimha Mills Pvt. Ltd. ("the Petitioner") was rejected by the Designated Authority under Section 106(2) of the Finance Act, 2013 holding that since the Petitioner had been issued with Show Cause Notice for the period involved in the VCES declaration, the Petitioner is not entitled to avail the benefit of the Scheme.

On appeal being preferred to the Ld. Commissioner (Appeals), the same was returned stating that the Scheme does not have a statutory provision for filing appeal against the Rejection Order under Section 106(2) of the Finance Act, 2013 passed by the Designated Authority and that the appeal preferred by the Petitioner under Section 85 of the Finance Act would not lie since the said provision provides appeal only against the

Orders passed by the Adjudicating Authority and in the present case, the Designated Authority who passed Rejection Order, cannot be construed as an Adjudicating Authority. Being aggrieved, the Petitioner filed a Writ Petition before the Hon'ble High Court of Madras.

The Hon'ble High Court of Madras, relying upon the decision of the Hon'ble Punjab and Haryana High Court in the case of *Barnala Builders & Property Consultant vs. the Deputy Commissioner of Central Excise & Service Tax, Dera Bhassi and others* held the following:

- Section 85(1) of the Finance Act denotes that any person aggrieved by any decision or Order passed by an Adjudicating Authority subordinate to the Commissioner of Central Excise may appeal to the Commissioner of Central Excise (Appeals);
- In terms of Section 65B(55) of the Finance Act, the definition of 'Adjudicating Authority' available under Section 2(a) of the Central Excise Act, 1944 would equally apply to the Finance Act.
- The Designated Authority has given a categorical finding on going through the facts and circumstances of the case by applying his mind, thus his decision would fall within the meaning of 'Adjudication' and thereby, the Designated Authority acted as an Adjudicating Authority;
- VCES was introduced by the Central Government, in exercise of the powers conferred by Sub-Sections (1) and (2) of Section 114 of the Finance Act, 2013 and hence, it is not a self-contained code, but is to be construed as a part and parcel of Chapter V of the Finance Act;
- When VCES itself is construed as part and parcel of the Finance Act, all other provisions of the Finance Act except to the extent specifically excluded would automatically apply to proceedings under the Scheme and consequently, the Rejection Order passed by the Designated Authority is appealable under Section 85 of the Finance Act.

Accordingly, the Hon'ble High Court directed the Ld. Commissioner (Appeals) to take up the appeal filed by the Petitioner for disposing the same in accordance with law, after affording an opportunity to the Petitioner.

LD/64/22

M/s Bootleggers Island

vs.

Customs, Excise and Service Tax Appellate Tribunal

04th June 2015

No penalty u/s. 76 and 77 can be imposed if the failure supported by reasonable cause in terms of Section 80 of the Finance Act, 1994.

The assessee, Bootleggers Island, is engaged in video tape production. Since the assessee had not filed ST-3 returns for the periods July, 2001 to September, 2001 and October, 2001 to March, 2002, notice was issued directing the assessee to file returns. Thereafter, the assessee filed returns and paid belatedly service tax upto December, 2001. Since the assessee had not paid service tax from January, 2002 to March 2002, October, 2002 to December, 2002 and January, 2003 to March, 2003 and for the belated payment of service tax, the assessee had not paid any interest. A show cause notice was issued proposing to demand service tax with interest and penalty. In response to the said notice, the assessee filed reply stating that the belated payment of service tax was not due to malafide intention and their customers were not willing to reimburse the service tax and hence, the incidence of service tax had to be paid out of the price already agreed upon. The assessee also agreed to pay interest and sought for dropping of the penalty proceedings. Not satisfied by the reply filed by the assessee, the adjudicating passed an order levying penalty u/s. 75, 76 and 77.

The Commissioner (A) dismissed the appeal filed by the assessee while the Tribunal remanded the matter back to the Original Authority for de novo adjudication holding that since the appellant was acting in his individual capacity as proprietor of the company and the said capacity was not disputed by the Authorities below, it was open to the authority to examine the question whether the benefit of Notification No.7 of 2001, which granted exemption to taxable service provided to a client by an individual professional videographer in relation to video tape production from the whole of the service tax leviable, was available to the assessee.

Subsequent to the remand order, the Adjudicating Authority adjudicated the matter once again and confirmed the demand made in the show cause notice holding that the benefit of notification No.7 of 2001 was not available to the assessee. The said demand includes interest under Section 75 and penalty in terms of Sections 76 and 77 of the Central

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Excise Act. The assessee's subsequent appeal was rejected by the Commissioner (A) and the Tribunal holding that financial hardship was the only ground raised for belated payment of service tax, which was not a ground for holding that assessees were not liable to penalty.

Aggrieved by the order of the Tribunal, the assessee preferred an appeal before the Madras High Court. The High Court observed that the Tribunal had clearly came to hold that it was not a case of the appellant that the benefit of Section 80 of the Finance Act, 1994 should be extended and in the absence of such a substantial plea and there being no bonafide justification for exemption, penalty was imposed. Thus, the High Court held that no penalty u/s. 76 and 77 could be imposed if the failure is supported by reasonable cause in terms of Section 80 of the Finance Act, 1994.

LD/64/23

Mahanagar Telephone Nigam Ltd

vs.

