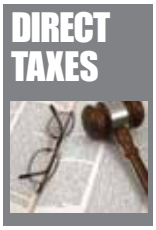
Legal Decisions[1]



Income Tax

LD/64/116

Pr. Commissioner of Income Tax
vs.
M/s Delco India P. Ltd.
10th February 2016

Section 292C of Income-tax Act, 1961 -Presumption as to assets, books of account, etc.

When the assessee had discharged its onus and rebutted the presumption u/s 292C, no interference with the order of ITAT was called for.

A survey was conducted on assessee's premises on 26.02.2009 simultaneously with the search and seizure operations conducted in relation to one Sh. Ram Hari Ram and Orchid Group. During survey, certain documents (available as a computer print) pertaining to M/s Smridhi Sponge Ltd were found and impounded from the business premises of the assessee.

A reassessment notice under Section 148 was issued, pursuant to which assessee filed revised return of income for AY 2007-08. Assessee submitted that the documents impounded did not belong to it, andalso denied having any business relations with Smridhi Sponge Pvt ltd. The statements of assessee were supported by the affidavit. Also along with the denial supported by affidavit, assessee provided the assessment details of the Smridhi Sponge Ltd alongwith names of directors and mailing address of the said concern as confirmed through sites of RoC and Income Tax Department. The AO also sent a notice under Section 133(6) to Smridhi Sponge on its registered office address, requiring the said concern to furnish copy of ledger account for the business carried with assessee.However, the same was left un-served and was returned as blank.

Subsequently, the AO thus held that the assessee had not recorded purchases made from Smridhi Sponge, and so the payment made alongwith the estimated G.P was added to the income of assessee, as undisclosed income under Section 68 (amounting to ₹2.68 lakh). On appeal, CIT(A), dismissed assessee's submissions and concluded that since the impounded documents were found from the assessee's business premises necessarily there was valid presumption under Section 292C that they relate to transactions with M/s Smridhi Sponge outside the assessee's books of accounts. However on the arguments advanced by the assessee, CIT(A) gave part relief to the assessee and deleted the additions of ₹10 lakh made by AO on account of purchases.

Aggrieved by the order of CIT(A), both assessee and Revenue filed an appeal before Delhi ITAT. The assessee contended that apart from the fact that the specific unrelated documents were found from the business premises of the assessee, there was no other evidence available with AO in presuming under Section 292C that the documents belong to the assessee.

Further, the assessee submitted that even though it had discharged its onus in rebutting the presumption by producing valid evidence, and also taking bonafide efforts in informing the said authority that the assessee had no dealings with the said concern. Assessee submitted that no effort was taken by the AO in rebutting the evidence provided by the assessee.

ITAT ruled in favour of assessee. ITAT observed that the assessee during the assessment proceedings and in the appellate proceedings made an all out mammoth exercise to give the details of M/s Smridhi Sponge Ltd. but however surprisingly for unstated reasons the department sat back after issuing notices to the address provided of M/s Smridhi Sponge relying blindly on Section 292C of the Act only on the rationale that the print outs had been founded from assessee's premises and thus they necessarily disclosed the assessee's undisclosed transactions with the said concern. ITAT observed that the documents relied upon while making additions under Section 68 was impeachable third party evidence.

Further, ITAT rejected Revenue's submissions and held that the departmental stand that the level of information available with the assessee proved that the assessee had interactions with the said concern was just adding insult to injury. ITAT observed that the onus to address the seized documents *qua* which a statutory presumption was drawn stood fully discharged by the assessee. ITAT held that the onus placed on the assessee that the seized documents do not belong to it, was successfully rebutted and

[1] *Contributed by CA. Sahil Garud, Indirect Taxes Committee and ICAI's Editorial Board Secretariat.*
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discharged and onus now was shifted upon Revenue to act upon the information made available to them. Thus ITAT deleted the additions made under Section 68 as undisclosed income.

HC perused ITAT order and provisions of Section 292C of the Act. HC observed that presumption under Section 292C that the books/documents found in possession or control of any person in the course of search or survey belong to that person is a rebuttable presumption. Assessee had discharged its onus that the impugned documents do not belong to it and that there was no interference called for with the order of ITAT.

Holding that no substantial question of law arose, HC dismissed Revenue's appeal.

LD/64/117

Commissioner of Income Tax, Kolkata
vs.
Birla Corporation Ltd.
2nd February 2016

Section 244A: Interest on Refunds

Assessee eligible for interest u/s 244A on refund of excess self-assessment tax paid u/s 140A; HC rejected Revenue's stand that Sec.244A(1)(a) covers cases for refund arising out of TDS/advance tax, whereas residual category u/s 244A(1)(b) was not attracted in view of Explanation appended thereto which covers only those cases where excess tax is paid in consequence to demand notice u/s 156.

The assessee, Birla Corporation Limited paid tax for AY 1992-93 and AY 1993-94, including the self-assessment tax under Section 140A. Assessment was completed for these AYs and certain additions were made. On appeal before the CIT(A), an order of refund of excess self-assessment tax alongwith interest was passed for both the relevant AYs. Thereafter the AO issued notice under Section 154 and the interest previously allowed on refund of excess self-assessment tax was withdrawn. AO referred to Explanation to Clause (b) of Section 244 which provides that the "date of payment of tax or penalty" under Section 244A(1)(b) means the date on and from which the amount of tax or penalty specified in the notice of demand issued under Section 156 is paid in excess of such demand. AO submitted that any tax paid after the issue of notice of demand would not include self-assessment tax and thus the interest would not be paid on excess payment under Section 140A. On further appeals, CIT (A) and ITAT Kolkata both reversed AO's order and ruled in assessee's favour.

Aggrieved again, Revenue filed an appeal before Calcutta HC.

Section 244A(1) provides for payment of interest on refund to assessee for any amount due to him under the Act. Clause (a) to Section 244A(1) provides for interest on refund arising out of TDS and advance tax, whereas Clause (b) to Section 244A(1) provides for interest on refund (from date of tax payment to date of refund-grant) arising out of 'other cases'. Explanation to Clause (b) states that "date of payment of tax or penalty" means the date on and from which the amount of tax or penalty specified in the notice of demand issued under Section 156 is paid in excess of such demand.

Before Calcutta HC, Revenue argued that Clause (b) of sub-Section (1) of Section 244A was not attracted in view of the explanation appended to the said clause. Revenue argued that interest would not be payable on the refund of excess self-assessment tax, since the same was not paid consequent to any notice of demand under Section 156 of the Act;

HC referred to SC ruling in *UOI vs. Tata Chemicals* wherein court held that that Explanation to Clause (b) of Sub-section (1) of Section 244A would not be applicable where payment is not made pursuant to any notice under Section156. Apex Court had held that *"The obligation to refund money received and retained without right implies and carries with it the right to interest."* HC further took note of Bombay HC ruling in *Stock Holding Corporation of India Ltd. vs. N.C. Tewari* [(2015) 373 ITR 282 (Bom.] wherein HC relied on SC ruling in Tata Chemicals and noted that assessee was entitled to interest on refund of self-assessment tax.

HC also relied on Delhi HC ruling in *CIT vs. Sutlej Industries Ltd* (2010) 325 ITR 331 wherein, Delhi HC allowed interest on refund of self assessment and held that "where the self-assessment tax paid by the assessee under Section 140A is refunded, the assessee should be, on principle entitled to interest thereon since the self assessment tax falls within the expression "refund of any amount". The computation of interest on self-assessment tax has to be in terms of Section 244A(1)(b), i.e., from the date of payment of such amount up to the date on which refund is actually granted.."

