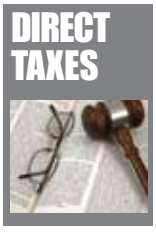
Legal Decisions[1]



Income Tax

LD/64/50

Commissioner of Income Tax
vs.
Bhagat Construction Co. Pvt Ltd
6th August, 2015 (SC)

Section 234B - Levy of interest for defaults in payment of advance tax.

Where an assessee who is liable to pay advance tax has failed to pay such tax or where the advance tax paid by such an assessee is less than 90% of the assessed tax, the assessee becomes liable to pay simple interest at the rate of one per cent for every month or part of the month; Levy of interest u/s 234B is automatic when the conditions for levy under the said provision are met; Relies on SC ruling in Kalyankumar Ray vs. CIT.

The assessee, Bhagat Construction Co. Pvt. Ltd., on an appeal against the levy of interest u/s 234B pleaded that the assessment order passed by the ACIT did not contain any direction for the payment of interest, and it merely stated that interest was payable u/s 234B, without more. On further appeal, ITAT specifically held that since no direction had actually been given in the assessment order for payment of interest, the present case would be covered by the SC ruling in *'Commissioner of Income Tax vs. Ranchi Club Ltd'* which merely dismissed the appeal affirming the High Court judgment in *'Ranchi Club Ltd. vs. Commissioner of Income Tax'.* On subsequent appeal, the High Court upheld the ITAT ruling.

Aggrieved, the Revenue preferred an appeal before SC.

SC accepted Revenue's contention that in the present case, there was a shortfall of advance tax that was paid, which, therefore, led to the automatic levy of interest u/s. 234B. SC further accepted the Revenue's argument that not only is Section 234B a provision which is parasitic in nature, in that, it applies the moment there is shortfall of advance tax or income tax payable under the Act, but that it is also compensatory in nature.

SC observed provisions contained in Section 234B and noted that under the provisions of Section 234B, the moment an assessee who is liable to pay advance tax has failed to pay such tax or where the advance tax paid by such an assessee is less than 90 % of the assessed tax, the assessee becomes liable to pay simple interest at the rate of one per cent for every month or part of the month. Thus, SC held that the Revenue was correct stating that levy of such interest is automatic when the conditions of Section 234B are met.

SC relied on ruling in *'Kalyankumar Ray vs. CIT'* and held that facts of the present case were squarely covered by the decision contained in Kalyankumar Ray's case in as much as it was undisputed that Form I.T.N.S.150 contained a calculation of interest payable on the tax assessed. This being the case, it was clear that as per the said judgment, this Form must be treated as part of the assessment order in the wider sense in which the expression had to be understood in the context of Section 143, which was referred to in Explanation 1 to Section 234B.

Thus, SC set aside the judgment of the High Court and allowed the appeal of Revenue.

LD/64/51

Dy. Commisioner of Income Tax, TDS Circle.
vs.
Vodafone Essar Gujarat Ltd.
12th June, 2015 (GUJ)

Sec 254(2A), Income-tax Act, 1961-ITAT has power to extend stay beyond 365 days.

ITAT is required to pass a speaking order while disposing of the application for extension of stay granted earlier; ITAT may extend stay beyond 365 days if it is satisfied that assessee has not indulged into any delay tactics and the delay in disposing of appeal not attributable to the assessee.

Recovery of demand proceedings were initiated against assessee, in respect of the total tax and the interest liability. The assessee preferred an application for stay of this demand before ITAT. ITAT extended the stay for a period of 180 days. Such an extension along with previous extensions granted, extended beyond the period of 360 days.

Aggrieved by ITAT's order granting stay beyond 365 days, Revenue filed a petition under Article 226 of the Constitution of India before the Gujarat HC. Revenue argued before HC any extension/granting of stay of demand beyond the period of 365 days was absolutely illegal, wholly without jurisdiction and contrary to Section 254(2A).

HC noted that though nothing in Section 254(2A) indicated towards a legal intent to curtail/withdraw powers of ITAT to extend stay beyond 365 days, the extension was subjected to the subjective

[1] *Contributed by CA. Sahil Garud and ICAI's Editorial Board Secretariat, Indirect Taxes Committee, CA. Hinesh Doshi & International Taxation Committee. Readers are invited to send their comments on the selection of cases and their utility at eboard@icai.in. For full judgment, write to eboard@icai.in*

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satisfaction by ITAT which was accorded only when it was convinced that the delay beyond 365 days was not attributable to assessee. HC stated that ITAT is required to review the matter after every 180 days and is also required to pass a speaking order after being satisfied that assessee did not indulge into any delay tactics.

HC held that while considering application for extension of stay, ITAT is required to consider facts of each case and arrive at subjective satisfaction on whether:

- *delay in not disposing is attributable to assessee or not or that whether the assessee in whose favour stay has been granted, has cooperated in early disposal of the appeal or not or*
- *there is any delay tactics by such assessee or not or,*
- *assessee is trying to take any undue advantage of stay in his favour or not.*

HC thus held that while passing order of extension, ITAT is required to pass a speaking order on each application and after giving an opportunity to the representative of the revenue Department. Therefore, if the revenue department is aggrieved by such extension on grounds that the assessee has not cooperated and/or has tried to take undue advantage of stay and despite the same the learned Appellate Tribunal has extended stay order, revenue can challenge the same before the higher forum/ High Court.

HC rejected Revenue's reliance on Delhi HC ruling in *CIT vs. Maruti Suzuki (India) Limited* wherein it was held that HC had the power to grant and extend stay beyond 365 days under Article 226 of the Constitution of India but Tribunal has no jurisdiction to extend the stay beyond 365 days u/s 254(2A). HC observed that if the procedure laid down by the Delhi HC is adopted, same would lead to either multiplicity of proceedings before HC or would lead to granting the stay of demand by Revenue itself. HC stated that if the aforesaid procedure as laid by this judgment is followed, it would meet the ends of justice and it may not increase the litigation either before the High Court and/or appropriate forum and the purpose and object of Section 254(2A) of the Act is achieved.

HC thus dismissed Revenue's petition.

LD/64/52

Sri P. M. Abdulla

vs.

The Income Tax Officer

3rd June, 2015 (KAR)

Section 68 and Section 69C, Income-tax Act, 1961.

Principles contained in Section 68 as well as Section 69C would be squarely applicable to sundry creditors in case of a trader; HC holds "credit purchases are nothing but expenditure and if sundry credits are not proved by the assessee, addition can be made by the assessing officer by resorting to Section 69C.

The Assessee, Sri P. M. Abdulla, is a wholesale dealer in raw rubber and for the assessment years 2003-04 and 2004-05, filed return of income which were selected for scrutiny and after issuance of notice u/s. 143(2), the assessment orders came to be framed on 23.03.2006 and 28.12.2006 and a sum was added by the assessing officer as unproved sundry creditors assessed u/s. 68 of the Income-tax Act, 1961.