Commissioner of Service Tax

June 8, 2015 (CESTAT-DEL)

The issue involved in this appeal is whether pre-deposit of 7.5% of the impugned service tax liability in terms of Section 35F (as amended w.e.f. 6.8.2014 by Finance No.2 Act, 2014) of the Central Excise Act 1944 read with Section 83 of the Finance Act, 1994 is required to be made while filing appeal against order-in-original dated 29.8.2014 when the Show Cause notice in respect thereof was issued before 6.8.2014.

It was contended by the appellant that as per the Kerala High Court judgment in the case of *Muthoot Finance Ltd. vs. Union of India & Ors.* and in the case of *M/s A.M. Motors vs. Union of India and Commissioner of Central Excise, Kozhikode*, mandatory pre-deposit is not required because lis in question commenced prior to the introduction of the amended Section 35F and therefore the appeal should be dealt with in terms of the provisions of Section 35F as existed prior to 6.8.2014 and that the same view has been held by Punjab & Haryana High Court in the case of *M/s Super Threading (India) Pvt. Ltd. and Another vs. Union of India and Others*.

The Hon'ble Tribunal referred to the amended provisions of Section 35F and held that the second proviso to amended Section 35F does not leave any scope for interpretational ambiguity with regard to the appeals filed prior to 6.8.2014. Thus the requirement of mandatory pre-deposit is squarely applicable to all appeals filed on or after 6.8.2014 and the amended Section 35F makes no distinction whether the show cause notices in respect of such appeals were issued prior to, on or after 6.8.2014. CESTAT is a creature of the very Act of which the said Section 35F is part and therefore it cannot go beyond the provisions of the Act which has created it. In this context, the Tribunal referred to the decision of Hon'ble Supreme Court in the case of *Om Prakash Bassi vs. Ashwani Kumar Bassi* (SC) where it was held that *"Rent controller being creature of statute can act only in terms of power vested by statute."* The Hon'ble Andhra Pradesh High Court in the case of *Maa Mahamaya Industries vs. CC, Visakhapatnam* HC of AP held that CESTAT being creature of statute with specific power mentioned in the statute itself does not have any inherent power like Civil Court to pass appropriate order to meet the ends of justice. Therefore, it was held that CESTAT cannot entertain any appeal filed on or after 6.8.2014 without the mandatory pre-deposit as per the provisions of Section 35F of Central Excise Act, 1944 as amended after 6.8.2014. Therefore, it was held that the appellant is required to make the mandatory pre-deposit in terms of Section 35F of Central Excise Act, 1944 as amended with effect from 6.8.2014 and in the absence of such pre-deposit its appeal shall not be entertained.

LD/64/24

Rajender Singh

vs.

UoI

May 29, 2015 (P&H HC)

The petitioner is the Managing Director of M/s Sanga Energy Pvt. Ltd. (SEPL), which is engaged in manufacture and supply and installation of towers, sub-station, solar panels etc. Investigations were carried out by the service tax department and from February 2014 till March 2015 on the issue of non payment of service tax on certain service activities which the SEPL contended as not liable. However, during the investigation stage, portion of the service tax was remitted. However, on 8.4.2015, the petitioner was arrested and bail was also rejected. In this backdrop, the petitioner approached the High Court.

The High Court while granting interim bail to the petitioner observed that as on the date of arrest,

no show cause notice was issued and no service tax dues were adjudicated. Further, as admitted by the respondents, after the arrest was made no enquiry or investigations were carried out, which goes contrary to the argument that investigation is in progress and his personal custody is required. Therefore, detention of the person would amount to taking away his liberty in the absence of any complaint having been filed against him. Therefore, based on the above observations interim bail was ordered subject to certain conditions to safeguard the interest of revenue.

Excise Law

LD/64/25

The Commissioner of Central Excise, Chennai

vs.

Intergral Coach Factory, Ministry of Railways, Chennai

11th June, 2015

So long as the goods manufactured are exempted goods, waste parings, scrap arising in the course of the manufacture of exempted goods would be entitled for exemption as per Notification No.89 of 1995 CE dated 18.5.1995

The assessee, Integral Coach Factory, is engaged in the business of manufacturing passenger coaches both self-propelled and non-propelled, steel freight containers and parts of passenger coaches for railways under Chapter 86 of Central Excise Tariff Act. The assessee was availing exemption under Notification No. 62/95-CE dated 16-03-1995. Revenue held that assessee had cleared ferrous and non-ferrous scrap without payment of excise duty and therefore, demanded duty along with interest and penalty while the Assessee contended that it was eligible for exemption under Notification No. 89/95-CE dated 18-05-1995 on such scrap, but the demand was confirmed upon adjudication. The assessee's appeal before the Tribunal allowed after considering the proviso and Explanation to the said Notification.

Aggrieved by the order of the Tribunal, the revenue filed an appeal before the Madras High Court.

The Madras High court observed that the assessee had availed the benefit of said Notification in respect of clearance of waste scraps arising out of manufacture of exempted goods. Though the exemption in respect of manufactured goods was available under Notification No. 62/95-CE, the problem arose because assessee cleared exempted goods on payment of duty during the period in dispute. Such erroneous payment of duty caused Revenue to hold that the goods were "other than exempted goods" and therefore demand was made. It noted CESTAT's conclusion by relying on Explanation to Notification No. 89/1995-CE, that since manufactured goods were exempted, the benefit of said Notification would be applicable.