HC distinguished Revenue's reliance on ruling in *CIT vs. Engineers India Ltd* [2015] 373 ITR 377 (Delhi) wherein Division bench differed from Sutlej

Industries and relied on another SC ruling in *CIT vs. Gujarat Fluro Chemicals*, reported in [(2014) 1 SCC 126]. HC stated that *"Section 244A does not deny payment of interest in case of refund of amount paid under Section 140A. On the contrary Clause-(b) being a residuary clause necessarily includes payment made under Section 140A…"*

Moreover, in present case, since refund was granted pursuant to relief allowed by CIT(A) against AO's erroneous assessment, HC observed that in the present case principles of restitution would be applicable and the Revenue was thus statutorily bound to pay interest under Section 244A(1)(b) to the assessee. HC held *"that Clause (b) of Sub-Section 1 of Section 244A is residual in nature and provides for interest on refund of excess self-assessment tax paid by the assessee. Furthermore the explanation to Section 244A(1)(b) would have no application since the tax in question was not paid consequent to any notice of demand under Section 156, rather it was paid under Section 140A. Hence, according to mandate of Section 244A(1)(b) interest is payable on refund of excess self assessment tax from the date of payment of such tax to the date when the refund is granted.."* Thus, the AO was directed to compute interest payable from the date of payment of tax on the basis of self-assessment till the date of grant of refund.

LD/64/118

Commissioner of Income Tax

Vs.

Reliance Industries Ltd.

1st February 2016

Section 148 of the Act – Reason to believe

If it is noticed from the records retained in original assessment that assessee claimed excess profits in respect of its power generating units, the obligation of the assessee is only to disclose primary facts, further issues are the subject matter of enquiry by AO while passing an order under Section 143(3). Assessment cannot be reopened in such case.

The Act requires reason to believe of the Assessing Officer himself that income chargeable to tax has escaped assessment and thus, satisfaction of the Assessing Officer cannot be outsourced or arrived at on the basis of directions of his superior.

The Assessee had established captive power plants/units which generate and supply power to its manufacturing units. The Assessee filed its return of income claiming the benefit of Section 80IA of the Income Tax Act, 1961 ('the Act').

As per the provisions of Section 80IA(10) of the Act, where it appears to Assessing Officer ('AO') that owing to the close connection between assessee carrying on the eligible business to which this section applies and any other person, or for any other reason, the course of business between them is so arranged that the business transacted between them produces to assessee more than the ordinary profits which might be expected arise in such eligible business, the AO shall, in computing the profits and gains of such eligible business for the purposes of the deduction under this Section take the amount of profits as may be reasonably deemed to have been derived there from.

The AO, on examining, had passed an order under Section 143(3) of the Act allowing the benefit to the Assessee as available under Section 80IA of the Act. Later, a notice under Section 148 of the Act was issued by the AO seeking to reopen the case. The notice for reopening of assessment beyond the period of four years from the end of the relevant assessment year, and was issued in view of Revenue's audit objection. This audit objection had been resisted to by the AO, nevertheless, the AO issued the notice on the ground that the electricity sold by the captive power generating units of the Assessee to its units was inflated as they were not comparable to its market value, and thus, the same was not allowable as this inflates the profits eligible for deduction under Section 80IA.

The High Court held as under:

The reason to believe that income chargeable to tax has escaped assessment on the part of the Assessing Officer is a sine qua non for issue of a reopening assessment under Section 148 of the Act as non-satisfaction of reason to believe would by itself make the notice fatal. Both the CIT(A) as well as the Tribunal, on the aforesaid basis came to the conclusion that in view of the fact that the Assessing Officer himself has not accepted the audit objection, there could be no reason for him to believe that income chargeable to tax has escaped assessment. It is clear from Section 147 of the Act that the jurisdictional requirement to issue a notice for reopening the assessment is the satisfaction of the "Assessing Officer." This satisfaction of the Assessing Officer cannot be outsourced or arrived at on the basis of directions of his superiors. We are unable to understand how the mandate of the Act requiring the Assessing Officer to have reason to believe that

Legal Update

income chargeable to tax has escaped assessment can be ignored on the altar of revenue collection. In fact, though on the above issue itself, the appeal is not being entertained, it may be pointed out that none of the other two conditions precedent viz. no change of opinion and failure to disclose all material facts are satisfied in this case. Thus, the impugned notice is not sustainable.

Service Tax

LD/64/119

CCE
vs.
Federal Bank Limited.
February 18, 2016 (SC)

Section 65 (19) of the Finance Act, 1994

Services provided by the Bank such as collection of telephone bills, collection of insurance premium on behalf of the client companies are liable to service tax under the heading 'Banking and Other Financial Services' under 'cash management services' w.e.f. 1.6.2007 and not under the heading Business Auxiliary Services prior to said date.

Issue before the Hon'ble Supreme Court was whether the services provided by the banks, such as collection of telephone bills, collection of insurance premium on behalf of the client companies are liable to service tax under the category *"business auxiliary service"* as defined under Section 65 (19) of the Finance Act, 1994.

The High Court had agreed with the view of the Tribunal and had dismissed the appeal by the department by holding that the heading 'Banking and Other Financial services' covers all charging services rendered by the Banks and hence, by express provisions in the same very section, cash management services stood excluded from the purview of service tax. On account of such exclusion, the authorities cannot levy service tax by indirect method of charging the same service under the head "business auxiliary service". The Supreme Court agreed with the views of the High Court and added that Section 65A of the Finance Act 1994 would also support the High Court view.

[Note: While it is true that this cannot be taxed under business auxiliary services, it is doubtful whether cash operations can come under the terminology "cash management services". There is no detailed discussion on this point by the Supreme Court.]

LD/64/120

M/s Tower Vision India Pvt Ltd
vs.
CCE
3rd March, 2016 (DEL)

CENVAT credit of duty paid on goods used for making telecom towers would not be eligible even if the same is used to provide output services.

Issue before the Larger Bench of the CESTAT was whether assessee who is engaged in providing passive infrastructure services to Telecom companies (allowing use of Telecom Towers and shelters), could claim credit of CENVAT paid on the goods used in erecting these towers and shelters. The assessee was paying service tax on the output services.

The Larger Bench relied upon the decision of the High Court in the case of *Bharti Airtel Ltd. vs. CCE*, wherein it was held that credit on goods used for erection of telecom towers and shelter by Telecommunication Companies would not be eligible as these would result in erection of immovable property. Larger Bench applied the said ratio to the service provider providing infrastructure support to telecom companies and observed that the inputs which suffered duty like MS angles and pre-fabricated shelters, *per se*, were not used for providing output service. In other words, there is a tower and cabin structure erected and embedded before such support service could be provided to the telecom operators. The Larger Bench observed that where the credit on these goods was not eligible when used by the Telecom companies themselves to erect the towers, it cannot be allowed where an intermediary company comes in between to create such structure and make it available to the Telecom Companies.

[Note: This decision is not the last word on this subject as there are some High Court views contrary to this principle - See Andhra Pradesh High Court and Karnataka High Court decisions in the case of *SaiSahmita Storages(P) Ltd.* reported in 2011 (23) S.T.R. 341 (A.P.) and SLR Steels Limited reported in 2012 (280) E.L.T. 176 (Kar.)]

