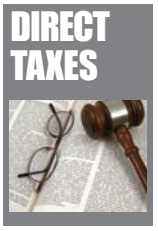
Legal Decisions[1]



Income Tax

LD/65/01

Commissioner of Income Tax, New Delhi
Vs.
Dinesh Jain
12th April 2016 (SC)

Section 271D / 271E: Penalty on failure to comply with Sec. 269SS and 269T regarding accepting or repaying loans in cash exceeding ₹20,000/-.

Revenue's SLP against Delhi HC order deleting penalty levied u/s 269T dismissed; However, question of law of limitation for purposes of Sec. 275(1)(c) left open.

The assessee Mr. Dinesh Jain had assigned the loan taken from one MGF Development to his wife by passing a journal entry and no repayment of loan was made to the lender either by the assessee or his wife. The AO initiated penalty proceedings u/s 271E for AY 2009-10 and passed the assessment order on 11/12/2011. Assessee contended there was no loan repayment to MGF Development Ltd but *"only substitution of one debtor by another"*, due to which no penalty u/s. 271E was leviable.

A notice was issued by the JCIT on 12/03/2012. The JCIT imposed penalty on 14/09/2012. CIT (A) held that since AO had initiated penalty proceedings on 05/12/2011 itself, the penalty order was beyond the period prescribed u/s 275 (1) (c). ITAT also ruled in favour of assessee.

As per sec. 275(1)(c), no penalty order shall be passed after expiry of the financial year in which proceedings in the course of which action for imposition of penalty has been initiated, are completed or 6 months from end of month in which action for imposition of penalty is initiated, whichever is later.

ITAT noted that assessee has transferred the loan by way of journal entry to his wife and observed that *"When the assessee has transferred the loan from himself to his wife by way of journal entry, it is only the substitution of one debtor by another debtor."* So far as creditors i.e. MGF Developments Ltd. was concerned, it had not received any amount. Since the creditors had not received any amount, it cannot be said that there is a repayment of loan. ITAT observed that *"Section 269 would come into play only when there is actual repayment of loan. Merely because loan is assigned by the assessee to his wife by way of journal entry, it cannot be said that there is a repayment of loan, otherwise, than by account payee cheque or account payee bank draft, so as to penalize the assessee u/s. 271E."*

Aggrieved, Revenue filed an appeal before Delhi HC. The Revenue contended that given the structure and phraseology of Sec. 271D/271E, the period of six months limitation particularly emphasizing the words "whichever is later" would commence only from the date when the appropriate and competent officer authorized to impose penalty initiates the proceedings. It was submitted that since notice was issued by the JCIT on 12/03/2012 and penalty was imposed on 14/09/2012, the limitation period ought to have been counted 12/03/2012.

HC referred to ruling in case of *Jitendra Singh Rathore*, [(2013) 352 ITR 327] wherein it was held that even though the Joint Commissioner is the authority competent to impose penalty u/s 271D *"the period of limitation for the purposes of such penalty was not to be reckoned from the issue of the first show cause notice by the Joint Commissioner, but the period of limitation was to be reckoned from the date of issue of first show cause for initiation of such penalty proceedings".*

Ruling in favour of assessee, Delhi HC held that *"In view of the express wording of Section 271D/271E which only mandated that the Joint Commissioner is authorised to issue the penalty order, the ITAT concluded that there was no power of initiation of proceedings by the AO."* Aggrieved, Revenue filed an SLP before the SC.

Dismissing Revenue's petition, SC held *"Since on merits, it has been found that there is no penalty, this Special Leave Petition is dismissed, however, leaving the question of law on limitation open."*

.....

LD/65/02

Adobe Systems Incorporated
Vs.
Asst. DIT
16th May, 2016

[1] *Contributed by CA. Sahil Garud, CA. V. Raghuraman, Indirect Taxes Committee and ICAI's Editorial Board Secretariat.*
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

Chapter X does not artificially broaden, expand or deviate from the concept of 'real income'; Even if the subsidiary of a foreign company is considered as its PE, only the income attributable to PE can be brought to tax in India.

The Assessee, Adobe Systems Incorporated, a US company, preferred writ petitions under Article 226 and 227 of the Constitution of India before Delhi HC, impugning three separate notices issued under Sec 148 of the Income Tax Act, 1961 for AY 2004-05, 2005-06 and 2006-07 respectively. The Assessee further impugns three separate orders passed by AO rejecting the objections raised by the Assessee against the assumption of jurisdiction u/s. 148. Adobe India provides software related Research and Development services to assessee. Assessee paid for R & D services on cost plus basis and claimed that the agreement was on principal to principal basis. However, based on the services rendered, the Assessing Officer held that Adobe India ought to be considered as Permanent Establishment of assessee.

HC observed that Adobe India was already assessed to tax on arm's length basis. HC held that the TP scrutiny/adjustments in respect of the activities of Adobe India must be read to have resulted in capturing the entire income from the said activities in the net of tax. HC reasoned that Sec. 92, which fell under Chapter X of the Act, mandates that any income arising from international transactions shall be computed having regard to the ALP. The purpose of enacting the transfer pricing regulations is to ensure that income from transactions between the related parties are not shifted out of India so as to escape or mitigate the incidence of tax payable under the Act. Thus, the transfer pricing regulations are to be read as providing the framework, to tax the real income of an assessee derived from international transactions with a related party and they cannot be read as provisions to impute any hypothetical income in the hands of an assessee.