On appeal, for the AY 2003-04, CIT(A) deleted entire addition made by AO except for amount pertaining two sundry creditors and for the AY 2004-05, the entire addition made by AO was deleted. On further appeal by the Revenue, after considering the rival contentions and on perusal of material on record, ITAT had partly allowed the appeals filed by the department and held that in respect of parties (Sundry Creditors) other than relating to whom additions made by the CIT(A) were to be restored to AO by casting initial burden on the assessee to discharge such burden by filing confirmation letters of Sundry Creditors and reserving liberty to AO to make verification of the confirmation if felt so necessary and also opining that AO may call upon the assessee to adduce evidence in the form of producing such parties.

Aggrieved by the order of the Tribunal, the assessee preferred an appeal before the Karnataka High Court.

The assessee contended that he had discharged the initial burden and the burden now was on the revenue to issue commission and make further enquiries to satisfy itself about the claim. He also contended that expenses incurred towards purchase have been recorded in the books accounts of the assessee and no part of expenses could be said as unexplained for invoking the provisions of Section 69C.

The High Court noted that the tribunal had found on factual scrutiny that the sundry creditors indicated in the books of accounts of the assessee was not proved by the assessee though sufficient opportunity was granted and the order of the AO did not indicate about any explanation having called for by the assessing officer from the assessee

and such explanation having been not accepted so as to treat the same as income of the assessee for such financial year. The High Court also noted the order of the Tribunal that Sec 68 read with Section 69C could be invoked in respect of sundry creditors which were not proved by the assessee before the assessing officer.

Thus, the High Court ruled in favour of the Revenue holding that *"...the principles contained in section 68 as well as section 69C would be squarely applicable to sundry creditors in case of a trader, as obtained in the facts of the present case. In fact, credit purchases are nothing but expenditure and if sundry credits are not proved by the assessee addition can be made by the assessing officer by resorting to section 69C".*

Service Tax

LD/64/53

Commissioner of Central Excise, Bhavnagar.

vs.

Gujarat Maritime Board, Jafrabad

22nd July, 2015 (SC)

Section 65(82) of the Finance Act, 1994; Section 32(4) of GMB Act–liability to pay service tax under category of 'port services'.

In absence of any service being rendered by the Gujarat Maritime Board in relation to any vessel/ goods, the claim for service tax on wharfage charges under category of 'port services' cannot sustain.

M/s. Gujarat Maritime Board ("GMB"), a statutory body constituted under the Gujarat Maritime Board Act, 1981 ("GMB Act"), administers and operates minor ports in the State of Gujarat. GMB entered into an agreement with Larsen & Toubro which ultimately became M/s Ultratech Cement Limited (UCL) whereby a licence was granted to UCL to construct and use a jetty for landing of goods and raw materials manufactured by UCL in their cement factory which was situated close to the said jetty at Pipavav port.

It was alleged by Revenue that service tax was payable on wharfage charges collected by GMB from their licensee UCL under the taxable category of "port services". A show cause notice was issued to collect 80% of Service Tax payable on wharfage charges which were not paid by the assessee. The Commissioner, Central Excise, *vide* OIO dated 16th July, 2009, held that it is clear that the nature of service provided which is wharfage, is squarely covered under the head 'port series' as defined in the Finance Act, 1994. The amount of rebate/ concession granted in wharfage charges amounting to 80% allowed to the licensee should, therefore, be included for purpose of calculation of Service Tax. Equally, the amount that was demanded on account of lease rent for waterfront usage was also confirmed to gather with interest and penalty, which was imposed on the assessee.

In appeal from this order, CESTAT by its judgment reversed the Commissioner's order holding that no service at all was rendered by the Gujarat Maritime Board in relation to any vessel and, therefore, no amount was payable by way of Service Tax. Equally, on an analysis of the agreement between GMB and UCL, it was held that 20% of wharfage charges which was payable under the agreement was really payable as licence fee/rental and, therefore, the balance 80% being of the nature of licence fee/rental and not being in the nature of payment for services would equally render the payment bad in law.

It was held that there is no doubt on a reading of the agreement that it is the Board itself that charges or recovers wharfage charges from the licensee UCL and does not authorise UCL to recover such charges from other persons. This being the position, it is clear that no service is rendered by a port or by any person authorised by such port and, therefore, the very first condition of levy of Service Tax is absent on the facts of the present case. So far as the direct berthing facilities provided for captive cargo is concerned, the lease rent charged for use of the waterfront also does not include any service in relation to a vessel or goods and cannot be described as "port service". The appeal of the revenue was dismissed accordingly.

LD/64/54

Lallooji & Sons

vs.

Officer in Charge Magh Mela, Allahabad & Others

20th July, 2015 (ALL)

Section 65(77a), 65(77b) read with Section 65(105) (zzw) of the Finance Act, 1994.

Services provided by a Shamiyana and Pandal contractor for a religious fair or congregation in the Mela area at Allahabad would not be liable to Service Tax.

The petitioner is a partnership firm & registered under Service Tax. The Respondent, the Officer Incharge of the Magh Mela at Allahabad issued a tender for the year 2004-05 inviting tenders from various Pandals and Shamiyana contractors for supply of various items as specified in the tender notice, such as tents, *etc.*

The tender submitted by the petitioner was accepted by the Mela Officer Incharge. An agreement for supply of tents on hire purchase basis was executed. Clause 11 of the agreement specified that Trade Tax and Service Tax would be payable by the Officer Incharge, Magh Mela. The petitioner contends that based on the agreement, the petitioner supplied the necessary tents and thereafter raised three bills which included Trade Tax @ 5% and Service Tax @ ₹10.2%. The Mela Officer made the payment of the bills minus Service Tax.

The petitioner thereafter made a representation requesting the Magh Mela Officer to pay the Service Tax so that the petitioner could in turn deposit the same to the Central Excise Department, respondent No.2. The Mela Officer intimated the petitioner that they have sought opinion from the District Government Counsel, who has opined that the Mela Officer was not liable to pay the Service Tax inasmuch as Pandal or Shamiyana services provided by the petitioner was for pure religious ceremonies or congregation, which was held in the Allahabad Magh Mela area. The petitioner, being aggrieved by the non-payment of the Service Tax, has filed the present writ petition for the quashing the letter dated 20th March, 2005 by which the Mela Officer has declined to make the payment of Service Tax and for a writ of mandamus commanding the Mela Officer to make the payment of Service Tax along with interest and penalty.