LD/64/121

M/s Cineyug Worldwide
vs.
Union of India.
22nd January 2016 (MUM)

HC remands matter back to settlement Commission; Holds Settlement Commission seemed to have straightaway accepted that Report

not only as gospel, but as totally incontrovertible, and incapable of being subjected to any rational settlement and there was absolutely no basis for this, other than the Settlement Commission saying, to all intents and purposes, that the matter was apparently too onerous and too taxing on the Settlement Commission's time, energy and resources; Further holds "the very least the Settlement Commission ought to have done, in our view, was to give the Petitioner an opportunity to respond to the Revenue's observations and Report. Had the Petitioners then failed to do so, or if, on a close examination, that response was found on merits to be without substance, the application could have been dealt with accordingly. But to deny that opportunity and to thereby short-circuit a properly brought Settlement Case in this fashion is not, in our view, in keeping with the statutory mandate at all.

Petitioners, Cineyug Worldwide, a partnership firm provides event management services covered by Section 65(40) read with Section 65(41) and 65(105)(zu) of the Finance Act, 1994. During the FY 2007-2008 to 2010-2011, the Petitioners claim to have suffered a set-back in their business due to default by clients in paying the Petitioners' fees for event management services rendered. Thus, petitioners wrote off the amounts of unpaid fees by reversing the entries in question in their books of account.

According to the Petitioners, their liability to pay service tax would have arisen only on their receiving fees from their clients. The Petitioners claim that since they had not received fees from some of their clients (which included major enterprises such as Star India, Unilever Limited and Zee TV, *etc.*), the Petitioners were unsure whether service tax would nonetheless be paid on the fees that they had billed or charged for services rendered, despite the fact that the fees in question had not actually been received by the Petitioners at all. This resulted in a delay in payment of service tax as also short payment.

During the course of a Service Tax Audit of the Petitioners' records, a written query was raised seeking details of an amount shown as "other income". The Petitioners responded to this query saying that out of this amount a part shown as 'other income', a part as interest on fixed deposits with banks and the remainder pertained to reimbursement of payments of music licence fees from Videocon Industries Limited. The Petitioners explained that they had made these payments on behalf of Videocon Industries at its request and that this amount was merely a reimbursement. The Petitioners clarified that they had not charged Videocon Industries any amount as fees for making this payment on its behalf.

Settlement Commission rejected the Petitioners' Application as not admissible. The Final Order of Settlement Commission indicated that the Revenue had given its Report and that this showed that the claim of the Petitioners could not be accepted. The Settlement Commission purported to note that the Petitioners did not have sufficient supporting documentation.

Aggrieved, the appellant filed an appeal before Bombay High Court. The appellant contended that the Revenue's Report was never supplied to the Petitioners nor were the Petitioners given an opportunity of dealing with it. It was added that the Settlement Commission accepted the Revenue's contentions regarding discrepancies without giving the Petitioners an opportunity to explain that there were in fact no such discrepancies.

The Petitioners contended that since they had accepted that there was a short payment of service tax and had in fact paid an amount along with interest and in addition to filing periodical returns as required, the Petitioners approached the Settlement Commission for a settlement of the dispute. They made an application for settlement. The Petitioners accepted their liability alongwith interest liability. The Petitioners sought immunity from penalties and prosecution.

HC accepted petitioners' submission that it is the statutory mandate and duty of the Settlement Commission under Chapter V of the CEA to strive for a possible settlement of the case, so that the interests of the Revenue are protected and that the Revenue is not put to a loss through protracted or delayed proceedings. HC further accepted that the settlement provisions are intended to advance revenue collection and resolve pending disputes and importantly, they make allowance for a defaulting taxpayer to make a clean breast of things and, against a commonly settled and negotiated payment of duty liability, to obtain immunity from payment of penalty and prosecution.

HC asserted "To merely opine only on the basis of Revenue's Report that because there was a difference between the Petitioners' case and that of the Revenue, no settlement is possible is directly contrary to the statutory mandate"

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HC accepted assessee's reliance on Bombay HC ruling in '*SSF Plastics India Private Limited v Union of India*,' *[2015 (325) E.L.T. 837 (Bom.)*] where it was held "*even if the Revenue did not accept the case of a petitioner before the Settlement Commission, the Bench was not handicapped and could not just fold its hands. The Settlement Commission must be mindful of its statutory obligation and duty. No shortcut is permissible in law.*"

It was held that Settlement Commission seemed to have straightaway accepted that Report not only as gospel, but as totally incontrovertible, and incapable of being subjected to any rational settlement and there was absolutely no basis for this, other than the Settlement Commission saying, to all intents and purposes, that the matter was apparently too onerous and too taxing on the Settlement Commission's time, energy and resources. It was further held *"the very least the Settlement Commission ought to have done, in our view, was to give the Petitioner an opportunity to respond to the Revenue's observations and Report. Had the Petitioners then failed to do so, or if, on a close examination, that response was found on merits to be without substance, the application could have been dealt with accordingly. But to deny that opportunity and to thereby short-circuit a properly brought Settlement Case in this fashion is not, in our view, in keeping with the statutory mandate at all."*

Ruling in favour of the petitioners, HC held that there has been a fatal violation of the principles of natural justice and the Settlement Commission had not proceeded in accordance with its statutory mandate under Chapter V of the CEA. Thus, HC rejected and repealed the reason given by the Settlement Commission that it could not take evidence or that, when confronted with conflicting submissions on facts and law, its only recourse was to dismiss a settlement application brought before it.

HC ordered for a copy of the Respondents' response/report to be provided to the Petitioners within 10 days order being made available and ordered the petitioners to submit their response to that report within 10 days thereafter. It was further ordered that the Settlement Commission would then consider all the material before it and pass an appropriate order on merits and in accordance with law.

Excise

LD/64/122

M/S Bhagyanagar Metals Ltd.
vs.
CCE
February 17, 2016 (HYD)

Software imported along with the fixed wireless telephones (stored in the telephone instrument) cannot be treated as software imported in media to be assessed separately and thereby is not eligible for exemption from payment of duty of customs.

Assessee imported Fixed Wireless Terminals (FWT), a type of cellular phones which are operated under CDMA Technology alongwith CD ROMS and filed B/Es separately for phones and CD-ROMS claiming phones as "hardware portion" of FWTs and CD-ROMS as "Software Portion" of the said FWTs. Department based on investigations came to the conclusion that the 'Software' claimed to have been contained in the CD ROMS are already pre-loaded in the phones and there is no software as goods to be assessed separately for claiming exemption.

Larger Bench observed that there is no separate media containing software that can be presented with the phone and classified under Tariff Heading 85.24. There are no two separate, distinct goods for assessment, namely (a) CDMA Fixed Wireless Telephone and (b) a media containing software presented with such telephone. The Larger Bench also relied upon the decision of the Apex Court in the case *Anjaleem Enterprises Pvt. Ltd. vs. CCE, Ahmedabad* and also the decision of the Tribunal in the case of *Jabil Circuit India Pvt. Ltd. vs. CCE,* and held that the Fixed Wireless phones as imported require to be classified and assessed as phones with no segregation of value assignable to the software separately.

LD/64/123

Union of India
vs.
Hamdard (Waqf) Laboratories,
February 25, 2016 (SC)

Section 11BB of the Central Excise Act, 1944

Interest on delayed refund in terms of Section 11BB would be payable from three months from the date of receipt of the application.

Consequent to the decision of the Hon'ble Supreme Court in their favour on the issue of classification of the goods manufactured by the assessee herein above, they preferred a claim of refund of the excess duties paid by them in connection with the said proceedings.