HC relied on Sony Ericsson Mobile Communications India Pvt Ltd vs. CIT [(2015) 374 ITR 118 (Del)] wherein the Delhi HC held that *"As a concept and principle Chapter X does not artificially broaden, expand or deviate from the concept of 'real income'."*

The HC noted that the method of determining the ALP for the said transaction, i.e. TNMM, had been accepted for AYs 2004-05, 2005-06, 2006-07; although for AY 2007-08, the TPO had sought to use the PSM, the same was not upheld by the DRP. Thus, undisputedly, the real income of Adobe India, which was related to the activities carried out by Adobe India has been brought to tax in its hands and even if there was any dispute relating to the same, it was liable to be resolved in proceedings relating to Adobe India.

The HC referred to Article 7 of the Indo-US DTAA and held that even if the subsidiary of a foreign company is considered as its PE, only the income attributable to PE could be brought to tax in India. HC noted that even if the subsidiary of a foreign company is considered as its PE, only such income as is attributable in terms of paragraphs 1 and 2 of Article 7 can be brought to tax and in the current case, there was no dispute that Adobe India, which according to the AO was the Assessee's PE, had been independently taxed on income from R&D services and such tax has been computed on the basis that its dealings with the Assessee are at arm's length (that is, at ALP). Thus, HC held *"even if Adobe India is considered to be the Assessee's PE, the entire income which could be brought in the net of tax in the hands of the Assessee has already been so taxed in the hands of Adobe India."*

HC relied on *DIT (International Taxation) v. Morgan Stanley & Company Inc.* [(2007) 292 ITR 416 (SC)] and DIT vs. E-Funds IT Solution [(2014) 364 ITR 256 (Delhi)] wherein it was held *"The term 'through' postulates that the taxpayer should have the power or liberty to control the place and, hence, the right to determine the conditions according to its needs".*

Thus, ruling in favour of assessee, HC held that even if the AO was correct in its assumption that Adobe India constituted the Assessee's PE in terms of Article 5(1), 5(2)(l) or 5(5) of the Indo-US DTAA, the facts in this case did not provide the AO any reason to believe that any part of the Assessee's income had escaped assessment under the Act. Thus, HC quashed reassessment.

LD/65/03

Rajmandir Estates P. Ltd.

Vs.

Prin. Commissioner of Income Tax, Kolkata

13th May 2016 (KOL)

Sec. 263: Revision of orders prejudicial to Revenue

Order of CIT u/s 263 directing further investigation into share application money for AY 2009-10

upheld; CIT believed "that unaccounted money is laundered as clean share capital by creating a façade of paper work, routing the money through several bank accounts and getting it the seal of statutory approval".

The assessee, Rajmandir Estates Private Limited had share capital of ₹55.15 lakhs as on 31.03.2008. During AY 2009-10, assessee raised additional share capital of ₹1.34 odd Crores by issuing 7,92,737 shares of ₹10/- each at a premium of ₹390/-share. AO issued notice u/s 148 and 142(1) seeking details like name of share applicants, their address, date of receipt and the total amount received. Assessee submitted that share capital was subscribed by 39 corporate applicants. 15 out of them were issued notices under Section 133(6) of the Income Tax Act and the source of money in respect of each of the 39 applicants including their confirmation and bank statements were disclosed by the assessee. Noting that assessee submitted share application details, AO did not make any addition on account of share application money.

CIT issued notice u/s 263 exercising its revisionary powers. It was observed that details of share application forms like date of allotment, number of allotment, number of shares allotted, share ledger folio, allotment register folio, application number were kept blank by some applicants. Further, shares were subscribed by closely held companies owned by the Promoters/ Directors or their close relatives or friends. CIT had the belief that unaccounted money is laundered as clean share capital by creating a façade of paper work, routing the money through several bank accounts and getting it the seal of statutory approval by getting the case reopened u/s 147 suo motu. Thus, CIT issued directions for a thorough enquiry to the AO. This act of CIT was also upheld by ITAT.

Before the Calcutta HC, assessee challenged the reopening of assessment u/s 263. Assessee submitted that provision of taxing of share capital receipt was inserted u/s 56(2)(viib) w.e.f. 01/04/2013 and was not applicable to instant AY 2009-10, and thus the AO's order was not prejudicial to Revenue. Further relevant provisions of Domestic transfer pricing and the proviso to Sec. 68 were also added w.e.f. April 01/04/2013. Assessee argued that enquiry directed by the Commissioner was therefore bound to be an exercise in futility. Before HC, Revenue referred to provisions of Black money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 and The Prevention of Money Laundering Act, 2002 in support of his actions.

Referring to the Lexis Nexis, 2014 commentary on the Prevention of Money Laundering Act, 2002, HC remarked that *"Identity of the alleged share-holders is known but the transaction was not a genuine transaction. The creditworthiness of the alleged shareholders is also not established because they did not have any money of their own. Each one of them received from somebody and that somebody received from a third person."* Further, just before cheques were issued to assessee, matching amounts were found credited in the bank accounts of applicants. Companies formed by some of the applicants were mere paper companies and also the blank share application forms proved that alleged application for shares and the alleged allotment were not in the usual course of the business.

HC distinguished the rulings in *CIT vs. Steller Investment Ltd.* [Delhi HC] and Calcutta HC ruling in *CIT vs. Precision Finance Pvt. Ltd.* HC referred to SC ruling in *CIT vs. Lovely Exports Pvt. Ltd*. wherein it was held that share capital would be taxed u/s 68 only after AO had verified applicants and held them to be bogus. HC noticed that there was a reasonable suspicion of culpability in instant case.