The petitioner argued that it has received a notice of demand dated 7th April, 2006 issued by respondent No.2, i.e., the Central Excise Department, by which the petitioner has been directed to pay the Service Tax, interest and penalty on the bills raised by it to the Mela Officer.

The Mela Officer contended that in view of the circular dated 17th September, 2004, Service Tax is not payable to the Pandal or Shamiyana service providers for religious purposes and, consequently, Service Tax was not payable on the bills raised by the petitioner.

The Central Excise Department contended that the petitioner is a "Mandap keeper" and, accordingly, Service Tax is liable to be paid by him.

The Court observed that in view of Section 65(77a), Section 65(77b) & Section 65(105) (zzw) of the Finance Act, "Pandal or Shamiyana contractors" were liable to pay Service Tax on the services provided by them directly or indirectly in connection with the preparation, arrangement, erection or declaration of a Pandal or Shamiyana which included supply of furniture, fixtures *etc.* However the clarification dated 17th September, 2004 issued by the Department indicates that the Pandal or Shamiyana contractor who provided services for pure religious ceremonies or congregation would not be liable to pay Service Tax.

It further observed that the definition of Mandap Keeper and Mandap makes it apparently clear that the petitioner does not come under this definition clause. The petitioner is a Pandal or Shamiyana contractor providing services in connection with the preparation, arrangement, erection or decoration of a Pandal or Shamiyana.

From the perusal of the definition of "Mela" as defined in Section 4 of United Provinces Mela Act, 1938 & Rule 2(ii) of United Provinces Mela Rules, it is clear that services provided by a Shamiyana and Pandal contractor for a religious fair or congregation in the Mela area at Allahabad would be covered under the Circular dated 17th September, 2004.

The High Court held:

In the instant case, the tender invited by the Mela Officer was for the purpose of erection of temporary tents etc. in the Mela area during the Magh Mela season for the year 2004-05. Since the supply of the tents by the petitioner was for a religious congregation, which was held in the Mela area at Allahabad, the respondent No.1 was not liable to pay the Service Tax to the petitioner.

The writ petition is dismissed with the observation that it is not open to the Central Excise Department to demand Service Tax on the services provided by the petitioner in the Mela area for the year 2004-05.

Excise Law

LD/64/55

Kunj Power Project Pvt. Ltd.
vs.
Commissioner of Custom & Central Excise
10th March, 2015 (ALL)

Section 14 of the Central Excise Act, 1944 - Power to summon persons to give evidence and produce documents in inquiries under this Act.

The mere order of summoning for giving evidence or to participate in enquiry issued by Central Excise authorities under Section 14 of Act, 1944 is not to be interfered only on the ground that the petitioner has submitted reply to earlier letters and therefore need not appear in person before the authorities concerned.

In the instant case, writ petition under Article 226 of the Constitution of India has been filed challenging various summons whereby petitioners have been summoned by Central Excise authorities for the purpose of enquiry by exercising powers under Section 14 of the Central Excise Act, 1944. It was contended that after receiving letters from Excise Authorities, whatever documents were demanded, they were supplied by petitioners, still they have been required to appear before the authorities concerned to participate in the enquiry. The aforesaid exercise is without any application of mind and therefore, the impugned orders are patently illegal.

The Court held that the authorities have statutory right to examine persons and to summon them to give evidence and produce documents in connection with enquiry relating to any goods or services. In absence of any material on record, i.e. pleading with due support of the documents that the summoning for examination of persons etc. is on account of any malice, coercion, duress or undue pressure, the statutory power exercised by authorities is not to be lightly interfered in writ jurisdiction under Article 226 of the Constitution. This provision is not confined to the persons or documents within the territorial jurisdiction of concerned Officer. The purpose of summoning involves multifarious reasons which include the inquiry into the truth of transactions in which the persons who are summoned are or may be involved or otherwise have some information *etc.* The mere fact that the letters sent by the Excise authorities requiring certain documents have been replied or the documents have been supplied would not entitle individuals or to claim not to be summoned for the purpose of giving evidence or otherwise for examination by the Central Excise Officer.

LD/64/56

Greaves Ltd.

vs.

Commissioner of Central Excise & Customs

6th August, 2015 (SC)

Section 11A of the Central Excise Act, 1944 - period of limitation.

Assessees could not be faulted with for taking into consideration some of those paras prior to the issuance of clarificatory circular by CBDT.

A show cause notice was issued to assessee, Greaves Ltd. on 3rd February, 1998. During the year 1993-94, as per the provision of Section 11A of the Central Excise Act, 1944, period of limitation was six months. However, extended period of limitation was utilised invoking the provision of the proviso to that Section.

In the impugned case, SC dealt with the issue of limitation. Assessee argued that there was no mis-declaration or mis-statement and therefore the extended period of limitation could not have been invoked.

SC observed that the Department, in its Circular dated 30th October, 1996 dealt with the issue as to what factors should be taken into consideration for arriving at the cost of production. SC relied on its own ruling in '*Commissioner of Central Excise vs. Asarwa Mills*' and held that the assessees could not be faulted with for taking into consideration some of those paras prior to the issuance of clarificatory circular dated 30th October, 1996.

Thus, SC held that extended period of limitation up to September, 1996 could not be invoked and allowed assessee's appeal.

LD/64/57

Commissioner of Central Excise

vs.

Indorama Synthetics (I) Ltd.

21st August, 2015 (SC)

Section 4 of the Central Excise Act, 1944 r/w Rule 6 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000–Determination of 'transaction value' of goods-Valuation of goods for purposes of charging of duty of excise.

Advance license received in assessee's favour constitutes 'additional Consideration'. Transfer of the right to procure duty free imported raw material is additional consideration, to be included in value; Additional monetary consideration, in addition to the price being paid for the goods, i.e. transfer of advance import licence in favour of the seller by the buyer enabling the seller of the goods to effect duty free import of the raw materials and bringing down the cost of production/procurement, is a consideration, the monetary value of which has to be considered under the provisions of the Rules, i.e. Rule 6 thereof; SC Judgement in IFGL case affirmed, Mazagon Dock distinguished.

The assessee, Indorama Synthetics (I) Ltd., is engaged in the manufacture of polyester chips, polyester staple fibre, polyester filament yarn and other goods. It had been clearing the same on payment of central excise duty. During the period 1999-2002, goods that were cleared as 'deemed

exports' to advance license holders were at a price lower than what was being charged to the other buyers who did not hold an advance licence. As per the Revenue, the reason for selling the goods to the aforesaid particular class of buyers at a lesser price was that the assessee had received 'additional consideration' and, therefore, its inclusion was necessitated having regard to the formula provided for arriving at the 'transaction value' contained in the statutory scheme.