The application was filed on 25.08.1999. Department raised certain queries relating to the claim vide letter dated 27.09.199 which was answered by the assessee on 30.09.1999. Refund cheque was issued on 15.11.2000. The assessee filed a writ petition before High Court seeking direction to the department to pay interest for delayed payment of refund in terms of Section 11BB, which petition was allowed. Against the said order of the High Court, the Department preferred an appeal.

The Hon'ble Supreme Court relied upon the decision of the same Court in the case of *Ranbaxy Laboratories Ltd. vs. CCE*, and held that it is obligatory on the part of the Revenue to intimate the assessee to remove the deficiencies in the application within two days and, in any event, if there are still deficiencies, it can proceed with adjudication and reject the application for refund. The adjudicatory process by no stretch of imagination can be carried on beyond three months. It is required to be concluded within three months. Therefore, it was held that, the only interpretation of Section 11BB that can be arrived at is that interest under the said Section becomes payable on the expiry of a period of three months from the date of receipt of the application under Sub-section (1) of Section 11B of the Act.

LD/64/124

Ramala Sahkari Chini Mills Ltd, UP

vs.

CCE

February 19, 2016 (SC)

Definition of Inputs- Rule 2(g) of CENVAT Credit Rules, 2002

The phrase 'includes' in the definition of inputs shall be given wide interpretation. The said phrase is generally used to enlarge the meaning of the preceding words and it is by way of extension, and not with restriction. The decision of the Supreme Court in the Maruti Suzuki on inputs overruled.

While interpreting the definition of phrase 'inputs' [Rule 2(g) of CENVAT Credit Rules, 2002], the Supreme Court in the case of Maruti Suzuki reported in 2009 (240) E.L.T. 641 (S.C.) held that the inputs could be divided into three parts, namely (i) specific part, (ii) inclusive part and (iii) place of use and observed that none of the categories in the inclusive part of the definition would constitute relevant consideration unless the crucial requirement of being *"used in or in relation to the manufacture"* stands complied with.

However, while dealing with the eligibility to avail credit on welding electrodes used for maintenance of machinery used in manufacture of final products, the Supreme Court doubted the above decision referred the matter to Larger Bench on the basis of the observation that the word "include" should be given a wide interpretation as by employing the said word, the legislature intends to bring in, by legal fiction, something within the accepted connotation of the substantive part and it appears that by employing the phrase "and includes", legislature did not intend to impart a restricted meaning to the definition of "inputs".

Agreeing with the order of the referral bench, the Larger Bench of the Supreme Court held that word "include" in the statutory definition is generally used to enlarge the meaning of the preceding words and it is by way of extension, and not with restriction. In this connection, the Hon'ble Court relied upon the decision in the case of *Regional Director, Employees' State Insurance Corporation vs. High Land Coffee Works of P.F.X. Saldanha and Sons & Anr.* [(1991) 3 SCC 617].

[**Note:** To summarise, the views of the Court in the case of Maruti Suzuki is no longer applicable and the credit cannot be restricted to the three classes of cases only as mentioned in Maruti Suzuki's judgement.]

LD/64/125

Mangalam Organics Ltd.

vs.

Union of India

16th January 2016

Section 11C of the Central Excise Act: Power not to recover duty of excise not levied or short- levied as a result of general practice

Assessee's case unfit for issuance of Notification under Section 11C of the Central Excise Act extending excise duty exemption to units manufacturing rosin and turpentine without aid of power, except for purpose of using electricity to pump water to overhead tank for the period 27.05.1994 to 28.02.2006; Power under Section 11C is discretionary and it is not mandatory for Government to issue a notification under Section 11C under all circumstances.

Assessee filed writ petition seeking to quashing of the decision of Revenue communicated by letter dated 30/09/2014 to the effect that Notification under Section 11C of the Central Excise Act, 1944 ('the Act') cannot be issued for extending the benefit

of not requiring to pay the Central Excise Duty to the units manufacturing rosin and turpentine without aid of power, except for the purpose of using electricity to pump, for lifting up water for condensation to the overhead tank, for the period from 27/05/1994 to 28/02/2006, and writ of mandamus for directing Revenue to issue a Notification under Section 11C of the Act extending the benefit of not requiring the central excise duty for the units manufacturing rosin and turpentine without the aid of power, except for the purpose of using electricity to pump, for lifting up water to overhead tanks for the above period.

The two methods of manufacturing rosin and turpentine from Oleo Pine Resin are (i) one method is the vacuum chemical treatment process which uses power in almost all the processes and (ii) the 'Bhatti process' which is entirely manual except for the use of power to operate the pump for lifting up water to the storage tank for the purpose of condensation. Number of assessee's units adopting the first method was around 10 whereas majority of the units (i.e., about 300) were using the latter method and confining the use of power only for lifting of water to overhead tanks for condensation of turpentine vapors collected as liquid turpentine in tanks. Assessee contented that Rosin and turpentine oil manufactured without the aid of power were exempted from central excise duty vide Notification No.179/77-CE dated 18/06/1977. The Tax Research Unit, Department of Revenue, Ministry of Finance, Government of India *vide* its letter dated 16/01/1978, in the context of Notification No.179/77-CE had clarified that if use of power is limited to drawing water into the cooling tank through which turpentine vapors condensation coils pass, the manufacture could not be said to be with the aid of power and, therefore, all units using the Bhatti process became entitled for exemption for excise duty.

The Notification dated 18/06/1977 was rescinded by Notification No.180/86–CE dated 01/03/1986 and superseded by another Notification No.167/86–CE dated 01/03/1986 under which units manufacturing rosin and turpentine without use of power continued to be exempted. By Circular No.38/38/94–CX dated May 27/05/1994, all circulars/instructions/tariff advises issued prior to March 1986 were withdrawn. Assessee argued that despite withdrawal of the earlier circulars/instructions/tariff advises, all manufacturers using Bhatti process, including Revenue, remained under the impression that the clarification of 1978 was still in operation. As no excise duty was levied on any of the Bhatti units till 2003/2004, the first time show cause notices were issued to two units one being assessee's unit. Further, by Notification No. 21/2006–CE dated March 1, 2006, Notification dated 01/03/1986 granting exemption from excise duty to those units manufacturing without the aid of power was also rescinded.

HC perused Section 11C of the Act. HC observed that Central Government is empowered not to recover duty of excise where a practice was generally prevalent regarding levy of duty including non-levy thereof and where according to the said practice the duty was not levied or is not being levied or short levied. However, HC clarified that, it is only in a case where Central Government is satisfied that a practice was, or is, generally prevalent that the Central Government may by Notification may direct that whole of duty of excise payable on such goods, or, as the case may be, the duty of excise in excess of that payable on such goods, but for such practice, shall not be required to be paid in respect of the goods on which the duty of excise is not or was not being levied or was, or is being, short levied in accordance with the said practice.

Meanwhile, as the assessee had challenged the SCNs issued by the Revenue, the Commissioner, Central Excise, Raigad followed the judgment of the Tribunal in M/s Gurukripa Resins Pvt. Ltd. To hold that it would be incorrect to hold that the circular dated 27/05/1994 had withdrawn the clarification issued vide letter dated 16/01/1978 and, therefore, the clarification continued to hold. The Commissioner accordingly, directed the dropping of the proceedings. In Gurukripa Resins Pvt. Ltd. the Tribunal had held that the process of manufacture no power is used and the fact that water is pumped up to the overhead tanks does not amount to manufacture with the aid of power, hence, Gurukripa Resins Pvt. Ltd. was entitled to the benefit of the exemption.

As Revenue had filed an appeal against the decision of the Tribunal in Gurukripa Resins Pvt. Ltd. before SC, the Tribunal kept the appeal of Revenue in assessee's case pending to await the decision of SC in Gurukripa Resins Pvt. Ltd.