HC this observed Commissioner had reasons to entertain the belief that this was or could be a case of money laundering which went unnoticed because the assessing officer did not hold requisite investigation except for calling for the records. Thus the CIT was justified in treating the assessment order erroneous and prejudicial to the interest of the revenue.

LD/65/04

Prin. Commissioner of Income Tax
Vs.
Nilkanth Concast P. Ltd.
13th May 2016 (DEL)

Sec. 142(2C): Extension of time to furnish special audit report prescribed u/s 142(2A). Sec. 153A: Assessment in case of search or requisition.

Assessment u/s 153A held as barred by limitation; AO's extension of time limit for furnishing of audit report u/s 142(2C) upon request made by nominated auditor for AY 2005-06 quashed; Auditor nominated by Commissioner cannot be said to be an agent of assessee.

A special audit u/s 142(2A) was ordered in case of assessment in case of assessee Nilkanth Concast Pvt Ltd. At the request of Chartered Accountant nominated by Commissioner, the AO extended the due date for furnishing the audit report and the assessment order for AY 2005-06 was passed by AO on 03/08/2007 after report was submitted. The assessee contended that the order u/s 153A was barred by limitation since as the provisions of sec 142(2A) for AY 2005-06, there was no power with to AO to suo motu extend the date for filing the special audit report u/s 142(2A). ITAT ruled in favour of assessee holding that the assessment was barred by limitation u/s 153(1B). ITAT noted that such suo-moto powers were granted by statute to the AO only from AY 2008-09 prospectively.

Aggrieved Revenue then filed an appeal before Delhi HC.

HC examined whether ITAT exceeded its jurisdiction in examining the question that *"whether the AO was justified in extending the time for the auditor nominated under Section 142 (2A) to submit the audit report".* HC held that since the said question was incidental to the main question urged regarding the assessment being barred by limitation, it has to be necessarily examined not only by the CIT(A) but consequently by the ITAT as well. Reliance was placed on SC ruling in *National Thermal Power* [(1998) 229 ITR 383] wherein it was held that the powers of ITAT are wide enough to even consider a point which may not have been urged before CIT(A) as long as said question requires to be examined in the interest of justice.

HC observed that the power to *suo moto* extend the time limit for furnishing the special audit report by the AO was introduced after amendment by Finance Act, 2008. Further, such amendment was prospective in nature. Reliance was placed upon decision in case of *CIT v. Bishan Saroop Ram Kishan Agro Pvt. Ltd.*

Further, HC rejected Revenue's contention that the request made to AO by the nominated auditor should have been considered to be a request made by assessee itself. HC observed that *"In terms of Section 142(2A), special audit is conducted under an order passed by the AO, by an accountant as defined in Explanation below Section 288(2) of the Act who is nominated either by the Commissioner and such nominated auditor is permitted to furnish an audit report in the prescribed form. When the said provision is read with Explanation below Section 288(2) of the Act, it is apparent that the said nominated auditor is not expected to be in a relationship of an agent of the Assessee or in any other capacity except as a nominee of the Commissioner. It is perhaps for this reason the proviso to sub-Section 2C of Section 142 specifically states that the extension of time for submitting the audit report can be made by the AO "on an application made in this behalf by the Assessee".* If the legislative intent was to permit the application to be made by the auditor nominated by the commissioner it would have been expressly provided in the proviso to sec 142(2C). HC remarked that if the submissions of learned counsel for the Revenue were to be accepted, then it would mean that the application can be made not only by the Assessee but by a Chartered Accountant of the Assessee nominated by the Commissioner in terms of Section 142 (2A) of the Act.

HC thus dismissed Revenue's appeal.

LD/65/05

S. T. Microelectronics P. Ltd.

Vs.

Dy. Commissioner of Income Tax, Kolkata

18th May 2016 (DEL)

Sec 144C: Reference to dispute resolution panel

Quashes assessment u/s 143(3) read with Sec 144C for AY 2009-10, presumes that order was not passed within the prescribed time-limit as Revenue could not prove service of final assessment order u/s 144C on assessee.

The assessee, ST Microelectronics Pvt. Ltd, is engaged in the business of development of integrated circuit design, Computer Aided Design tools and computer software. The assessee shifted to a new address and the new address was updated in the PAN database which was duly recorded. All communications were thereafter received by assessee from the Respondents at the new address. The assessee listed out all the communications received by it at the new address beginning with a notice dated 31st August, 2010 u/s. 143(2) for AY 2009-10 and ending with a notice dated 22nd April, 2014 issued to it u/s. 221. During the proceedings for AY 2009-10, the Assessing Officer passed draft assessment order u/s 144C with addition by TPO and by making further addition on account of training expenses which was received by assessee on 22nd March, 2013. The assessee did not receive final assessment order nor did it receive the penalty notice u/s 221(1) and Sec.

271(1)(c) issued by DCIT. It was only in response to the show cause notice received that the final orders were provided to assessee. The Revenue could not provide the proof of dispatch when asked for the same. The assessee contended that final assessment order was not passed on the date mentioned therein and was probably antedated in order to avoid the expiry of the period of limitation as stipulated u/s 144(C).

HC noted *"The point involved in this case concerns the passing of the final assessment order by the AO and whether, in fact, it was done within the time period stipulated under Section 144(C)(4) of the Act read with Section 144(C)(3) of the Act."* HC further noted that assessee's specific case was that the final assessment order was not passed on the date mentioned therein, i.e., 22nd April, 2014 and was probably antedated in order to avoid the expiry of the period of limitation as stipulated under Section 144(C)(4) r/w sec. 144(C)(3).