It was observed that on surrender of advance licence with the aforesaid buyers, the assessee could receive drawback from the Government/Director General of Foreign Trade (DGFT) as per the Export-Import (EXIM) Policy and this was stated to be the additional consideration. The Revenue issued five separate show cause notices asking assessee to pay the differential duty as the said additional consideration was to be included while arriving at the 'transaction value' of the said goods in terms of Section 4 of the Central Excise Act, 1944 r/w Rule 6 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.

On appeal, the Commissioner confirmed the demand of differential duty as mentioned in the show cause notices and also levied penalties and interest. On further appeal, the Tribunal relied on its own ruing in *'IFGL Refractories Ltd. vs. Commissioner of Central Excise'* and opined that the drawback was received from the Government and not from the buyers and, therefore, such drawback could not be treated as additional consideration for the purpose of arriving at 'transaction value' as per the definition thereof u/s 4 of the Act.

SC observed that the assessee had been selling polyester staple fiber to two classes of domestic buyers in addition to exporting the same in the international market and one of the categories of domestic buyers included those who were having advance licence and the other category consisted of those not holding any such licence. The assessee had issued two different price lists. Those buyers who had advance licence but agreed to surrender the said licence, were offered price of ₹37.50 per kg whereas the other category, with no such licence, were sold the goods at ₹50 per kg.

SC further observed that the advance licence holder category buyers got their licenses invalidated/ surrendered and thereafter, DGFT issued licence in favour of the assessee herein permitting it to procure the goods duty free from indigenous manufacturers and on the supply of this material to such buyers, treating the same as 'deemed exports', thereby earning the benefits of duty drawback. SC noted the provisions of Exim policy and noted that assessee could get the duty drawback and it could happen when advance licence holder category of buyers got their advance licenses invalidated thereby surrendering the benefits accrued under such advance licence.

Thus, SC held that the Commissioner had rightly come to the conclusion with regard to the fact that additional monetary consideration, in addition to the price being paid for the goods, i.e. transfer of advance import licence in favour of the seller by the buyer enabling the seller of the goods to effect duty free import of the raw materials and bringing down the cost of production/procurement, was a consideration, the monetary value of which had to be considered under the provisions of the Rule 6. SC distinguished its own ruling in *'Commissioner of Central Excise vs. Mazagon Dock Ltd.'* on facts.

Thus, SC relied on its own ruling in IFGL's case allowing the Revenue's appeal and set aside the decision of the Tribunal and restored the order passed by the Commissioner.

LD/64/58

Purolator India Ltd.

vs.

Commissioner of Central Excise

25th August, 2015 (SC)

Section 4 of the Central Excise and Salt Act, 1944 - Valuation of excisable goods for purposes of charging of duty of excise– Determination of price taking into account cash discount.

Cash Discount has to be taken into account in arriving at "price" even under Section 4 as amended in 2000; The expression "actually paid or payable for the goods, when sold" only means that whatever is agreed to as the price for the goods forms the basis of value, whether such price has been paid in full/, in part or not paid; The basis of "transaction value" is therefore the agreed contractual price. Further, the expression "when sold" is not meant to indicate the time at which such goods are sold, but is meant to indicate that goods are the subject matter of an agreement of sale; The common thread running through Section 4 is that excisable goods has to have a determination of "price" only "at the time

of removal" and this basic feature of Section 4 has never changed even after two amendments; Relies on Bombay Tyre International and Madras Rubber Factory Ltd. rulings rendered in context of Sec 4 before amendment'.

The assessee, Purolator India Limited, is engaged in the manufacture of excisable goods, namely Filter Elements, Inserts, and Cartridges and Components. These goods are either cleared by the appellant to various vehicle manufacturers or stock transferred to depots from where they are further stock transferred to clearing and forwarding agents. For effecting stock transfers, assessee filed declarations under Rule 173C with the excise department. In these declarations, the appellant claimed deduction towards Sales Tax, Cash Discount and Volume Discount on excise duty payable to arrive at the assessable value under Section 4 of the Central Excise and Salt Act, 1944.

Apart from undertaking manufacturing activities, assessee at times also received goods from customers for repair in case of defects noticed by the customers. The customers either rejected the entire lot or a particular box etc. if they notice any defect, so that their time was not wasted in checking each and every item and thus, goods are sent back to the appellant. On receipt of such consignments, the appellant checked the same for defects indicated and undertakes necessary repairs. Thereafter, the finished products were returned to customers. The appellant was filing the necessary D-3 declarations for receipt of such returned goods and was maintaining the register required in Form V for the said purposes and was thereafter returning such repaired items under the provisions of Rule 173H without payment of duty thereon.

A Show Cause Notice was issued alleging that the appellant was not eligible for the various deductions claimed on account of volume discount, sales tax and cash discount. Besides this, it was also alleged that the appellant had removed new finished excisable goods instead of old/repaired goods. On appeal, the Commissioner of Central Excise passed an Order dropping the duty demand on the issue of cash discount for the period prior to July 2000. However, on the remaining issues, the Commissioner confirmed duty demand and also imposed penalty. The order of Commissioner was upheld by the Tribunal.

Aggrieved, assessee preferred an appeal before SC.

SC accepted assessee's contention that Section 4 of the Central Excise and Salt Act, 1944 as amended in 2000, had made no change in the situation *qua* cash discount as it obtained under old Section 4. It was further argued that under both the old Section and the new Section, cash discount had to be allowed as had been held in *'Union of India vs. Bombay Tyre International Limited'* and *'Government of India vs. Madras Rubber Factory Ltd.'*

SC noted the provisions of both the old Section 4 and the new Section 4, and held that the common thread running through Section 4 is that excisable goods has to have a determination of "price" only "at the time of removal" and this basic feature of Section 4 has never changed even after two amendments. SC further held that Section 4(2) pre- 2000 Amendment made it clear that *'where the price of excisable goods for delivery at the place of removal is not known, and the value thereof is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery is to be excluded from such price.'*

SC held that the expression "actually paid or payable for the goods, when sold" only meant that whatever is agreed to as the price for the goods forms the basis of value, whether such price has been paid, has been paid in part, or has not been paid at all and the basis of "transaction value" is therefore the agreed contractual price. It was further held that the expression "when sold" is not meant to indicate the time at which such goods are sold, but is meant to indicate that goods are the subject matter of an agreement of sale.

Thus, SC set aside the Tribunal's order and held that 'cash discount' had to be taken into account in arriving at 'price' even under Section 4 as amended in 2000.

Customs

LD/64/59
Jaswal Neco Ltd.
vs.
Commissioner of Customs
4th August, 2015 (SC)

Section 3(2) and 3A(2), Customs Tariff Act, 1975–Levy of additional duty and special additional duty.