The High Court observed that the Tribunal had rightly held that *proviso* to this Notification would not apply to the facts of the case and the erroneous payment of duty would not render the goods 'other than exempted goods'. It was further observed that *'So long as the goods manufactured were exempted goods, waste parings, scrap arising in the course of the manufacture of exempted goods would be entitled for exemption as per Notification No.89 of 1995 CE dated 18-5-1995.'*

Thus, the question of law was answered in favour of assessee clarifying that Tribunal had rendered a finding w.r.t. relevance of both the Notifications and dismissed the appeal.

LD/64/26

M/s Shyam Steel Industries and Anr.

vs.

Deputy Commissioner of Central Excise and Service tax

19th June, 2015

Refusal to exercise power conferred on a public authority in a situation which warrants exercise of the power, would amount to an act of unreasonableness and arbitrariness; Ground for refusal mentioned by Dy. Commissioner as lot of paper work and imposition of various statutory obligations on the assessee/department is misconceived; Prayer for directing respondents to assess the goods provisionally allowed.

The Assessee, Shyam Steel Industries, is engaged in the business of manufacture and sale of MS Billets and TMT Bars. The TMT Bars cleared from assessee's factory are either supplied directly to customers or to a network of dealers engaged in re-sale. In order to boost the sale of finished goods through the dealers, assessee offers various promotional schemes in the form of turnover/quantity discount, cash discount etc. While the discounts are made known to the dealers even before the clearance of the finished goods from the factory by way of claims notified and published from time to time, quantification thereof is possible only at the end of the notified period. The dealers fulfilling the qualification conditions become eligible to get duty discount at the end of

the notified period, processed by way of credit notes. The assessee's application for permission to clear subject goods on provisional assessment as per Rule 7 of Central Excise Rules for period August, 2013 to November, 2013 was rejected.

The Commissioner of Central Excise allowed the appeal files by assessee holding that there were sufficient reasons for extending the facility of provisional assessment of duty under Rule 7. Thereafter, the Revenue filed an appeal before the Tribunal which was still pending. Since there was no stay of operation of the Commissioner's order, assessee filed a writ petition before Calcutta High Court to allow clearance of excisable goods manufactured to be manufactured by assessee under provisional assessment in terms of Rule 7 of Excise Rules.

Assessee contended before the Calcutta High Court that 'Transaction value' was defined to mean the price actually paid or payable for the goods when sold and additional consideration which the buyer is liable to pay to or on behalf of the assessee in connection with the sale. The assessee further contended that the price 'actually paid or payable' for the goods manufactured and sold by the company was the net price arrived at upon deduction of the discounts offered by the company to its buyers and hence the said discounted price was the transaction value on which central excise duty was required to be paid.

The High Court noted the assessee's submission that it was impossible for assessee to determine correct 'transaction value' of concerned excisable goods at the time and place of removal thereof, and assessee was therefore compelled to take recourse to clearance of the goods under provisional assessment. Assessee clarified that, since the quantity/turnover discounts were based on and linked to achievement of the target and were allowed on varying rates depending upon the slab which a particular dealer attained in terms of the relevant scheme, it was not possible to quantify the discount at the time of clearance of a particular consignment from the factory or the place of removal.

The High Court observed Rule 7 of the Central Excise Rules, 2002 and noted that the Assistant Commissioner or the Deputy Commissioner was empowered to order payment of duty on provisional basis where the assessee was unable to determine the value of excisable goods or determine the rate of duty applicable. The High Court further noted that the same was subject to assessee executing a bond binding him to pay the difference between the amount of duty as may be finally assessed and the amount of duty provisionally assessed.

The High Court observed that the discount of any type made known prior to the clearance of the goods but quantified subsequently and passed on to the customers was an admissible deduction from the transaction value and as such the assessment for such transactions may be made on a provisional basis.

The High Court referred the Apex courts discussion in case of *'Union of India vs. Arviva Industries (I) Ltd.'* and held that the Circular referred to by assessee, which stated that assessee had to disclose the intention of allowing such discount to Revenue and make a request for provisional assessment, was binding on Revenue. The High Court further held that Revenue had no legitimate ground to disallow assessee to pay excise duty on provisional basis on the concerned goods as per Rule 7 of the Central Excise Rules, 2002, since, the actual transaction value cannot be determined at the time of removal of the goods from the factory, and denying such permission to assessee would result in forcing assessee to pay more excise duty than it was actually liable to pay and is grossly unfair and would cause undue injustice and prejudice to assessee. The High Court observed that since the assessee agreed to execute requisite bond as per Rule 7(2), the interest of Revenue would be fully protected even if assessee was allowed to pay duty on a provisional basis.

The High Court observed that as a year elapsed from the date of order of Commissioner and in absence of stay order, it was obligatory on the part of Revenue to comply with the Commissioner's order and allow assessee to obtain clearance of the concerned goods upon payment of duty on provisional basis as mentioned in Rule 7.

The High Court relied on the Calcutta High court's case of *Pankaj Guljarilal Gupta vs. Collector of Customs'* and allowed the writ Petition filed by the assessee.

LD/64/27

The Commissioner of Central Excise, Chennai
vs.
M/s Joy Foam Pvt. Ltd.
11th June, 2015

Where the inputs are considered to be put to intended use in the manufacture of finished products, it is deemed to have been

consumed in the process of manufacture; claim of reversal of credit cannot be countenanced and since the goods are lost or destroyed due to unavoidable accident.