HC held that *"entire assessment order contained the date only in one place and that date was written by hand and the notice issued to the Petitioner on the same date u/s. 274 had the date typed. In the circumstances it was absolutely essential for the Respondents to have made the effort of demonstrating that the final assessment order was in fact passed on 22nd April, 2013. However, the Respondents have failed to do so and therefore strengthen the doubts as to whether, in fact, the final assessment order was passed on that date."*

HC acknowledged that when the assessee sought to inspect the file to see whether there was any entry in the dispatch register, he was not allowed such inspection and later came to conclusion that there was no such dispatch register available which would have shown the date of dispatch of the final assessment order and proof of service of such assessment order.

HC relied on the case of *M. M. Rubber and Co* and held that *"...it was incumbent on the Department to demonstrate that the AO who passed the assessment order ceased to have any control over such order and that it left his hand soon after it was passed. The Department having failed to do so, a presumption has to be drawn that the final assessment order was not passed within the time period specified under Section 144(C) (4) read with Section 144(C)(3) of the Act."*

Thus, the HC quashed the assessment order and the penalty order u/s 271(1)(c) and Sec. 221(1).

LD/65/06

S. S. Jyothi Prakash

Vs.

The Addl. Commissioner of Income Tax

7th June 2016 (BLR)

Section 69: Unexplained Investments

Only payment of additional stamp duty on basis of the valuation made by the valuer of the stamp Act authority, cannot be said to be a valid ground to initiate the proceedings u/s 69 of the Income Tax Act.

The assessee is engaged in the transport business and running his proprietary concern namely "Shri. Shivalinga Transport"at Shimoga. He was also receiving interest and remuneration in capacity of partners. He filed a return of income for the AY 2006-07, declaring his total income at ₹18.11 Lakhs. In the course of regular assessment proceedings, an addition of ₹51.69 lakhs was made u/s 69 of the Act as unexplained investment in a residential house at Shimoga. The assessee had purchased a residential house for a consideration of ₹66.56 lakhs which included the stamp duty. The value of the property by the AO was taken at ₹90.51 lakhs as against actual consideration reflected in the sale deed at ₹60.07 lakhs. After document was presented for registration, the objection was raised by the stamp department for the deficit stamp duty, which was paid by the assessee. The matter was then referred to the valuer for the purpose of valuation and consequently the difference of ₹51.69 lakhs was added by applying the provisions of Section 69 of the Act.

The CIT(A) confirmed the order of the AO. Further, the ITAT held that the impugned property was already valued by the Departmental valuer, approved valuer of the assessee and also District Registrar/Appellate Authority for the stamp duty purpose. ITAT dismissed the appeal and upheld the valuation decided by the District Registrar, and directed the AO to re-compute the capital gain on the basis of such valuation.

Aggrieved assessee approached Karnataka HC.

HC analysed the provisions of section 69 and relied upon rulings in case of *CIT vs. Puneet Sabharwal* [(2011) 338 ITR 485] and *CIT vs. Sadhna Gupta* [(2013) 352 ITR 595]. HC observed that in the case of unexplained investment, the primary burden to prove the understatement is on the Revenue and only once such burden is discharged, it would be permissible to rely upon the valuation given by the District Valuation Officer.

HC observed that there was no evidence to conclude that the assessee had paid extra consideration over and above what was stated in the sale deed. HC stated that unless and until there is some other evidence to indicate that extra consideration had flowed in the transaction of purchase of property, the report of DVO cannot form basis of any addition on the part of the revenue.

Ruling in favour of assessee, HC held that the payment of additional stamp duty may be on the basis of the valuation of the valuer of the stamp Act authority, but the same *ipso facto* cannot be said to be a valid ground to initiate the proceedings under Section 69 of the Act or to invoke power u/s 69 on the premise that additional consideration was paid or received".

LD/65/07

R. K. P. Company
Vs.
Income Tax Officer
24th June, 2016 (Raipur)

Section 40: Amounts not deductible

Rule of resolving ambiguity in favour of assessee did not apply where the interpretation in favour of assessee would have to treat the provisions unconstitutional; Allows Retrospective benefit of second proviso to Sec 40(a)(ia) inserted vide Finance Act, 2012

During the course of the assessment proceedings for AY 2010-11, the Assessing Officer disallowed a payment made to NBFCs on account of interest charges without deduction of tax at source, u/s. 40(a)(ia). On appeal, assessee relied upon Delhi High Court's judgment in the case of *'CIT Vs Ansal Landmark Townships Pvt Ltd'* [(2015) 377 ITR 635 (Del)], but CIT(A) upheld the assessing Officer's order. Aggrieved, assessee filed an appeal before Raipur ITAT.

The Revenue contended that that even if insertion of second proviso to Section 40(a)(ia) could be construed as retrospective in effect, the corresponding rule in the Income Tax Rules 1962 was not, and had not been held to be, retrospective, and the second proviso to Section 40(a)(ia) could not, therefore, be give retrospective effect; and, that there was no decision on this issue by jurisdictional High Court and, as such, the stand of the Assessing Officer could not be faulted.

ITAT held that the rule of resolving ambiguity in favour of assessee did not apply where the interpretation in favour of assessee would have to treat the provisions unconstitutional, as held in the matter of *State of M. P. vs. Dadabhoy's New Chirmiry Ponri Hill Colliery Co. Ltd.* [AIR 1972 (SC) 614]. Thus, the view expressed by Delhi High Court in the case of Ansal Landmark *(supra)*, which was in favour of assessee, was required to be followed.