LAM coke imported prior to 2000 not exempted from Anti-Dumping Duty; Rate of duty applicable as per Notification No. 81 of 1998 dated

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27.10.1998–Interest inapplicable as assessee did not sign a bond to that effect.

The assessee, Jaswal Neco Ltd. imported Low Ash Metallurgical (LAM) Coke under seven Bills of Entry, against four advance licenses without payment of basic customs duty (BCD), special customs duty (SCD) and special additional duty (SAD) and Anti-dumping duty (ADD) by claiming exemption under Notification No.30/97 and 41/97. Subsequently, the assessee failed to fulfill its export obligation as entire LAM was used by assessee for the manufacture of pig iron. When demand was raised assessee paid the entire duty payable towards BCD, SAD and SCD but did not make any payment towards ADD.

Assessee challenged levy of ADD by relying on Notification No.69 of 2000 which exempted imports of Metcoke by a manufacturer of pig iron or steel using a blast furnace if he follows the procedure set out in the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996. SC on perusal of the said notification noted that the said exemption was inserted pursuant to a meeting with representatives of Mini Blast Furnace producers of Metallurgical Coke. On perusal of the minutes of such meeting, SC opined that the exemption of such Blast Furnace units was something that could take place only in the future. SC concluded that no exception was carved out before 19.5.2000 in favour of Blast Furnace Manufacturers either when the provisional Anti-dumping duty was first imposed or when the final Notification dated 27.10.1998 was issued.

SC accepted assessee argument that it was liable to pay Anti-dumping duty only under the Notification No. 81 of 1998 dated 27.10.1998. With regard to the liability to pay interest SC noted that Notification No.30 of 1997 makes it clear that interest at the rate of 24% per annum is only liable to be paid if at the time of clearance of the imported materials the importer executes a bond in which such interest is stated to be payable. Thus as in present case, nothing about any interest was mentioned in the bond executed by assessee, SC held that no interest is payable on any of the customs duties. SC relied on its own ruling in *J.K. Synthetics Ltd. vs. Commercial Taxes Officer, (1994)* to hold that levy of interest provisions being substantive same can only apply prospectively. SC thus held that until 13.7.2006 the Customs Act itself contained no provision for levy of interest and as the provisional assessment had been made in 1998 and the final assessment only on 4.11.2004 interest cannot be levied as both dates are prior to 13.7.2006.

On the issue that whether Anti-dumping duty can be included in calculating special customs duty and special additional duty, SC observed that additional duty and special additional duty includes any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs. SC in this regard accepted assessee's contention that these words refer only to a surcharge provision and not to a provision which levies an independent duty, as the relevant words are "an addition" and not "in addition". SC further noted that Section 3(2) and 3A(2) have been amended with effect from 1.3.2002 so as to expressly not include Anti-dumping duty.

SC also deleted the penalty.

LD/64/60

Commissioner of Customs

vs.

Pennar Industries Ltd and Anr

31st July, 2015 (SC)

Material which is imported has to be against an advance licence with actual user condition; In order to avail the exemption from import duty, it is necessary to make export of the product manufactured from that very raw material which is imported.

The assessee, Pennar Industries Ltd., imported 2018.6 MTs of hot rolled non-alloy steel wide coils against an advance licence issued under the Duty Exemption Entitlement Certificate (DEEC) Scheme. Assessee took umbrage under Notification No. 30/1997 and did not pay the import duty. Notification allow users to import the raw material duty-free with the condition that the said material would be used by the importer itself and converted into specified finished goods and thereafter those goods would be exported as per the export obligations given in the advance licenses. Assessee owing to the inferior quality of the goods so manufactured disposed of the said manufactured goods in the domestic market. To meet export obligation it arranged the export through Steel Company which arranged the export performance through their agent Shirdi Industries Ltd. Shirdi Industries Ltd. in turn arranged for third party exports of cold rolled non-alloy steel coils through Essar Steel Ltd. The assessee thus claimed that that it had fulfilled its obligation.

Revenue rejected such transaction as it was of view that the obligation has to be fulfilled by assessee himself for availing the benefit of notification. The

Revenue, thus, issued SCN 2002 demanding the duty of ₹1.65 crore along with interest @ 24% from the date of clearance.

SC perused the notification and noted that the material which is imported has to be against an advance licence with actual user condition in terms of para 7.4 of the EXIM Policy 1997-2000. SC observed that the conditions contained in notification are stringent and assessee was not supposed to dispose of or utilise the exempt materials in any manner except for utilisation in discharge of the export obligation. SC thus held that as per this Notification, in order to avail the exemption from import duty, it is necessary to make export of the product manufactured from that very raw material which is imported. SC thus held that, therefore, in *stricto sensu*, the mandate of the said Notification has not been fulfilled by the assessee.

SC thereafter considered the issue that whether amendment of the licence by the DGFT allowing export obligation to be fulfilled through third party would tantamount to meeting the requirement of the Notification. SC noted that DGFT, in its order mentioned that there was no mis-utilisation of the raw material imported by assessee and there was no violation of any other conditions of the licence causing Revenue loss at the cost of exchequer.

SC placed reliance on co-ordinate bench ruling in *'Sheshank Sea Foods Pvt. Ltd.'* [(1996) 11 SCC 755] and held that order of DGFT was under the provisions of EXIM Policy and thus was not binding on customs authorities. SC though ruled that assessee becomes liable to pay the import duty. SC further advised government that appropriate provision dealing with such situations shall be made, as Exemption Notification No. 30/1997 has been issued to implement and effect the EXIM Policy provisions and when the DGFT has itself accepted the benefits of the assessee and carried out the amendment in the import licence, assessee should not be left high and dry. SC further reduced the interest from 24% per annum to 9% per annum.

LD/64/61

D. R. Enterprises Ltd.

vs.

Asstt. Collector of Customs and Ors

12th August, 2015 (SC)

Article 226 of Constitution of India–Writ Jurisdiction.

Non-exercise of power under Article 226 in face of alternate remedy is merely a self-imposed restriction; Rejects assessee's plea that HC exceeded jurisdiction as writ order was passed at insistence of assessee.

The assessee, D. R. Enterprises Ltd. sought to avail the concessional rate of custom duty on the import of Web Printing Machine under Open General Allowance ('OGL') with the aid of Notification No. 114/80-CUS, dated 19.06.1980. However, HC rejected the same on the ground that for availing such concessional rate one of the condition that needs to be satisfied is that the machine should have output of 30,000 or more copies per hour. HC noted that leaflet of the manufacturer stated that output of the machine was 25,000 copies per hour as opposed to 36,000 copies per hour as claimed by assessee.

SC thus referred to facts of the case and noted that HC had directed the Custom authorities to furnish list of material required from assessee but as same was not furnished. HC again directed inspection of consignment under the supervision of the Court Appointed Officer. As the same was not carried out, Bombay HC passed an order allowing clearance of the imported machine. Subsequently when after 14 years, the main writ petition came before HC and it ruled against assessee by holding that the speed was less than 30,000 copies per hour.