SC in Gurukripa Resins Pvt. Ltd., [(2011) 13 SCC 180)], held that process of lifting of water into cooling tank was integrally connected with manufacture of its goods and, hence, if power is used for lifting of water, the exemption would not be available. The SC further held that, Circular of 1978 was inapplicable since the same was withdrawn in 1994. HC therefore stated that in view of SC decision, the Tribunal upheld the show cause notices in the case of assessee, and held that, Revenue could not go beyond limitation period

The Institute of Chartered Accountants of India
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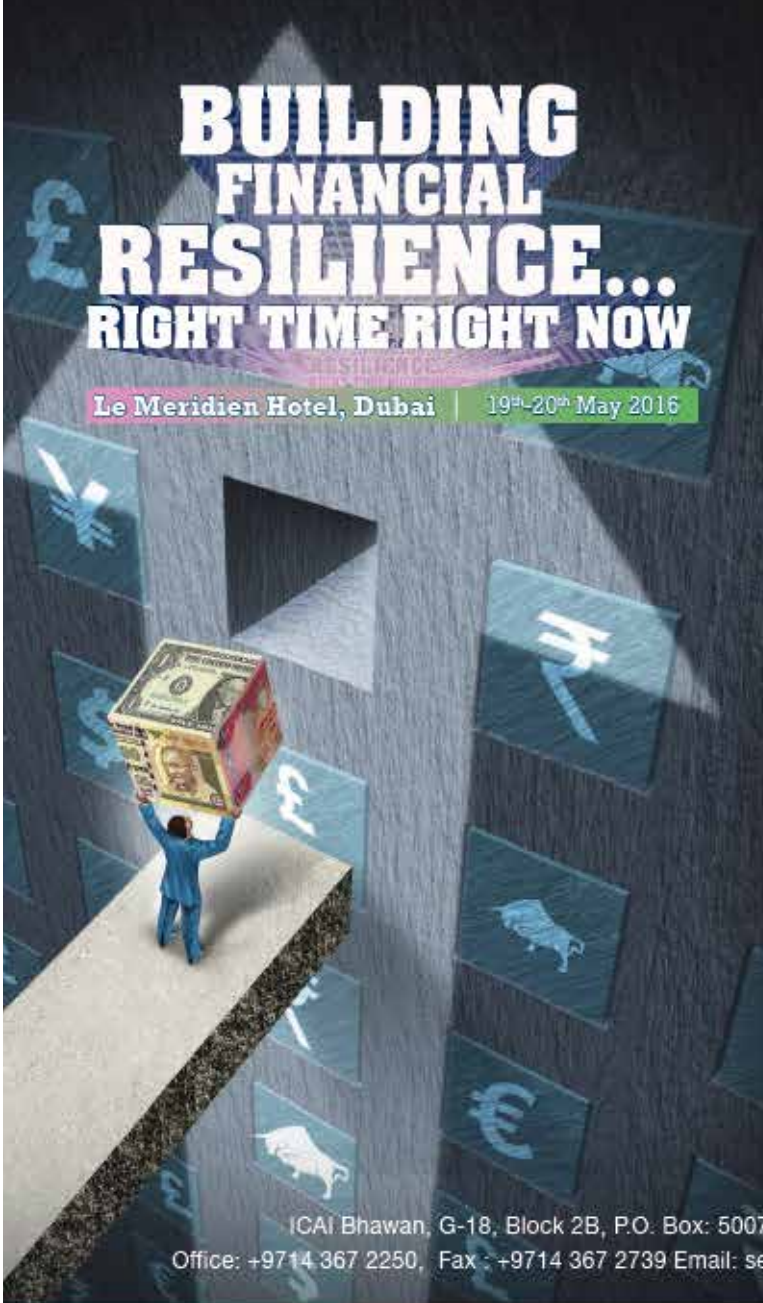

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of one year to recover excise duty. Both Revenue and assessee challenged the said decision of the Tribunal before HC of Judicature at Bombay and the appeals are pending.

HC stated that *"In view of the findings returned by the Supreme Court in the case of M/s Gurukripa Resins Pvt. Ltd., which manufacturing unit was admittedly identically situated as that of the petitioner's unit, the petitioner cannot, thus, seek the benefit of quashing of the decision communicated by the Ministry of Finance by letter dated 30.09.2014."*

HC observed that Section 11C grants a discretionary power to the Government to issue or not to issue such a notification, and the said provision does not mandate the Government to issue such a notification. Thus, the Government may or may not issue such a notification even though the Government may be satisfied that a notification is required to be issued. HC noted that the counter affidavit stated that the policy of the Government is not to issue a notification under Section 11C when it benefits only a few assessees. The policy, as stated, is that when a large section of trade is affected and relief is proposed to be given, notification under Section 11C is issued. HC stated that discretion is granted to the Government to issue or not to issue such a notification and the discretion has been exercised after conducting survey and resurvey and on a justifiable ground, the said decision, does not require any interference.

Thus, HC held that, decision of the Government not to issue a notification under Section 11C could not be faulted and no mandamus can be issued to the revenue to issue such a notification.

LD/64/126

Shah Yarn Tex P. Ltd.

vs.

The Commissioner (Appeals)

Office of the Commissioner of Central Excise and Service Tax

29th January 2016

Interest and penalty not leviable once input credit is allowed by CESTAT

Demand of penalty and interest was unsustainable absent any duty payable; Duty payable was already available with Revenue as input credit, hence, there was no question of evasion or denial or violation of duty payment.

Assessee is engaged in manufacture of mercerized cotton yarn during the period 01.04.2003 to 01.11.2003. Except for this period, mercerised cotton yarn remained exempted from payment of duty. The assessee procured duty paid grey yarn, mercerized the same and cleared the product without payment of duty during the said period.

A show cause notice (SCN), was issued seeking to levy duty on mercerised yarn along with penalty and interest. Assessee responded that the same was time-barred and there was no intention on its part to evade duty payment. The original Authority confirmed the demand of duty of ₹1.22 lakhs, out of which ₹1.06 lakh was adjusted by appropriation from CENVAT credit and an amount of ₹22,069/- was paid in cash. Additionally, interest under Section 11AB, penalty under Section 11AC and Rule 26 of Central Excise Rule, 2002 were levied. The assessee filed an appeal before the Commissioner of Central Excise (Appeals), who rejected the appeals by his order dated 06.06.2005.

CESTAT held that assessee must be allowed to utilise credit, while the duty is demanded on the final product. CESTAT held that, a substantive right is not to be denied on the ground of infraction of procedural provision [i.e. non-following of procedure of filing of declaration for availing CENVAT benefit]; accordingly, CESTAT set aside the order of the lower authorities and allowed the appeal to that extent.

Thereafter, Revenue sent a communication requiring assessee to pay penalty of ₹1.22 lakh. Assessee responded that once input duty credit was granted by CESTAT, the question of payment of penalty did not arise. Aggrieved, assessee preferred an appeal before CESTAT. CESTAT dismissed assessee's appeal, holding that communication requiring the assessees to disclose as to whether penalty and interest have been paid and also giving a warning that recovery proceedings would follow in case of failure, would only amount to a communication and therefore, the appeal is not maintainable. Assessee contended before the HC that it was the content and not forms of communication that would decide eligibility to file appeal, and especially when content threatened assessee with consequence of facing recovery proceedings, certainly assessee was eligible to file appeal. Reliance was placed upon the decision in *Kanaga Durga Clothers (P) Ltd., vs. CCE, Madurai [2007 (215) E.L.T. 313]*, where it has been held that, letter of jurisdictional Superintendent demanding interest on delayed payment of duty was appealable.