On the issue of second proviso to Section 40(a)(ia)being held to be retrospective, without corresponding enabling provision in the rules being held to be retrospective, ITAT commented that the said argument was *'hyper technical and too pedantican approach'.* ITAT further noted that the second proviso to Section 40(a)(ia) was held to be retrospective in the context of finding solution to the problem to the taxpayer, and the matter was set aside to the file of the Assessing Officer with certain directions about factual verifications on the recipient having included the same in the receipts based on which taxable income was computed, and the income having been offered to tax. ITAT noted that the decision was not on the retrospectivity of the proviso alone, it was also on deletion of disallowance in the event of the recipient having taken into account these receipts in the computation of income, and further held that *"...the judge made law is as binding on the authorities below as is the legislated statue. The hyper technical stand of the Departmental Representatives, therefore, does not merit our approval"*

ITAT held that a High Court being a non-jurisdictional High Court did not alter the position as laid down by Jurisdiction High Court i.e. Bombay High Court in the matter of *CIT vs. Godavari Devi Saraf* ([1978) 113 ITR 589 (Bom)] and as analysed by coordinate bench in the case of *ACIT Vs Aurangabad Holiday Resorts Pvt. Ltd.* [(2009)118 ITD 1 (Pune)].

Thus, ITAT remitted matter to the file of the Assessing Officer for limited verification on the aspect as to whether recipient of payment had included the same in his computation of business income offered to tax, and, if found to be so, ITAT directed deletion of the disallowance in question.

LD/65/08

Pr. Commissioner of Income Tax
Vs.
Sun Pharmaceutical Industries Ltd
1st March, 2016 (AHD)

Legal Update

Section 115JA: Deemed income relating to certain companies.

Lease Equalisation reserve is not in the nature of reserve and thus the same amount will not be added while computing the book profit u/s 115JA; lease equalisation charge was not in the nature of a reserve, in as much as, the amount of lease equalisation charge over a period of lease was equal to the difference between the quantum of principal recovered and the residual value.

Assessee, Sun Pharmaceutical Industries Ltd, filed its return for AY 2000-01 declaring its income u/s 115JA. Assessment was framed u/s 143(3) and income reported by assessee stood enhanced. AO made addition on account of lease equalisation charges while computing book profits for Sec. 115JA invoking explanation to Sec. 115JA(2). On appeal, CIT(A) had dismissed assessee's appeal. However, on further appeal ITAT relying upon Delhi HC ruling in *GE Capital Transportation Finance Services Ltd.* [113 ITD 22] and Madras HC ruling in TVS Finance & Services Limited allowed the appeal. Aggrieved Revenue filed appeal before Gujarat HC.

Assessee contended before the High Court that manner of computation of book profits under normal provisions and under MAT provisions are different and while computing book profits under normal provisions, assessee always have an option whether to make a claim or not. Assessee contended that provisions of Sec. 115JA are similar to that of Sec. 115JB and lease equalisation charge did not fall under clauses (a) to (g) of Sec. 115JA, therefore, question of adding it back did not arise.

Revenue countered that when assessee had added lease equalisation charges under the normal provisions, it could not be given a different treatment under MAT provisions. It was submitted that lease equalisation charge was nothing but a 'Reserve', therefore, explanation to Sec. 115JA(2), would get attracted. Revenue in support of its contentions relied upon Karnataka HC ruling in *CIT and Anr vs. Weizmann Homes Ltd.* Gujarat High court referred Madras HC ruling in *TVS Finance and Services Limited vs. JCIT* [2009 (318) ITR 435], wherein it was held that the lease equalisation charge was not in the nature of a reserve, in as much as, the amount of lease equalisation charge over a period of lease was equal to the difference between the quantum of principal recovered and the residual value.

Gujarat HC also referred *CIT vs. Virtual Soft Systems Limited* [2012 (341) ITR 593] and observed that lease equalisation charge was a method of recalibrating the depreciation claimed by the assessee in a given accounting period. HC further observed that, over the lease term, the debits and credits in the P & L account would square off with each other, thus that the same stood neither in the form of a reserve nor a deduction.

Thus, Gujarat HC held that lease equalisation charge would not fall within the ambit of clause (b) of the Explanation to Sec. 115JA(2) and dismissed Revenue's appeal.

Service Tax

LD/65/09

General Manager-Food Corporation of India
vs.
Union of India
(Gujarat)

When no amount is payable by service recipient to service provider on account of deficiency in provision of service, the Revenue cannot initiate garnishee proceedings under Section 87 on such service recipient.

Food Corporation of India (FCI) engaged various agencies for handling transportation of food cargo and other related activities. Though said activities were exempt from payment of service tax, one of such agencies, Kailash Enterprises recovered service tax of ₹5.37 crores from FCI. However, Kailash Enterprises did not deposit this service tax amount in the government's treasury. Accordingly, the service tax department initiated proceedings against Kailash Enterprises for recovery of service tax of ₹5.37 crores under Section 73A of Finance Act, 1994. In the adjudication order, the commissioner held that even though the services in question were exempt from service tax, Kailash Enterprises was required to deposit service tax collected by it from FCI in terms of provisions Section 73A.

Between FCI and Kailash Enterprise there were multiple disputes of deficiency in service provided by the latter. On finding that service tax paid by FCI was retained by Kailash Enterprises with itself and also, as a result of various issues of non/un-satisfactory performance of some contractual obligations, FCI utilised the performance bank guarantees issued by Kailash Enterprise to FCI and recovered a sum of ₹3.52 crores. Also, civil suit

had been instituted by FCI for further recoveries from Kailash Enterprise. In this background, the Revenue sought to recover from FCI the said amount of 3.52 Crores towards demand of service tax by invoking provisions of Section 87 of Finance Act, 1994. Therefore, FCI filed petition challenging Revenue's recovery notices issued to it.