With regards to assessee's contention that HC was incompetent to pass such order on merit in a writ, SC noted that issue was decide on merit at the instance of assessee who could have simply withdrawn the writ petition as with the passing of interim order it had got the printing machine cleared from the customs authorities and was using the same. SC relied on this fact to observe that after inviting the High Court to decide the matter on merits and finding that the decision has gone against him, assessee's contrary arguments were nothing but a desperate attempt to chicken out of the situation which was his own creation. SC thus rejected assessee's contention that HC was not competent to decide the issue in exercise of its writ jurisdiction.

SC further clarified that powers under Article 226 are wide and that refusal to entertain writ when alternate statutory remedies exist is a self-imposed restriction only. SC thus upheld HC order holding that assessee had failed to prove that

the subject printing machine imported by it under OGL was having an output of more than 35,000 copies per hour so as to entitle it to claim exemption under Notification No. 114/80-CUS.

CENVAT Credit

LD/64/62

Commissioner of Central Excise, Service Tax & Customs

vs.

PNB Metlife India Insurance Co. Ltd.

9th April, 2015 (KAR)

Rule 2(l) and Rule 3 of the Cenvat Credit Rules, 2004

'Re-insurance services' is an 'input service' eligible for Cenvat Credit within the meaning of Rule 2(l) of the Cenvat Credit Rules, 2004

Assessee is engaged in and licensed to carry on life insurance business. In the process of its business, the Insurer issues insurance policies on which Service Tax is charged from its customers (Insured). Insurer had procured re-insurance service (in compliance with Insurance Laws) from overseas Insurance companies and had availed CENVAT credit of Service Tax paid on such services received by it. Department denied credit on ground that re-insurance takes place after Insurance business is affected and hence, same is not input service used for output service.

It was held that issuance of an insurance policy by the insurer and subsequent procurement of re-insurance (which is a statutory requirement) is an integral part of the total process. The process of insurance does not come to an end merely on the issuance of the insurance policy by the Insurer. In fact, it continues till the existence of the term of the policy. Since re-insurance is a statutory obligation, and the same is co-terminus with the Insurance policy issued by the assessee, the transfer of a portion of the risk by way of re-insurance has to be considered as having nexus with the output service. If credit is not allowed, then same would be against principle of CENVAT credit and would lead to double taxation, which is impermissible. If a person has collected service tax, no doubt the same has to be deposited, but if in the process of the same transaction, it has paid some service tax, which is necessary for its business, then it is entitled to CENVAT credit to extent of service tax which has been paid by it.

LD/64/63

Union of India

vs.

Asahi India Safety Glass Ltd.

7th May, 2015

Rule 2(k), read with rule 3 of the Cenvat Credit Rules, 2004 , Rules 57A and 57D of the Central Excise Rules, 1944 , Article 226 of the Constitution of India, read with section 32M of the Central Excise Act, 1944.

Cenvat Credit is allowed on inputs used in or in relation to manufacture of final products

The assessee herein was engaged in the manufacture of Toughened (Tempered) and Laminated Safety Glass for Automobiles falling under Chapter Heading 7004.10 and 7004.20 respectively of the First Schedule to the Central Excise Tariff Act, 1985. For the manufacture of the glass of aforesaid nature, the assessee has been supplying float glass which is the main raw material of the product. The assessee has also been availing claim of modvat credit of duty paid on the aforesaid raw material, under Rule 57A of the Central Excise Rules, 1944 (hereinafter referred to as `Rules'). Show cause notices were issued by the Department to the assessee alleging therein that they had availed Modvat credit of inputs that were inherently defective and were neither used nor usable in or in relation to the manufacture of the final products. The Department found that: (a) some 'float glasses' were not defective but, (b) on inspection after process of cutting, marking, breaking off, grinding and washing, certain defects were noticed, (c) defective part/sheet was discarded and remaining part/sheet was used for manufacturing; and (d) assessee was getting reimbursement (exclusive of duty portion) from supplier for such defective sheet or part thereof.

High Court *inter alia* held that: (a) credit is allowed on inputs used in or in relation to manufacture of final products; (b) manufacturing commenced with loading of float glass on float table for cutting; (c) defect was noted after commencement of manufacture and carrying out of certain processes but before lamination, (d) hence, input was wasted in course of manufacture and therefore, same has been used in manufacture and is therefore, eligible for credit

The legal position laid down by the High Court could not be dislodged by Department. Hence, same was confirmed. In forming this opinion the High Court relied upon the judgment of this Court in

the case of *Collector of Central Excise vs. Rajasthan State Chemical Works 1991 taxmann.com 24 (SC)* wherein the Court held as to when the manufacturing process starts. Extract from the said judgment which is quoted by the High Court, is reproduced for proper understanding of the matter:

> *"Manufacture thus involves series of processes. Process in manufacture or in relation to manufacture implies not only the production but the various stages through which the raw material is subjected to change by different operations. It is the cumulative effect of the various processes to which the raw material is subjected to, manufactured product emerges. Therefore, each step towards such production would be a process in relation to the manufacture. Where any particular process is so integrally connected with the ultimate production of goods that but for that process manufacture or processing of goods would be impossible or commercially inexpedient, that process is one in relation to the manufacture."*

The High Court has also relied upon two other judgments of this Court, viz., *J.K. Cotton Spg. & Wvg. Mills Co. Ltd. vs. Sales Tax Officer [1965]* 1 SCR 900 and *Standard Fireworks Industries vs. Collector of Central Excise* laying down the same proposition as noted in the case of *Rajasthan State Chemical Works (supra).*

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Sales Tax

LD/64/64

Pioneer Trading

vs.

State of Karnataka, Bangalore

15th April, 2015 (KAR)

Section 59 read with Section 39 of the Karnataka Value Added Tax Act, 2003, Section 37B of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 and Section 151A of the Customs Act, 1962.

Where first clarification dated 3-6-2006 had provided that 'white oats were exempt' and subsequent clarification dated 20-1-2010 provided that 'white oats were taxable', said subsequent clarification would be effective only from its issue date and no demand can be raised prior to said date.

In terms of the clarification issued by the Commissioner on 03.06.2006, the petitioner-assessee considered the 'White Oats' to be exempted from tax and thus, for the tax period in question, the assessee had neither collected tax from the customers nor did it deposit any tax with regard to the commodity in question. Then on 16.02.2010, a notice was issued to the assessee under Section 39(1) of the Act requiring the assessee to answer as to why the White Oats should not be subjected to tax and why the assessee be not liable to pay tax along with interest and penalty? This notice was for the assessment years 2006-07 to 2008-09. For the assessment year 2009-10, a separate notice under Section 39(1) of the Act was issued on 18.08.2010 requiring the assessee to explain as to why tax, along with interest and penalty, be not charged for the said period.