HC perused provisions of Sections 11AB and 11AC of Act, under which, penalty and interest had been demanded. Assessee contended that there was no liability to pay interest or penalty since there was no liability at all to pay the tax, since tax payable was

available as CENVAT credit. Further, the Tribunal's finding that, assessee ought to have been given the benefit of CENVAT credit, was not challenged by Revenue.

HC stated that, it was clear that, when the content of the communication was impregnated with missiles (demands), which may at any time, escape and hit against the assessee, then the assessee was entitled to challenge the same, though same is worded as a "letter", not as an "order". HC stated that it was really astonishing to read such a finding by the Commissioner (Appeals) that the appeal was not maintainable, by construing the communication as a letter and not as an order.

HC stated that, it is not assessee's case that they were not liable to pay tax, but contention is that, because of confusion in amendment, they did not pay and that, in any event, the duty payable was already available with Department as input credit, hence, there was no question of any evasion or denial or violation of payment of duty. HC took note of assessee's further contention that, when assessee's claim for adjustment of demand with CENVAT Credit and this denial on part of Department was held to be unjustified, then the Department ought not to have proceeded with the claim for penalty and interest after 4½ years of delay and that SCN itself can be issued only in serious cases where there is allegation of fraud, suppression, willful misstatement *etc*. and unfortunately, provisions of Section 11 A(1) had been used unwarrantedly.

HC held that, when input credit is allowed, the duty is deemed to have been paid on original date of payment of duty and, then there is no question of any liability to pay further duty. Further, in the absence of the Department challenging the findings of the Tribunal that there is no justification to deny CENVAT credit, the Revenue had no case and Department was not at liberty to demand either interest or penalty. HC stated that when the Central Excise Act, 1944 and the Rules framed thereunder, permit the adjustment of CENVAT Credit, and when the CENVAT Credit is granted, there is no outstanding duty payable and therefore, the question of payment of interest and penalty do not arise. HC thus allowed assessee's appeal.

LD/64/127

Commissioner of Central Excise and Service Tax

vs.

Rohit Ferro Tech Ltd & Ors

3rd February 2016

Section 32O: Bar on subsequent application for settlement in certain case; Section 32E: Application for settlement of cases

'Explanation' inserted by Finance Act, 2014 in Section 32-O(1)(i) that the concealment of particulars of duty liability "relates to any such concealment made from the Central Excise Officer" is consistent with the statutory intent and is a reiteration of the statutory provisions in Section 32E(1), hence is clarificatory in nature; Bar under Section 32-O(1)(i) from filing subsequent application consequent upon imposition of penalty in earlier case was always in vogue.

The assessee had approached settlement commission under Section 32E of the Act w.r.t. four show-cause notices (SCNs) issued. A penalty was imposed on the assessee. Against a fifth SCN, assessee made an application under Section 32E. Settlement commission denied entertaining application of the assessee since penalty was imposed on the assessee on w.r.t. on earlier occasions. The single judge of HC however held that if there is any concealment in that application and a penalty has been imposed by the Settlement Commission on the ground of concealment in the application, then a second application is barred. The Single judge noted that order of the Settlement Commission did not specify whether such kind of a penalty was imposed on the assessee. Just because a penalty was imposed on a SCN the assessee's application before the Commission was not entertained, which was incorrect. The single judge hence directed Settlement commission to reconsider its denial order.

Aggrieved, the Revenue preferred an appeal before Division bench of Calcutta HC.

Before the HC, Revenue argued that on all four occasions of SCNs issued against the assessee, applications were filed for settlement and orders on each of those applications were passed imposing penalty for concealment of duty particulars. Revenue argued that since on earlier four occasions orders were passed by the Commission imposing penalty for evasion of duty, the Commission was justified in passing the order dated 28.03.2014 on the said application for settlement holding it had no jurisdiction to entertain the application under Section 32-O(1)(i) of the Act, which the learned Single Judge in the impugned judgment had overlooked.

Assessee argued that if imposition of penalty of any kind would have been a disqualification, then in Section 32-O(I)(i) the words *"on the ground of concealment of particulars of his duty liability"* would not have been incorporated. Since ambiguity was

set at rest with the introduction of the 'Explanation' to Section 32-O(I)(i) in August, 2014 and as all the earlier four show cause notices were issued prior to its introduction, the bar under Section 32-O(1)(i) does not apply to it. Assessee further argued that with the introduction of sub-Section 2 to Section 32-O with effect from 1st June, 2007 which was omitted on 8th May, 2010 by Act 14 of 2010, the one-time approach was removed and thus even if earlier penalty was imposed for concealment of particulars of duty liability, an application for settlement was maintainable.

HC perused provisions of Section 32-O(1)(i) and Section 32(2) of the Act. HC observed that under Section 32-O(1)(i) a person is barred from filing a subsequent application for settlement where he has suffered an order passed under Section 32F(5) and therein the 'Explanation' has been introduced that the concealment of particulars of duty liability "relates to any such concealment made from the Central Excise Officer". HC observed that 'Explanation' in Section 32-O(1)(i) is consistent with the statutory intent in Section 32-E(1). As seen 'Explanation' introduced is a reiteration of the statutory provisions in Section 32E(1). Hence, the "Explanation" is clarificatory in nature. Therefore, as the bar under Section 32-O(1)(i) was always in vogue, the submission in this regard on behalf of the respondent is unacceptable.

HC rejected assessee's argument that onetime approach to settlement was removed, observing that no earlier application for settlement "identical to the issue" was "pending" before the Commission when any of the subsequent applications were filed. Further, HC observed that under Section 32-O(1)(i) the bar to file subsequent application was always in vogue, in view of the clear finding in detail by the Commission that in the previous proceedings penalty was imposed for concealment of particulars of duty liability. HC stated that on earlier four occasions the assessee was found guilty for concealment of duty particulars and penalty was imposed which the learned Judge had overlooked.

Thus, ruling in favour of Revenue, HC set-aside order of single judge.

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LD/64/128

Ketan Pottery Works

vs.

Union of India

28th January 2016

Inclusion of export clearances to 'Nepal' for computing SSI exemption threshold of ₹1.5 crore as per Explanation Clause (G) to Notification No. 8/2003 declared as 'unconstitutional' w.e.f. March 2012, in view of changed Govt. of India Policy

The assessee, Ketan Pottery Works, is SSI unit and engaged in manufacture of ceramic and pottery items, exporting its goods to Nepal. While considering the limit for SSI exemption it did not include the value of exports made to Nepal. A show–cause-notice [SCN] was issued on the assessee for the same.

The issue before HC was whether the inclusion of exports to Nepal while calculating the exemption limit of ₹150 lakh as per Notification No. 08/2003 is valid or not.

As per the notification issued by the Government dated 01.03.2003, exemption of excise was granted on specified goods for first clearance upto value of ₹150 lakh and full exemption to captive consumption for manufacturer having clearances not exceeding ₹4 crore in preceding financial year. Clearance for home consumption was exempted under the said notification. As per the notification while calculating limit of ₹150 lakh, the clearances which are exempt from whole of the excise duty under any other notification or for any reason should not be considered. However, explanation to the notification states that exports to Nepal and Bhutan shall be considered as clearance for home consumption.