A fire accident occurred in the factory premises of the assessee, M/s Joy Foam Pvt. Ltd. During the accident, the stock of manufactured goods, raw materials, work-in-progress and the returned goods were destroyed. The assessee reversed the credit availed on stock of raw materials, returned goods and inputs contained in semi-finished goods, which destroyed in the fire accident. The commissioner allowed remission of duty after taking note of their application for remission of duty on the finished goods destroyed in the fire accident. Thus, the assessee was directed to pay CENVAT credit along with interest. The Tribunal allowed the assessee's appeal seeking payment of CENVAT credit.

Aggrieved by the order of the Tribunal, the Department preferred an appeal before the Madras High Court.

The High Court referred the Delhi Tribunal ruling in the case of *'Inalsa Ltd. vs. CCE'* where it was held that *the final product had not suffered duty only as a result of remission of duty given a fulfilling the conditions, therefore, under Rule 49, it was not to be equated to a general exemption from duty or goods being charged to nil rate of duty.*

The High Court further referred to Madras Tribunal ruling in the case *CCE vs. Indchem Electronics* wherein the Tribunal had taken the view that inputs which were to be used in the manufacture of final product and the final product was destroyed due to fire and remission of duty was granted the credit in respect of inputs used on such inputs is not desirable.

The High Court observed that that reading of Rule 49 of Central Excise Rules, 1944 and Rule 21 of Central Excise Rules, 2002 which provided for remission of duty in respect of goods lost or destroyed by natural cause or by unavoidable accidents or in case goods become unfit for consumption or for marketing at any time before removal did not provide reversal of credit in respect of inputs used in the manufacture of such goods. It was further observed that the Modvat rules prohibited the credit of duty paid in respect of the inputs which were used in the manufacture of exempted goods in respect of the inputs which were used in the manufacture of exempted goods which are chargeable to nil rate of duty.

Thus, the High Court ruled in favour of assessee.

LD/64/28

The Commissioner of Central Excise, Chennai

vs.

M/s KTV Oil Mills

11th June, 2015

Dispute regarding 'a process being manufacturing process or not' is out of jurisdictional purview of HC u/s 35(g) of of the Central Excise Act, 1944.

During the appellate procedures, the Tribunal held that the activity undertaken by the assessee, KTV Oil Mills, falling under chapter 15 of Central Excise Tariff Act, 1985 did not amount to manufacture. The Revenue, being aggrieved by the order of the Tribunal, preferred an appeal before Madras HC.

The assessee objected to the maintainability of the appeals contending that Section 35G of the Central Excise Act, 1944 provided that an appeal on the issue 'whether the activity of the assessee does not amount to manufacture' would not lie before the High Court.

The High Court relied on Karnataka High Court ruling in the case of *'CCE Mangalore vs. Mangalore Refineries & Petrochemicals Ltd'* wherein it was held that: the following disputes do not fall within the jurisdiction of the High Court under Section 35(g) of the Act:-

(a) Dispute relating to the duty of excise payable on any goods.
(b) The value of the goods for the purposes of assessment.
(c) A dispute as to the classification of goods.
(d) Whether those goods are covered by an exemption notification or not.
(e) Whether the value of goods for the purposes of assessment is required to be increased or decreased.
(f) The question of whether any goods are excisable goods or not.
(g) Whether a process is a manufacturing process or not, so as to attract levy of excise duty.
(h) Whether a particular goods fall within which heading, sub-heading or tariff item or the description of goods as mentioned in column No.3 of the Central Excise Tariff Act, 1985."

The High Court held that the issue that arose for consideration was 'whether the activity undertaken by the assessee falling under chapter 15 of the Central Excise Tariff Act, 1985 does not amount to manufacture'. Therefore, the objection of the assessee was sustained.

Thus, the High Court ruled in favour of the assessee.

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LD/64/29

Aurangabad Electricals Ltd

vs.

CCE, C & ST, Aurangabad

June 15, 2015 (CESTAT-MUM)

The appeal is against the confirmation of demand of duty and penalty on the clearance of Aluminium dross, Aluminium turning and Aluminium oily flash cleared by the appellant to their job worker-M/s. Shridhar Metal Works. The Appellant is manufacturer of Motor Vehicle Aluminium parts and during the manufacturing process, some quantity of Aluminium dross, Aluminium Turning & Aluminium oily flash generates which is given to one M/s. Shridhar Metal Works who converts these waste aluminium material into Aluminium Ingots. M/s. Shridhar Metal Works Metals being the job worker of the appellant was given a portion of the factory premises of the Appellant for carrying out such process. The said waste aluminium material is not sold to M/s. Shridhar Metal Works but given freely for carrying out job work. The resultant product on job work i.e. Aluminium Ingots is returned by M/s. Shridhar Metal Works within the same factory premises to the Appellant which the Appellant admittedly use the said Ingots in the manufacture of Motor Vehicle Parts. The appellant is clearing the said Motor vehicle parts on payment of excise duty. The contention of the revenue is that there is removal of said waste aluminium material by the Appellant to a different entity i.e. M/s. Shridhar Metal Works, hence the removal of waste material which is Aluminium Waste and Scrap falling under Chapter Heading No. 76020010 of the Central Excise Act, 1985 is liable to excise duty in the hands of the appellant.