The assessee replied to both the notices. Then for the assessment years 2006-07 to 2008-09 (36 months), by assessment order dated 28.07.2010 passed by the Assessing Officer, the appellant was made liable to tax for the sale of White Oats. For the assessment year 2009-10 (12 months), by a separate order dated 31.01.2011, the assessee was further subjected to tax for the aforesaid 12 months.

The assessee challenged the said orders in appeals, which were decided by two separate orders dated 20.12.2012 passed by the Joint Commissioner of Commercial Taxes whereby the appeals of the assessee were dismissed.

Challenging the said appellate orders, the assessee filed appeals before the Karnataka Appellate Tribunal, which were dismissed by a common order dated 01.02.2014. Challenging the said orders, these Revision Petitions were filed. It was held that owing to earlier clarification, not only assessee but the Department also was under bona fide belief that goods were non-taxable and therefore, assessee had not collected tax from customers and even Department did not raise any objection to returns filed. Since clarification is different from advance ruling, benefit of clarification can be claimed by all assessees. Hence, notice under Section 39 alleging concealment of particulars cannot be issued. Therefore, no demand could be raised for period prior to 20-1-2010.

In view of the aforesaid, the subject revision petitions were allowed and Court set-aside the order dated 01.02.2014 passed by the Tribunal as well as the orders passed by the authorities below, to the extent that the assessee/petitioner shall not be held liable for payment of tax with regard to the commodity in question (i.e., White Oats) till 20.01.2010 i.e., the date when the second clarification was issued by the Commissioner.

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Legal Update

LD/64/65

A.V. Francis @ Francis Alukka
vs.
Assistant Director, Directorate of Enforcement, Cochin
February 9, 2015 (KER)

Section 3 of The Foreign Exchange Management Act, 1999 - Payment to or for the credit of any person resident outside India.

Payment towards customs duty payable by non-resident Indian while importing a car was in violation of provisions of FEMA.

Penalty was imposed on the petitioner by adjudicatory authority on finding that the petitioner advanced ₹15 lakh to a non-resident Indian in relation to import of a car. The adjudicatory authority found that any payment to the credit of a non-resident Indian was in violation of the provisions of FEMA and therefore a penalty of ₹5 lakh was imposed on the petitioner. The petitioner filed writ petition against the order. He submitted that the restriction was only to make payment to a person residing outside India and that restriction would not apply to any person in India, even though he might have status of a non-resident Indian.

Issue arose that in light of the fact that the petitioner made payment in India towards customs duty payable by non-resident Indian while importing a car, whether payment to the credit of non-resident Indian was in violation of provisions of FEMA and whether therefore penalty was to be imposed upon the petitioner.

The Court held:

The payment was made in India towards customs duty payable by the non-resident Indian while importing the car. The adjudicatory authority with reference to Notification No. 16/2000, dated 03/05/2000 held that only certain payments are allowed to be made in favour of a resident outside India during his stay in India and not the one that was paid by the petitioner to the importer of car, who is a non-resident Indian.

As per Regulation 2 of FEMA Notification No. 16 any person resident in India can make any payment in rupees:

a. Towards meeting expenses on account of boarding, lodging and services related thereto and travel to and from and within India of a person resident outside India who is on a visit to India;
b. To a person resident outside India by means of crossed cheque or a draft as consideration for purchase of gold or silver in any form imported by such person in accordance with the terms and conditions imposed under any order issued by the Central Government under Foreign Trade (Development and Regulations) Act, 1992 or under any other law, rules or regulations for the time being in force.

The payment effected is not the one referable as permitted under Notification No. 16/2000 dated 03/05/2000. Further, Notification No. FEMA/17/RB-2000 dated 03/05/2000 relied by the learned counsel for the petitioner has no application in this matter, as the same deals with the payment in Indian rupees to residents of Nepal and Bhutan.

Accordingly the grounds raised by the petitioner were rejected and the appeal of the petitioner was dismissed.

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LD/64/66

Vijay Mallya
vs.
Enforcement Directorate, Ministry of Finance
13th July, 2015 (SC)

Section 40 r/w Section 56 of FERA - Non-compliance of FERA summons is an independent offence; Exemplary costs for evasion of summons imposed.

Section 40 of FERA mandates issuance of summons, which should be complied with, and non-compliance of it is an independent offence, refers to SC ruling in ED vs. M. Samba Siva Rao; Fact that the adjudicating officer chose to drop the proceedings against the appellant herein does not absolve the appellant of the criminal liability incurred by him by virtue of the operation of Section 40 read with Section 56 of the Act; Exemplary costs of ₹ 10 lakh.

The appellant, Vijay Mallya, Chairman of United Breweries Ltd., entered into an agreement with Benetton Formula Ltd., London for advertisement of 'Kingfisher' brand name on racing cars during Formula-I World Championships for the years 1996, 1997 and 1998 providing for fee payable. Since requisite permission of Reserve Bank of India ('RBI') was not taken, in violation of Foreign Exchange Regulation Act ('FERA'), Chief Enforcement Officer, Enforcement Directorate, summoned the appellant. Approval was later sought from Finance Ministry for payment, however, it was rejected.

Since the appellant failed to appear on four occasions in response to summons issued, a

complaint u/s 56 of the Act was filed before Additional Chief Metropolitan Magistrate against the appellant. The trial court after considering the material on record summoned the appellant and framed charges against him.

The appellant challenged the Magistrate's order before High Court seeking quashing of proceedings. It was submitted that there was non-application of mind in issuance of summons as well as in framing the charge which was in violation of procedure under CrPC.

High Court rejected appellant's contentions by holding that framing of composite charge could not be treated to have caused prejudice so as to vitiate the proceedings.

Aggrieved, appellant preferred an appeal before the Supreme Court. SC analysed the relevant provisions of FERA [Section 40 and Section 56] and referred to SC ruling in *Enforcement Directorate vs. M. Samba Siva Rao [(2000) 5 SCC 431]* wherein it was held that *"The provisions of Section 40 itself, which confers power on the officer of the Enforcement Directorate, to summon any person whose attendance he considers necessary during the course of any investigation, makes it binding as provided under sub-section (3) of Section 40, and the investigation or the proceeding in the course of which such summons are issued have been deemed to be a judicial proceeding by virtue of sub-section (4) of Section 40."*

Relying on above observations, SC observed that a complaint was maintainable if there was default in not carrying out summons lawfully issued. From the replies to the summons issued against the appellant, SC observed that it was not a case of mere seeking accommodation by the appellant but requiring date to be fixed by his convenience. Such stand by a person facing allegation of serious nature could hardly be appreciated. Obviously, the enormous money power makes him believe that the State should adjust its affairs to suit his commercial convenience.