As per the Indo-Nepal Treaty of October 2009, it was agreed by the two countries that the Government of India would collect excise duty for the goods which are manufactured in India and exported to Nepal and same shall be paid to Government of Nepal provided that it shall not exceed the import duties levied on similar goods imported from other countries and Government of Nepal do not charge import duty to importers. Due to this treaty-clause Rule 18 and 19 of Central Excise Rules, 2002 always had an exclusion of exports made to Nepal. Rule 18 pertains to rebate of duty when goods are exported and Rule 19 pertains to exports without payment of duty under bond.

Later, this situation underwent a major change when the bilateral treaty no longer prevailed. Government issued a circular dated 13.01.2012 in which various notifications were amended and exports to Nepal were treated at par with other countries except Bhutan from 1st March 2012.

Assessee contended that even SSI notification no. 8 of 2003 was ought to be amended and the term "clearances for home consumption" which will include clearances for export to Nepal and Bhutan ought to have been changed deleting reference to

exports to Nepal. Assessee contented that purely due to oversight, the Government of India did not amend such notification. Assessee also made reference of Tariff Conference held on 28th and 29th September 2015 in context of requirement of amending SSI notification no.8 wherein it was held that the condition in this notification is restricting the benefit to small scale manufacturers to the extent of clearances made to Nepal, and clarification was needed in view of change in treatment given to exports to Nepal. Assessee further submitted that other SSI units making exports to the countries other than Nepal would have an advantage over the units whose exports are mainly to Nepal.

Revenue contended that granting of exemption is matter of discretion of Government of India. Exemption is granted in exercise of the powers of delegated legislation. All exports to Nepal are treated similarly. Notification, therefore, cannot be said to be discriminatory.

HC referred to SC decision in case of *P. J. Irani* where it was held that legislation would be amenable to judicial review on three ground namely (1) if it was discriminatory, (2) if it was made on grounds which are not germane or relevant to the policy and purpose of the Act and (3) if it was made on grounds which are mala fide.

HC stated that Article 14 of the constitution ensures equality of law and equal protection of rights. Notification No. 8/2003 is violating Article 14 and thus, is discriminatory in nature. HC observed that the need for amendment to notification 8/2009 was also recognised during the conference of Commissioners where this issue came up for consideration and suitable recommendations were made. Despite such clear facts, the Government of India did not act and rescind reference to the exports to Nepal in the SSI notification No.8/2003, particularly in Explanation Clause (G) where clearances for home consumption would include clearances for export to Nepal also. In absence of such amendment, the SSI units exporting goods to Nepal would have to include value of such exports within the exemption limit, though exports to Nepal now stand on the same footing as export to any other country. HC stated that continued reference of export to Nepal on the said notification is thus wholly arbitrary. HC remarked that *"Quite apart from total oversight or inaction on the part of the Government of India in not making such corresponding changes, we find that the same is also discriminatory"*

HC observed that reference to clearances for export to Nepal in Explanation clause (G) to SSI notification No.8/2003 has been rendered wholly redundant. If such reference continues even after 01.03.2012, the situation that would arise is that, for all purposes, export to Nepal would be treated on par with export to any other country. Thus it would be discriminatory *vis-a-vis* other SSI units who might be having exports to countries other than Nepal as compared to the SSI unit of assessee whose substantial exports may be to Nepal. Under such circumstances, the former set of SSI units would claim total exclusion of all clearances made by them to all countries while computing exemption limit under notification No.8/2003, whereas the later would be subjected to inclusion of value of exports made to Nepal for computation of such limit.

HC thus held that portion "and Nepal" appearing in Explanation Clause (G) to SSI Notification No.8 of 2003 was unconstitutional with effect from 01.03.2012, being violative of Article 14 of Constitution of India.

Customs

LD/64/129

Maldhari Sales Corporation

vs.

Union of India

27th January, 2016 (DEL)

Section 28 of the Customs Act, 1962

HC holds that it is not the date of knowledge of the misdeclaration that is relevant but the date of clearance of the goods under a B/E which contained such misdeclaration and/or undervaluation; SCN held to be not time barred

The Directorate of Revenue Intelligence ('DRI') received information that Asian Wire Ropes Limited ('AWRL'), Hyderabad was importing low/high carbon steel wire rods and electrolytes zinc free of duty under the Duty Exemption Entitlement Certificate (DEEC) Scheme by misdeclaring and undervaluing the goods and then disposing of the said imported goods in the local market for profit instead of using them in the manufacture of steel wire ropes for export. Based on the said information, the residential, office and factory premises of AWRL and persons connected with it were searched in Bombay and Thane on 15th February 1989. Searches also took place at the locations of various persons and entities at Hyderabad and Faridabad. As a result of the searches, incriminating documents were seized. It transpired that the goods imported free of duty under the DEEC Scheme by AWRL were unauthorisedly disposed of through M/s. Maldhari Steels by Mr. Kumud J. Dharaya. Documents also showed the payment of

the differential value and commission to Mr. Vipin Gupta the brother of Mr. Subhash Gupta, one of the Directors of AWRL. The searches also resulted in recovery of certain quantities of steel wire ropes from the various locations that were searched.

When the goods that were seized were examined, it conformed to EN-1A British specifications relating to leaded free cutting steel wire ropes. These were declared as steel wire ropes of Belgium origin with carbon content over 0.60% and had been assessed on that basis and allowed for clearance free of customs duty.

Broadly there were two sets of imports which form the subject matter of two show cause notices (SCNs) issued in the present case. One SCN concerned goods that were mis-declared/undervalued and cleared by the Customs but were available for confiscation. The other SCN concerned goods that were mis-declared/undervalued and cleared but had already been diverted and sold in the market and, therefore, not available for confiscation.

The first SCN was adjudicated by the Collector of Customs and the Order-in-Original dated 28th June 1991 was passed. The key findings in this order-in-original were that the Department has proved the various charges as set out in the first SCN. It was held that the imported goods, i.e., EN-1A leaded free cutting steel, were neither used as input by the importer in the manufacture of steel wire ropes, i.e., the exported product, nor could such free cutting steel be used at all for the manufacture of steel wire ropes. It was stated that no evidence had been produced by the notices to prove that they had in fact used the imported steel wire rods for the manufacture of steel wire ropes. Further, the evidence brought on record by the Department proved that the imported steel rods had been sold in the open market for profit. The import of EN-1A leaded free cutting steel wire rods against the advance licenses under the DEEC Scheme was clearly unauthorised and the goods in question were liable for confiscation under Section 111 (d) of the Act read with Section 3 (2) of the Imports & Exports (Control) Act, 1947.

HC observed that whereas the first SCN was issued to 19 entities, the second SCN was issued to 43 entities. The second SCN was adjudicated by the Collector of Customs by an order-in-original dated 31st August 1994 and the said order also discussed at length the evidence produced. It was concluded that the case of the Department stood entirely proved. However, as regards the persons involved it was held that 28 of the notices who were specifically buyers of the goods did not come within the scope of the persons/firms by whose actions the subject goods have become liable for confiscation. The penal proceedings against the said 28 notices were accordingly dropped.

HC further observed that the goods imported by AWRL weighing 186.761 MT valued at ₹19,65,332 CIF under B/E 3454/32 dated 25th January 1988 as well as the goods covered by the B/E enumerated hereinbefore were held liable for confiscation under Section 111 (d), (m) and (o) of the Act. A penalty of ₹1 crore was levied on AWRL under Section 112(a) of the Act. Apart from AWRL being asked by an order to pay duty amounting to ₹2,19,01,589 along with interest @ 18% per annum, a penalty of ₹50 lakh each were imposed on Mr. Janakiram and Mr. Subhash Gupta and ₹20 lakh each on Mr. KumudDharia, M/s. Beekay Industries, M/s. Maldhari Steel Pvt. Ltd. and ₹10 lakh on M/s. Maldhari Sales Corporation. Both these adjudication orders were appealed against before the CEGAT. By the impugned order dated 29th October 1997 the CEGAT dismissed the appeals concurring with the findings of the Collector of Customs.