Hon'ble Gujarat HC observed that the enforcement of bank guarantee by FCI was relatable not only to non-payment of service tax by Kailash Enterprises to government's treasury, (which was recovered from FCI) but also as a result of failure to perform contractual obligations. The recovery of ₹3.52 crores had an element of deficiency in services by Kailash Enterprises and was not restricted only to non-payment of service tax. High Court held that, Section 87 of Finance Act, 1994, provides a mechanism for initiation of garnishee proceedings by central government to recover unpaid dues of a person liable to pay the sum to the Government from any other person or requiring any other person from whom money is due or may become due to such defaulting person. The Court noted that in present case since no amount was payable by FCI to Kailash Enterprises on account of deficiency in provision of service, the invocation of section 87 is not justified. Consequently, recovery notices issued by the revenue to FCI were quashed.

LD/65/10

Suresh Kumar Bansal

vs

UOI

(Delhi)

The service tax on services provided by preferential location u/s 65(105)(zzzzu) are constitutionally valid. However, in the absence of any machinery provisions relating to quantification of service portion in Act or Rules made thereunder, service tax cannot be levied on services provided in relation to construction of complex u/s 65(105)(zzzh) to the extent Explanation under section 65(105)(zzzh) seeks to include composite contracts for purchase of units in a complex within the scope of taxable service.

The Petitioners entered into separate agreements with a builder to buy flats in a multi-storey group housing project. The builder, in addition to the consideration for the flats, also recovered service tax from the Petitioners, under two categories namely (i) services in relation to construction of complex under Section 65 (105)(zzzh) and (ii) services in relation to preferential location under section 65(105)(zzzzu). Aggrieved by the levy of service tax, the Petitioner challenged levy of service tax on both these services.

The Petitioners challenged constitutional validity of taxing entries and levy of service tax on these services on the following grounds:

- The Parliament does not have the power to levy tax on immovable property; thus, the levy of service tax on agreements for purchase of flats was beyond the legislative competence of the Parliament.
- The power of Parliament to levy tax would be limited to only on the service component after excluding the value of goods as well as the value of land from such contracts. Since, neither the Act nor the rules made thereunder provide any machinery provisions for ascertaining the service component of such composite contracts, the levy of service tax must fail.
- Section 65(105)(zzzh), read with Section 66 of the Act did not restrict the levy of service tax only to the service element of 'composite contracts'. However, the said provisions could be applied only for imposition of service tax on service contracts simplicitor and therefore their application to composite contracts would render the said provisions unconstitutional. For this proposition, the Petitioner relied upon decision of Hon'ble Supreme Court in the case of *Larsen & Toubro Ltd. v. State of Karnataka* (SC).
- There is no service element in preferential location charges which are levied by a builder and the same relates only to the location of the immovable property and, hence are not exigible to service tax.
- The services covered under Section 65(105)(zzzh) and 65(105)(zzzzu) are now sought to be taxed by virtue of Section 66E(b), read with Section 65B(22) and Section 65B(44) of the Act. The challenge laid by the Petitioners to the provisions of Section 65(105)(zzzh) and 65(105)(zzzzu) of the Act would also be equally valid for the taxing provisions introduced with effect from 1st July, 2012.
- Only the services rendered after execution of the flat buyer's agreement could be subjected to tax as prior to the said date, in absence of the service recipient, the service in relation to

construction of a complex, if any, is rendered by the builder to itself and cannot be subjected to service tax.

The Department contended that, concerned legislative amendment introduced by the Finance Act, 2010, namely, insertion of Explanation to Section 65(105)(zzzh) and clause (zzzzu), were valid and enforceable on following grounds:

- Decision of Hon'ble Bombay High Court in the case of *Maharashtra Chamber of Housing Industry v. Union of India* and decision of Karnataka High Court in the case of *Confederation of Real Estate Developers' Association of India v. Union of India* were relied upon in which the aforesaid entries u/s 65(105) were held valid and enforceable.
- The development of a project results in the substantial value addition on bare land and includes various services such as consulting services, engineering services, management services, architectural services etc. These services are subsumed in the taxable service as contemplated under Section 65(105)(zzzh) of the Act.
- In case of construction services, as the gross amount charged to buyers include value of land and construction material, only 25% of the Base Selling Price (BSP) charged by a builder from the ultimate consumer is subjected to levy of service tax. However in case of preferential location charges collected separately, the entire amount charged by a developer is for value addition and, therefore, the gross amount charged for such services is chargeable to service tax under Section 66, read with Section 65(105)(zzzzu) of the Act

The Hon'ble High court noted that the Department did not seek to levy tax for taxable service under Section 65(105)(zzzza) of the Act (which was introduced by virtue of the Finance Act, 2007) as according to them builders engaged in constructing complexes and selling units are liable to pay service tax on the transaction with the purchaser only with effect from 1st July, 2010 by virtue of the impugned Explanation to Section 65(105)(zzzh) of the Act. Therefore, although such composite contracts for development of complex and sale of units therein would fall within the scope of works contract as held by the Supreme Court in Larsen and Toubro Ltd.(supra), Hon'ble Court did not examine whether services involved in construction of complexes is exigible to service tax as services in relation to execution of a works contract falling within the scope of Section 65(105)(zzzza) of the Act or under Section 65B(44) after the amendments brought about in the Act by virtue of Finance Act, 2012 as the said controversy was outside the scope of these petitions.