The Hon'ble Tribunal held that considering the plethora of judgments submitted by the appellant, it is well settled that the waste generated during the course of manufacture of final product, can be sent without payment of duty for melting to the job worker and thereafter the same is used for manufacture of dutiable goods. Therefore, it was held that the removal of remnant by appellant to the job worker is not liable to duty as the clearances of remnants (intermediate goods) are to be considered as being covered under rule 4(5)(a) of CCR, 2004/ rule 16A of CER, 2002. Further, the goods cleared under job work is not liable for duty, in terms of notification 214/86-CE dated 25/3/1986 as final product is cleared on payment of duty. Hence, no duty liability arises on clearances of remnants to job worker.

Further, it was held that as it is held that the removal of remnant is not dutiable, the aspect of excisability of said remnant material with reference to judgments in case of *Indian Aluminium Co. Ltd. and Hindalco Industries Limited*. Therefore, it was held that the demand of duty on clearance of remnant is not sustainable.

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LD/64/30

TVS Motor Co. Ltd.

vs.

Union of India

June 12, 2015 (Kar HC)

The assessee is engaged in the manufacture of Motor Cycles. Assessee exported the manufactured goods and paid duty, including automobile cess leviable under Automobile Cess Rules, 1984, on such goods. The rebate claim filed by the assessee was rejected to the extent relating to Automobile Cess, Secondary and Higher Education Cess on Automobile Cess on the ground that only duty of excise could be claimed as rebate and not such cess

The High Court while allowing the rebate on automobile cess held that a bare perusal of Rule 3 of Automobile Cess Rules, 1984 indicates that provisions of Central Excise Act, 1944 and the Rules made thereunder including those relating to refund of duty has been made applicable to the levy and collection of Cess. The Court relied upon the decision of Supreme Court B*answara Syntex Ltd., vs. Union of India* which held that education cess on goods is also a duty of excise and the decision of High Court in the case of *CCE vs. Shree Renuka Sugars Ltd.,* wherein it was held that Sugar cess levied and collected under Sugar Development Fund Act, 1982 is also duty of excise for the purpose of cenvat credit. Therefore, the rebate claim of the assessee including the cess was held to be in order.

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LD/64/31

CCE

vs.

Mahavishnu Cylinders

June 05, 2015 (HC-MAD)

The assessee was engaged in the manufacture of LPG Cylinders and was supplying the same to

M/s. Indian Oil Corporation Ltd. through an open tender to supply the cylinders at Net Delivery Price of ₹300/- per cylinder. The assessee opted for SSI exemption for the financial year 2005-06 under Notification No.8/2003 and cleared the goods at 'Nil' rate of duty and on crossing the SSI exemption limit, they cleared the goods on payment of appropriate Central Excise Duty. However, in the initial period of claiming SSI exemption, due to clerical error, duty component was also shown in invoice. Case of the department is that the assessee, during the period of claiming SSI exemption, collected the duty and but did not remit the same.

The High Court observed that price charged for each cylinder being fixed by tender, it remained the same during the period when SSI exemption was availed also after crossing the SSI exemption limit. The assessee had not collected anything in excess of the price fixed at NDP by IOCL, which is inclusive of excise duty. It is clear from the facts recorded by lower authorities that the assessee had not collected anything as representing duty in excess of what was paid. The Court held that when such being the case, because of the error committed by the clerk in generating the invoice, the assessee could not be faulted with and demand of duty does not sustain.

LD/64/32

CCE

vs.

M/s Dalmia Cements (Bharat) Ltd

June 4, 2015 (HC-MAD)

The assessee is engaged in the manufacture of cement. During the period between March, 2004 and March, 2005, a power plant was set up by the assessee within their factory premises for which they took cenvat credit on the duty paid on inputs and capital goods received in their factory in relation to the setting up of the power plant. The said power plant was leased to M/s. Keshav Power Pvt. Ltd., to operate and run and supply power to the assessee at an agreed rate per unit of electricity. Case of the department is that the as the power plant has been leased out, the assessee is liable to reverse the cenvat credit availed on such plant in terms of Rule 3(5) of Cenvat Credit Rules, 2004 as removal of capital goods/inputs as such. Tribunal held that there is no requirement of reversal of credit and hence the department went in appeal.

The High Court observed that the Tribunal on analysis of the lease deed has taken a view that there is no removal of capital goods from the factory premises and hence Rule 3(5) would not be applicable. Further, the Court held that Rule 3(5) would come in to play only where the goods are removed as such from the factory under the cover of invoice and in the instant case, as the goods are not removed from the factory under cover of invoice, said rule cannot be made applicable.

Customs Law

LD/64/33

Karnataka Power Corporation Ltd.

vs.

The Asst. Commissioner of Customs, Chennai.

11th June, 2015

The Tribunal was incorrect in dismissing the appeal and restoration application on the ground that assessee had not obtained COD clearance. COD system was abolished by SC vide its judgment in case of Electronics Corporation of India vs. UOI

The assessee is engaged in the installation, maintenance and operation of power generating units in the State of Karnataka. As against the rejection of the refund claim by the Adjudicating Authority as well as by the Commissioner (Appeals), the appellant filed an appeal before the Tribunal on 25.09.2004. The Tribunal dismissed the appeal for want of COD [Committee on Disputes] clearance with liberty to the assessee to apply for restoration in the event of clearance being granted.