HC dismissed the appeal reasoning *"At the outset it requires to be noticed that Section 28 (4) of the Act provides for an extended period of limitation where any duty is not levied or has been short-levied by reason of (a) collusion or (b) any wilful misstatement or (c) suppression of facts by the importer. This extended period is five years from the 'relevant date'."*

HC reiterated the definition of the 'relevant date and held that even prior to the amendment to Section 28 of the Act by the Finance Act, 2011 (8 of 2011), the extended period of limitation of five years was available where duty had been levied or short-levied by reason of collusion or any willful statement or suppression of facts by the importer. Explanation (1) to Section 28 (1) of the Act is unambiguous that the period of limitation had to be calculated from the 'relevant date'. It was held that the relevant date in terms of clause (a) of Explanation 1 had to be calculated with reference to the date of order of clearance of the goods sought to be imported under a B/E. The misdeclaration or under valuation of the goods in the B/E would, therefore, relate back to the date of the clearance of the goods under a particular B/E.

It was held that the relevant date for the purpose of limitation would be the clearance of the B/E in question. The earliest of the B/Es forming the subject matter of the second SCN is 12th March 1987 and the second SCN was issued on 11th March 1992 which was within five years from the date of such

B/E. The date of clearance of the consignment with reference to that B/E was obviously on a date after the date of such B/E. The contention of learned counsel for the Petitioners that the limitation for the purpose of Section 28 (4) of the Act for issuance of SCN will begin to run from the date of knowledge of the misdeclaration or undervaluation of the goods is contrary to the express language of clause (a) of Explanation 1 which makes it clear that limitation begins to run from the 'relevant date' which in the present case will be the date on which the goods were cleared by the Customs. For the purpose of Explanation 1 (a) to Section 28 of the Act, it is not the date of knowledge of the misdeclaration that is relevant but the date of clearance of the goods under a B/E which contained such misdeclaration and/or undervaluation. Consequently, the second SCN in the present case was issued within the extended period of limitation in terms of Section 28 (4) of the Act.

It was further held that there could be no manner of doubt that the subject matter of the two SCNs where two different sets of B/Es. Each B/E was separately assessed at the time of clearance of the imported goods. The B/Es mentioned in the first SCN are not the ones mentioned in the second SCN and vice versa. Therefore, the question of applicability of the principle of res judicata does not arise.

HC distinguished the decisions cited by the Petitioners on facts and held that the Learned counsel for the Petitioners was unable to show any error, legal or factual, in the said adjudication orders which calls for interference by HC in exercise of its writ jurisdiction under Article 226 of the Constitution. High Court, thus, dismissed the petitions.

Sales Tax

LD/64/130

State of Punjab & Others

vs.

Shreyans Indus Ltd.

March 4, 2016 (SC)

Section 11 of the Punjab General Sales Tax Act, 1948

Power of the Commissioner of Sales Tax to extend period for completing the assessment, shall be done within the normal time limit allowed and same cannot be exercised after the limitation period has expired.

In terms of Section 11 of the Punjab General Sales Tax act, 1948 the assessment of return shall be completed within 3 years from the end of the year in which returns are filed. However, Section 11(10) empowers the Commissioner for reasons to be recorded in writing to extend the period of three years, for passing the order of assessment by such further period as he may deem fit.

In the present case, the assessee filed his quarterly returns as required under Punjab General Sales Tax Act, 1948. After expiry of the time limit of 3 years for assessment, the assessing authority, issued notice for assessment, which was contested by the assessee as a time barred. The Commissioner issued an order granting extension of time, giving reasons for the same and the assessing authority passed the assessment order.

Assessee contested the order of extension as well as the assessment order. The Tribunal took a view that the Commissioner has given sufficient reasons for extension of the time limit. The matter was carried to High Court which held that once the period of limitation expires, Commissioner is debarred from exercising his powers under sub-Section (10) of Section 11 of the Act and cannot extend the period of limitation for the purposes of assessment. The Department contested the same before Supreme Court.

The Hon'ble Supreme Court agreeing with the views of the High Court held that that extension of time for assessment has the effect of enlarging the period of limitation and, therefore, once the period of limitation expires, the immunity against being subject to assessment sets in and the right to make assessment gets extinguished. Therefore, there would be no question of extending the time for assessment when the assessment has already become time barred. A valuable right has also accrued in favour of the assessee when the period of limitation expires. If the Commissioner is permitted to grant the extension even after the expiry of original period of limitation prescribed under the Act, it will give him right to exercise such a power at any time even much after the last date of assessment.

LD/64/131

S. K. Khandelwal & Anr

vs.

The Special Director of Enforcement & Anr

17th February 2016

Section 35 of FEMA: Appeal to High Court

If assessee is allowed to file a writ petition despite the existence of an efficacious remedy by way of appeal under Section 35, provisions of the statute which provide for certain conditions for filing the appeal, would be defeated.

Legal Update

The assessee filed the present writ petition seeking to quash order dated 15.10.2013 passed by the Respondent whereby appeal nos. 14 and 15 of 2012 alongwith application for condonation of delay were dismissed. Assessee submitted that though the applications for condonation of delay were allowed in appeals bearing nos. 116, 117 and 118 of 2011, yet they were dismissed in appeal nos. 14 and 15 of 2012. Assessee submitted that the delay in filing the appeal is entirely attributable to general counsel of the petitioner. In response, the Revenue submitted that the instant writ petition was not maintainable since assessee had an alternate efficacious remedy under Section 35 of the Act which was not exhausted.

HC referred to SC ruling in case of *Raj Kumar Shivhare* [(2010) 4 SCC 772] in which it was held that *'The argument that under Section 35 only appeals from final order can be filed has been advanced on a misconception of the clear provision of the section itself. The section clearly says that from "any decision or order" of the Appellate Tribunal, appeal can be filed to the High Court on a question of law. SC had stated that Under Section 35 of FEMA, the legislature has conferred a right of appeal to a person aggrieved from "any" "order" or "decision" of the Appellate Tribunal. Of course such appeal will have to be on a question of law. In this context the word "any" would mean "all". Further SC concluded by holding that "if the appellant was allowed to file a writ petition despite the existence of an efficacious remedy by way of appeal u/s 35 of FEMA this will enable him to defeat the provisions of the statute which may provide for certain conditions for filing the appeal, like limitation, payment of court fee or deposit of some amount of penalty or fulfillment of some other conditions for entertaining the appeal. It is obvious that a writ court should not encourage the aforesaid trend of bypassing a statutory provision."*

Thus, following the SC ruling in Raj Kumar Shivhare (*supra*), HC dismissed the petition giving the appellants a liberty to file appropriate proceedings in accordance with law. ■

ICAI News

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Air Mail charges for CA Journal (in case of members abroad)	₹2100/-
Sea Mail charges for CA Journal (in case of members abroad)	₹1100/-

Payment of above fee and amount can be made through Local or at par cheque/ DD favoring The Secretary, ICAI payable at the city of concerned regional Office of ICAI so as to reach to the office on or before 30th September, 2016. Member may also make payment online at www.icai.org/memfee.html.

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Life shrinks or expands in proportion to one's courage. - Anaïs Nin