Interpreting section 65(105)(zzzh), the High court held that, the grant of completion certificate implies that the project is complete and at that stage all services and goods used for construction are subsumed in the immovable property; thus at that stage sale of a complex or a part thereof to a buyer constitutes an outright sale of immovable property, which admittedly is not chargeable to service tax.

The High court also clarified that, in cases where construction is carried on by a builder on behalf of or for another person it can hardly be disputed that the builder renders a host of services which are involved in construction. However, the controversy as to whether any services are rendered arises only in cases where the builder does not carry on the development activities on behalf of the purchaser but on his own but with an intention to sell the developed units; he enters into agreements with prospective buyers to sell fully developed units as and when such buyers are found. He may do so before commencing any construction/development activity or during the course of developing the complex.

The Court further explained that, construction of a complex essentially has three broad components, namely, (i) land on which the complex is constructed; (ii) goods which are used in construction; and (iii) various activities which are undertaken by the builder directly or through other contractors. The object of taxing services in relation to construction of complex is essentially to tax the third component and the resultant value created by such activities.

The Court held that when buyer pays the agreed consideration to the builder, at the time of booking and construction linked payments, although title to the unit (the immovable property) does not pass to the prospective buyer at the stage of booking, it can hardly be disputed that the buyer acquires an economic stake in the project and in one sense,

the services subsumed in construction (i.e. services in relation to a construction of the complex) are rendered for the benefit of the buyer. The court however explicitly mentioned that, but for the legal fiction introduced by the Explanation, such value addition would be outside the scope of services because in strict sense, no services, as commonly understood, are rendered in a contract to sell immovable property.

As to validity of explanation, the court held that, the Legislature is competent to enact a deeming provision for the purpose of assuming the existence of a fact which does not even exist. The use of a legal fiction is a well known legislative device to assume a state of facts (or a position in law) for the limited purpose for which the legal fiction enacted, that does not exist. The Parliament is fully competent to enact such legal fiction. In the present case the Parliament has done precisely that; it has enacted a legal fiction, where a set of activities carried on by a builder for himself are deemed to be that on behalf of the buyer.

Consequently the High Court held that, imposition of service tax in relation to a transaction between a developer of a complex and a prospective buyer does not constitute impingement on the legislative field reserved for the States under Entry-49 of List-II of the Seventh Schedule to the Constitution of India, as the imposition of service tax by virtue of the impugned Explanation is not a levy on immovable property, but the clear object of imposing the levy of service tax in relation to a construction of a complex is essentially to tax the aspect of services involved in construction of a complex the benefit of which is available to a prospective buyer who enters into an arrangement.

As regards measure of tax, the Hon'ble high court stated that, the measure of tax must have a nexus with the object of tax and it would be impermissible to expand the measure of service tax to include elements such as the value of goods because that would result in extending the levy of service tax beyond its object and would impinge on the legislative fields reserved for the State Legislatures. As regards, the present case, the Court held that, undisputedly, the contract between a buyer and a builder/promoter/developer in development and sale of a complex is a composite one. The arrangement between the buyer and the developer is not for procurement of services simplicitor. Thus, while the legislative competence of the Parliament to tax the element of service involved cannot be disputed but the levy itself would fail, if it does not provide for a mechanism to ascertain the value of the services component which is the subject of the levy. Clearly service tax cannot be levied on the value of undivided share of land acquired by a buyer of a dwelling unit or on the value of goods which are incorporated in the project by a developer. Referring to section 67 of the Finance Act, 1994 and Service Tax (Determination of Value) Rules 2006, The court held that, in this case, there is no machinery provision for ascertaining the service element involved in the composite contract, as neither the Act nor rules provide for ascertaining the value of services involved in relation to construction of a complex. As regards, Rule 2A of Valuation Rules, the Court clarified that, whilst the said rule provides for mechanism to ascertain the value of services in a composite works contract involving services and goods, the said Rule does not cater to determination of value of services in case of a composite contract which also involves sale of land. Therefore relying upon Larsen & Toubro Ltd. (supra) and *CIT v. B.C Srinivasa Shetty* [1981] 2 SCC 460, the Court held that, in absence of machinery provisions to exclude non-service elements from a composite contract, the levy on services referred to in Section 65(105)(zzzh) could only be imposed on contracts of service simplicitor-that is, contracts where the builder has agreed to perform the services of constructing a complex for the buyer-and would not take within its ambit composite works contract which also entail, transfer of property in goods as well as immovable property. The Department's contention that, an assessee is entitled to abatement to the extent of 75% and only 25% of the gross amount charged by a builder from a flat buyer is charged to service tax, was not appreciated by the High Court stating that, circulars or other instructions could not provide the machinery provisions for levy of tax. The charging provisions as well as the machinery for its computation must be provided in the Statute or the Rules framed under the Statute. Therefore, the abatement to the extent of 75% by a notification or a circular cannot substitute the lack of statutory machinery provisions to ascertain the value of services involved in a composite contract. Consequently, the High Court set aside the impugned Explanation to the extent that it seeks to

include composite contracts for purchase of units in a complex within the scope of taxable service.

As regards, challenge to the levy of service tax on taxable services as defined under Section 65(105)(zzzzu), the Hon'ble High Court did not accept the contention of the Petitioners that, there is no element of service involved in the preferential location charges levied by a builder and that such charges relate solely to the location of land. The Court held that, preferential location charges are charged by the builder based on the preferences of its customers. They are in one sense a measure of additional value that a customer derives from acquiring a particular unit. Such charges may be attributable to the preferences of a customer in relation to the directions in which a flat is constructed; the floor on which it is located; the views from the unit; accessibility to other facilities provide in the complex etc. Since, service tax is a tax on value addition and charges for preferential location in one sense embody the value of the satisfaction derived by a customer from certain additional attributes of the property developed. Such charges cannot be traced directly to the value of any goods or value of land but are as a result of the development of the complex as a whole. Therefore, the High Court rejected the Petitioner's challenge to levy of insertion of section 65(105)(zzzzu).