SC further observed that the fact that the adjudicating officer chose to drop the proceedings against the appellant herein does not absolve the appellant of the criminal liability incurred by him by virtue of the operation of Section 40 read with Section 56 of the Act. The offence under Section 56 read with Section 40 of the Act is an independent offence. If the factual allegations contained in the charge are to be proved eventually at the trial of the criminal case, the appellant is still liable for the punishment notwithstanding the fact that the presence of the appellant was required by the adjudicating officer in connection with an enquiry into certain alleged violations of the various provisions of the Act, but at a subsequent stage the adjudicating officer opined that there was either insufficient or no material to proceed against the appellant for the alleged violations of the Act, is immaterial.

SC also rejected appellant's reliance on ruling in *Dy. Chief Controller of Import and Export vs. Roshan Lal Agarwal* [(2003) 4 SCC 139] wherein it was held that prosecution of the accused, who is alleged to be guilty of not responding to the summons issued by a lawful authority, would not be justified. SC stated that this case could not be read as laying down a general statement of law since the matter therein was confined to that particular case.

SC further observed that *"Exonerating such an accused, who successfully evades the process of law and thereby commits an independent offence on the ground that he is found to be not guilty of the substantive offence would be destructive of law and order, apart from being against public interest. Such an exposition of law would only encourage unscrupulous elements in the society to defy the authority conferred upon the public servants to enforce the law with impunity."*

Dismissing the appeal, SC held that the entire approach adopted by the appellant was a sheer abuse of the process of law. SC also imposed exemplary costs of ₹10 lakh to be paid to the Supreme Court Legal Service Authority.

Transfer Pricing

LD/64/67

Advanta India Limited

vs.

ACIT

(Bangalore ITAT)

Transfer Pricing adjustment on corporate guarantee confirmed, issuance costs impact profits; Distinguishes Bharti Airtel.

The assessee, Advanta India Limited, during AY 2008-09, granted a loan of ₹1,454 crore to its directly owned Amsterdam based subsidiary, namely Advanta Holdings BV, and earned an interest on the same.

Assessee claimed this transaction as at arm's length price, by applying internal CUP analysis, on the strength of comparable borrowings by the assessee from Exim Bank. While the assessee charged interest rate of LIBOR plus 300 points, the assessee borrowed from Exim Bank on LIBOR plus 250 points. As, according to the assessee, entire

advance was out of the IPO proceeds received in the Netherlands, there were no direct costs involved in this transaction.

The revenue contended that the TPO was of the view that since the assessee was the tested party, the right comparable would be a similar loan granted by the assessee to unrelated parties in similar situation as the subsidiaries. TPO also rejected Exim Bank borrowing as a valid comparable, under the CUP method, on the ground that the borrowing cost in the hands of the assessee is not relevant to ascertain the arm's length interest the assesse should earn from its advances. TPO also stated that even if LIBOR was to be considered, LIBOR would have to be the rate at which Indian companies go for External Commercial Borrowings. The TPO then considered opportunity cost at 10.5% which was the FD rate of scheduled banks, and thus as against interest of 8.25% (LI BOR plus 300 points) charged by the assessee, arm's length interest was adopted at 10.5% (FD interest rate offered by scheduled banks in India), and an adjustment of ₹3.02 crore to the interest earned was computed by the TPO.

The DRP rejected assessee's objections, and aggrieved, assessee appealed before ITAT.

On ALP Determination, ITAT held that it was irrelevant as to what should be 'opportunity cost' of the funds advanced to the AEs. On the first principles, all that the ALP adjustment seeks to do is to neutralise the impact of intra AE relationship in any international transaction with the AEs. Applying this principle to the facts in assessee's case, ITAT held, *"What the assessee has actually done cannot be called into question in the course of ALP ascertainment exercise; all that can be called into question is the price at which the assessee has done a transaction with an AE."*

Regarding Arm's Length Interest Rate, the ITAT rejected TPO's consideration of arm's length interest rate as opportunity cost of investing IPO proceeds in fixed deposit with scheduled bank, holding that, *"when arm's length price of an international loan transaction, which is designated in a hard currency, is to be ascertained, the interest rate on rupee transactions in India has no relevance at all"*

Further, ITAT deleted TP adjustment of ₹3.02 crore on foreign currency loan to AE subsidiary, holding that, *"...if a credit institution like Exim Bank is offering the foreign currency loan to the assessee at a particular price, it is reasonable to proceed on the basis that the foreign currency loan, on similar terms, to the AE could be an arm's length transaction"*.

On the issue of Interest addition on interest receivable from AE outstanding, the revenue contended that the TPO also made an adjustment of ₹1.03 crore on the basis of non-realisation of variation between ALP and the actual transaction value in the interest at the arm's length price, in addition to interest on interest receivable as on the beginning of the year. Before ITAT, assessee relied on the decision in the case of Nimbus Communication Ltd. (43 SOT 295) and submitted that interest on outstanding balance could not be charged by way of ALP adjustment.

ITAT remitted interest adjustment on outstanding interest receivable from AE on above loan transaction by holding that since the loan arrangement with Exim Bank already held to be a valid internal CUP, *"even the question as to whether the delayed payment of interest will invite compounding of interest can be addressed in the light of the terms of the internal CUP"*, distinguishes Nimbus Communications Ltd ruling.

On matter of Guarantee on behalf of AE, the Assessee had issued a guarantee of US $ 20,000,000, on behalf of its Argentina based subsidiary Advanta Semillas SAIC, to the State Bank of Argentina. Assessee had incurred a cost of ₹0.04 crore towards issuance of guarantee, being payment made to the ICICI Bank and the assessee had offered these charges as ALP of the corporate guarantee charges. The revenue contended that the TPO noted that complete details in respect of the nature and further details of the guarantee were not furnished by the assessee. TPO contended that since AE was a loss making entity, minimum guarantee would have been 2% if such an entity had tried for a bank guarantee in India. Thus considering 2% as arm's length guarantee commission, and proposed adjustment of ₹0.16 crore, which was confirmed by the DRP.

ITAT upheld TP adjustment, in principle, on corporate guarantee issued by assessee (an Indian company) to AE. ITAT distinguished Bharti Airtel ruling by observing that since assessee had incurred costs on issuance of guarantee in present case, the same had a *"bearing on the profits and income of such enterprise"*, thus constituted an international transaction. However, remitted the matter for ascertaining arm's length guarantee commission, as there was no scientific basis for 2% considered by TPO/DRP, and assessee had not furnished necessary information. ■