Subsequent to such an order of Tribunal, SC held in the case of *Electronics Corporation of India vs. UOI* that that the decision in the case of *Oil and Natural Gas Commission v. Collector of Central Excise* had outlived its utility and therefore, it had to be recalled. Assessee thereafter filed a restoration application before the Tribunal. However, the Tribunal dismissed the application holding that no clearance was produced by the assessee and that when this dismissal order of their appeal was passed the decision of ONGC case was in operation.

The Madras HC observed that in the case of *Electronics Corporation of India vs. UOI,* it was held in paragraph 8 that by another order dated 20.7.2007 (Oil & Natural Gas Corpn. Maharashtra Ltd. case) this Court extended the concept of dispute resolution by High-Powered

Committee to amicably resolve the disputes involving State Government and their instrumentalities.

The appeal in the instant case was filed on 25.09.2004 and therefore, *prima facie*, the appellant was justified in saying that there was no requirement for clearance by the High Powered Committee. The Tribunal was at error in dismissing the appeal at the first instance. Even otherwise, subsequent to the decision of the Supreme Court in the case of *Electronics Corporation of India vs. UOI,* the restoration application has been filed on 30.5.2011. The law as it stands on and after 17.2.2011 is that there is no requirement of getting clearance from the COD. The Tribunal had failed to note the decision of the Supreme Court and therefore, the order of the Tribunal is erroneous.

HC distinguished Revenue's reliance on decision in case of *Hindustan Copper Ltd. vs. UOI* on facts. Ruling in favour of assessee, HC thus held that the decision of the Supreme Court in the case of *Oil and Natural Gas Commission vs. Collector of Central Excise* does not apply to the State Government and its instrumentalities.

LD/64/34

Sanco Trans Ltd.

vs.

Commissioner of Customs, Chennai.

11th June, 2015

Since show-cause notice was not sent within 90 days of offence report, Customs Broker license revocation held as unsustainable.

Power of Customs Commissioner to suspend/ revoke license is traceable to Regulation 20 and procedure thereof under Regulation 22 of Customs House Agent Licensing Regulations 2004 (CHALR); Show cause notice quashed since in terms of Regulation 22, the notice was required to be issued within 90 days from date of receipt of offence report

The Customs Authorities sought to revoke the licence and forfeit the security deposit with penalty imposition of the assessee, for failure to comply with provisions of Customs Brokers Licensing Regulations 2013. Writ petition was therefore filed before Madras HC challenging the show cause notice.

During investigation, it was found that assessee had attempted to assist one Mos Metro India to clear the imported goods at a much lower rate, with intent to evade payment duties to the tune of ₹1.05 crore by suppressing the Load Port Chartered Engineer's Certificate and original purchase invoices of subject machineries. According to Revenue, assessee had prima facie failed in discharging its obligations as Customs Broker under Regulations 11(d), 11(e), 11(f) and 11(j) of CBLR. Therefore, by invoking Regulation 91, Revenue suspended the license of assessee. The assessee had filed a writ petition which was disposed of, directing Revenue to conduct an enquiry. In the meanwhile, the 10 year validity license of the assessee was about to expire and therefore the assessee filed a renewal application. However, Revenue sent the instant show-cause notice. Hence Writ petition was filed by the assessee.

The HC observed that as per Regulation 18 of CBLR, Commissioner of Customs was empowered to revoke the licence of a Customs Broker and order for forfeiture of part or whole of security, or impose penalty not exceeding ₹50,000/-.

The HC observed that ordinarily, the Writ Court would not exercise its discretionary jurisdiction in entertaining the writ petition questioning the show cause notice, unless the same *inter alia* appeared to be without jurisdiction. The HC noted the assessee's contention that show cause notice was issued in contravention of Regulation 20(1). Regulation 20(1) states that the show cause notice should be issued within 90 days from the date of receipt of offence report from the Investigating Agency. In the present case, same was issued after expiry of 3 years from the date of alleged offence report of Special Intelligence and Investigation Branch (SIIB). The HC noted assessee's reliance placed upon judgment in the case of *MKS Shipping Agencies Pvt. Ltd. vs. The Commissioner of Customs, Tuticorin* wherein it was held that issuing show cause notice beyond the period of 90 days as prescribed under Regulation 22(1) of CHALR could not be sustained.

HC observed that the power to suspend or revoke the license was traceable to Regulation 20 and procedure for suspension was to be found in Regulation 22 of Customs House Agents Licensing Regulations 2004. The HC observed that show cause notice under Regulation 20(1), notice was required to be issued to CHA within 90 days from date of receipt of offence report. In the present case, the notice was issued beyond the statutory

period and hence was unsustainable for want of jurisdiction.

Thus, the HC set aside the demand notice and consequently, finding no impediment for Revenue to renew the Customs Broker License in terms of Regulation 9(1) of CBLR, allowed assessee's writ petitions.

LD/64/35

Commissioner of Customs (AIR).
vs.
M/s BSES Kerela Power Ltd.
11th June, 2015

HC is not inclined to entertain appeal determination of any question in relation to rate of duty.

The question raised in the appeal before the HC was whether cost of the material surrendered to the foreign company while refurbishing the exported product for repair, should be included in the value for the purpose of levy of duty as under Customs Notification No.94/96 or not. On this basis of the show cause notice issued, the Commissioner held that the assessee is liable to pay differential duty and also liable for payment of interest and penalty under the respective provisions of the Act. CESTAT allowed the appeal of the assessee, aggrieved due to which, the Revenue preferred the instant appeal.

The assessee objected the maintainability of appeal before the High Court arguing that as per Section 130 of the Customs Act, an appeal on the issue relating to rate of duty of excise or value of goods for purposes of assessment would not lie before this Court. Assessee placed reliance on SC decision in the case of *Navin Chemicals Manufacturing and Trading Co. Ltd. vs. Collector of Customs* wherein it was held that sub-Section (5) uses the expression 'determination of any question having a relation to the rate of duty or to the value of goods for the purposes of assessment' and the Explanation thereto provides a definition of it for the purposes of this sub-Section. Questions relating to the rate of duty and to the value of goods for purposes of assessment are questions that squarely fall within the meaning of the said expression. It was held by the SC that HC is not liable to entertain an appeal in relation to rate of duty.

Further, Section 130 of the Act deals with appeal to the High Court against the order of the Tribunal. Section 130 (1) explicitly exempts appeal in respect of determination of any question in relation to rate of duty.

Accepting assessee's arguments, theHC held that it was not inclined to deal with the matter raised in the instant appeal, and thus disposed the present appeal as being not maintainable while granting liberty to the appellant/department to pursue the matter before the Supreme Court, if so advised.

Sales tax

LD/64/36

State of Gujarat
vs.
Indian Petrochemicals Ltd
09th June, 2015

Assessee is entitled to interest under section 54[1][aa] on refund arising from appellate order.

Order passed in appeal against original assessment order u/s 41 is assessment order u/s 41 and the original order of assessment merges in it; Intention of the legislature cannot be presumed that only refund arising at the first stage of assessment is eligible for interest and orders of assessment passed at subsequent stages resulting into refund are not entitled to interest; Reference was made to SC ruling in CIT vs. Gujarat Fluoru Chemicals case.

In the instant case, Indian Petro Chemicals Ltd. ("the Assessee") was allowed refund of the tax amount by the Appellate Authority. However, as the interest was not awarded on such refund of the tax amount, the Assessee preferred second appeal before the Hon'ble Tribunal.

It was the submission of the Department that entitlement of interest under Section 54 of the Gujarat Sales Tax Act ("Gujarat Sales Tax Act") is only for such refund amount which has arisen in the Assessment Order under Section 41 thereof and not at the Appellate stage. Thus, the Assessee was not entitled to interest on such refund amount that has arisen at the Appellate stage.

The Hon'ble Tribunal relying upon its earlier decision in the case of *Saurashtra Chemical Ltd. vs. State of Gujarat* and on account of the principles of doctrine of merger and reasonable construction of the provisions of Section 41 of the Gujarat Sales Tax Act, held that when the interest on

refund of tax upon the Assessment is available, such interest should be made available on the refund of the tax which has accrued on account of the Order passed in appeals against the Assessment Order. Being aggrieved, the Department preferred an appeal before the Hon'ble High Court of Gujarat.

The Hon'ble High Court of Gujarat held that once an Order is passed by the competent authority for Assessment and the appeal is preferred before the Appellate Authority against such Assessment Order, which is modified by the Appellate Authority, the principles of doctrine of merger would squarely apply. Thus, the interpretation canvassed by the Department for Section 54(1)(aa) of the Gujarat Sales Tax Act, if accepted, would run counter to the basic principles of doctrine of merger which is well accepted doctrine incorporated in the system of administration of justice.

Further, the Hon'ble High Court relying upon the following judgment of the Apex court, *Sandvik Asia Ltd. vs. Commissioner of Income Tax and others* and *Commissioner of Income Tax vs. Gujarat Fluoro Chemicals*, held that the principles of compensatory measure may apply where the legislature is silent about entitlement of interest on refund of the tax amount, which is already paid by the Assessee. Thus, by considering interest by way of a compensatory measure, the Hon'ble High Court rejected the argument of the Department that interest cannot be awarded by way of compensation unless the interest was expressly provided on any amount of refund.

LD/64/37

M/s Pferd Tools Pvt. Ltd.

vs.

The Commissioner Of Sales Tax, Maharashtra

June 23, 2015 (MUM HC)

The assessee is a manufacturer of steel files and rasps. It holds an Entitlement Certificate under the Package Scheme of Incentives 1993 for the period 4th December 1998 to 31st December, 2003 with monetary ceiling of ₹1,32,48,400/-. With reference to the above, the assessments were completed and tax dues were adjusted with the Central Acts. However, Department exercising its 'revisionary' powers and Commissioner passed an order holding that the exports ought to be worked out at 96.1% instead of 97.6% and therefore, he concluded that there was an excess set-off.

In this background, the following two questions of law were referred by Tribunal for answer and opinion of High Court:

> "(1) Whether on the facts and in the circumstances of the case, the Tribunal was justified in confirming the disallowance of set off claimed under Rule 41-D of the Bombay Sales Tax Rules, 1959, by the Deputy Commissioner of Sales Tax, by ₹1,22,267/- in respect of the tax paid on the consumables which were treated as components, parts and accessories of machinery by the Deputy Commissioner of Sales Tax?
>
> (2) Whether the Tribunal was justified in confirming the reduction of set off by the Deputy Commissioner of Sales Tax by 1.5% by calculating the exports at 96.1% in place of 97.6% calculated by the Sales Tax Officer after excluding the sales of scrap?"

On Appeal, the Hon'ble High Court of Bombay held that in the instant case, when the dealer pointed out the nature of the consumables, then, there was no reason to doubt the veracity and genuineness of his version. When no contrary material was available on record, then, all the more the set-off/refund should not have been denied. There was no reason, therefore, to rework or recompute and recalculate the set-off in terms of the assessment order.

Therefore, it was held that the authorities have completely misread and misinterpreted the Rules and the concurrent conclusion is not in accordance with law. In view of the above, High Court held that the answer to the questions lies in the framing of the questions themselves. The words employed by the Tribunal while referring the question No.1 indicate as to how the tax was paid on consumables and which were treated as components, parts and accessories of machinery by the Deputy Commissioner of Sales Tax. Therefore, question No.1 was answered in favour of the dealer and against the Revenue. In view of the aforesaid discussion and reasoning, even question No.2 was to be answered in favour of the assessee and against the Revenue by upholding the conclusion of the Sales Tax Officer in excluding the sale of scrap.

LD/64/38

M/s East Coast Constructions And Industries Ltd
vs.
Kerala State Electricity Board & Others
June 4, 2015 (KERALA HC)

The petitioner is a Company which had executed contract works on behalf of the Kerala State Electricity Board (for short, "the Board"). They had approached the High Court seeking a writ of mandamus directing the Board to issue 'C' Form declaration for the value of materials supplied. The petitioner-Company submitted that the Board has agreed under clause 14.4 of Instruction to Bidders that they would issue the required sales tax declaration forms to the contractor.

The petitioner, for executing the works, purchased goods from outside the State and transferred the same to the Board by way of sale In-transit. It is the case of the petitioner-Company that they furnished 'C' Form declaration to the seller who in turn had issued Form E1 Certificate to enable the petitioner to avail the benefit under Section 6(2) of the Central Sales Tax Act 1956, (hereinafter referred to as the "CST Act"). Petitioner's case is that to avail the benefit, under Section 6(2) of the CST Act, they require "C" Form declaration from the Board.

The petitioner has been denied "C" Form by the Board on the ground that the petitioner has not produced any proof of payment of tax under the CST Act. It is also submitted that invoices issued by the petitioner are not in the name of the Board and invoices are tampered. On refusal by Board to issue Form C, Petitioner filed writ of mandamus directing the Board to issue 'C' Form for the value of materials supplied.

The Hon'ble High Court referred to the provisions of Section 6(2) of CST Act and held that Rule12(4) of the Central Sales Tax (Registration and Turn Over) Rules, 1957 prescribes that certificate referred in Section 6(2) of the CST Act which shall be either in Form E-1 or Form E-2. As it is admitted by the petitioner, he has issued "C" Form to the first seller who in turn issued Form E-1 to the petitioner. The petitioner's case is that he has made the sale to the Board during the movement of goods by way of transfer of documents. If that be so, the petitioner will have to issue declaration in Form E-2 to the Board and the Board in turn will have to furnish "C" Forms to the petitioner. Essentially, Section 6(2) of the CST Act refers to movement of goods by transfer of title. Thus, the first sale alone will be taxable and the tax on subsequent sale will be exempted if dealers are registered. Therefore, the Board cannot insist proof of tax paid by the first seller. The Board can only demand Form E-2 from the petitioner. It is to be noted that the Board have no case that the goods delivered to them are not by sale in-transit though, such case is attempted to have been projected in the statement filed by the Commercial Tax Department. The Board appears to be on a misconceived notion that invoice is necessary for issuing 'C' Forms. Of course, if the Board requires invoice for any other purposes (for their record), the Board can demand.

In this context, the High Court referred to the dictum laid down by the Hon'ble Supreme Court in *A & G Projects and Technologies Ltd. vs. State of Karnataka* wherein in para.16 it was held as follows:

"Analysing Section 6(2), it is clear that sub-section (2) has been introduced in Section 6 in order to avoid cascading effect of multiple taxation. A subsequent sale falling under sub-section (2), which satisfies the conditions mentioned in the proviso thereto, is exempt from tax as the first sale has been subjected to tax under sub- section (1) of Section 6 of the CST Act, 1956. Thus, in order to attract Section 6(2), it is essential that the sale concerned must be a subsequent inter-State sale effected by transfer of documents of title to the goods during the movement of the goods from one State to another and it must be preceded by a prior inter-State sale. It is only then that Section 6(2) may be attracted in order to make such subsequent sale exempt from levy of sales tax. However, the proviso to sub-section (2) of Section 6 prescribes further conditions and it is only on fulfilment of those conditions that the subsequent sale stands exempted. If those conditions are not satisfied, then notwithstanding the fact that the sale is a subsequent sale, the exemption would not be admissible to such sub-sequent sales. This is the scheme of Section 6 of the CST Act, 1956."

Therefore, in the present case since the Board has already admitted supply of materials by the petitioner, they are bound to issue "C" Forms as and when Form E-2 certificate is received from the petitioner, it is always open to the Assessing Authority to consider genuineness of the claim for exemption claimed by the petitioner in appropriate proceedings. The issue whether the petitioner is entitled for exemption and has satisfied the conditions under Section 6(2) of the CST Act cannot be decided in these proceedings at the instance of the Tax Department. Thus, the writ petition was disposed of directing the Board to issue "C" Forms to the petitioner as and when petitioner produces E-2 certificate without any delay. ■