LD/65/11

Qatar Airways

Vs.

Commissioner of Service Tax

12th May 2016 (MUM)

Services received from foreign based Computerised Reservation System (CRS) regarding ticket booking not taxable as "online database access or retrieval services" under reverse charge mechanism.

The assessee is an international airline having headquarters at Dubai and Doha respectively. The assessee has branch offices located in India and operate airlines and have registration for discharge of service tax liability under the category of "Transportation of Passengers", "Cargo Handling Services" and "Transportation of Goods by Air".

Assessee-appellant offers sale of tickets and make reservation of seats on scheduled flights through 2 different channels (1) through branch offices located in different countries, and (2) through Global Distribution System (GDS) platform provided by other companies operated facilities for "Computerised Reservation System" (CRS) also located outside India viz. Galileo, USA, Abacus, Singapore, Amadeus, Spain and Sabre. This CRS companies facilitated the sale of products or services as to seat inventory in a specific flight by using an online computer system, which are used by Travel Agents. Assessees' HOs had entered into an agreement with the CRS companies for making payment to them on booking of tickets. These CRS companies raise invoices on assessee for the tickets booked, based upon such agreement and bills are settled by the HO of assessee.

Revenue concluded that assessees' branch offices in India are liable to discharge service tax liability under the category of "online information and data base access or retrieval service" for the payments made in respect of tickets issued by various transport agents for individuals based in India. Revenue took a stand that the branch offices are permanent establishments and they remitted the charges collected for tickets from transport agents, to their HOs in Dubai and Doha. Revenue held that payments to CRS companies by HOs were taxable under reverse charge mechanism in the hands of the branch offices.

Before CESTAT, assessee argued that the service provided by CRS companies cannot be qualified as import of services and that the branch office does not "access or receive" data of CRS companies. CRS companies provide online information to the passengers / transport agents about availability of the flight or seats for travelling at the date chosen thereby. The HOs settle the bills raised by such CRS companies for the issuance of tickets to the passengers. Assessee argued that Sec 66A would not apply in this case as branch offices were not making any payment to CRS companies.

Revenue argued that the instant services were covered under the category of "on-line data base access or retrieval service" which was brought into service tax net w.e.f. July 16, 2001 as per Sec 65(75) r/w Sec 65(105)(zh) of the Finance Act. Revenue submitted that the beneficiary of services were the Indian offices and that the tickets are for the passengers embarking in India for international journeys and therefore, the users of services provided by CRS companies would be the assessees and not their foreign based HOs.

CESTAT observed that assessees had correctly relied on CESTAT judgment in British Airways. In this case, it was held that assessee- branch has to

be treated as a separate person from HO. Since the HO received services from CRS companies located outside India, and the same were consumed outside India, Indian branch could not be held as recipient of services so as to make it liable under reverse charge mechanism u/s 66A.

CESTAT thus ruled in favour of assessee.

LD/65/12

Mega Cabs Pvt. Ltd.
Vs.
Union of India
3rd June, 2016 (DEL)

Rule 5A(2) as amended in terms of Notification No. 23/2014- Service Tax dated 05/12/2014, to the extent that it authorises the officers of the Service Tax Department, the audit party deputed by a Commissioner or the CAG to seek production of the documents mentioned therein on demand was ultra vires the Finance Act.

The assessee, Mega Cabs Pvt Ltd, is in the business of running a radio taxi service and is also engaged in selling advertisement space. The assessee got registered with the Service Tax Department in Delhi on 27th December 2004 and since then it is stated to be regularly been paying service tax and also filing its service tax returns. By a Notification dated 28th December 2007, the Central Government in the Ministry of Finance, Department of Revenue inserted Rule 5A in the ST Rules. Consequent thereto, the CBEC also issued an instruction on 1st January 2008 explaining the scope of the powers of the various officers of the Department to carry out audit or scrutiny of the records of service tax payers.

Both the Notification dated 28th December 2007 inserting Rule 5A as well as the CBEC Instruction dated 1st January 2008 were challenged before this Court in a writ petition by Travelite (India). The challenge in the said petition was also to a letter issued by the Commissioner of Service Tax dated 7th November 2012 seeking the records of the said Petitioner Travelite (India) for the years 2007-08 till 2011-12 to be made available for scrutiny by an audit party. In *Travelite (India) v. Union of India*, a Division Bench of this Court struck down Rule 5A(2) as being ultra vires Section 72A read with Section 94(2) of the FA. The consequent Circular of CBEC Instruction dated 1st January 2008 was also struck down. It was clarified that Service Tax Audit Manual, 2011 was merely an instrument of instructions for the Service Tax authorities and has no statutory force.

Meanwhile on 9th July 2013, the Additional Commissioner (Audit) issued a letter with 6 annexures to the Petitioner seeking information for conducting audit of the records of the Petitioner under Rule 5A of the ST Rules, 1994 as it then stood for the years 2008-09 to 2012-13. The Petitioner in a reply sought deferment of the audit in view of the challenge to Rule 5A of the ST Rules as it then stood in the petition filed before this Court by Travelite (India). After the insertion of Section 94 (2) (k) of the FA, the Assistant Commissioner of Service Tax Department issued a letter dated 25th September 2014 stating that the Department has deputed its officers to conduct the verification/scrutiny of the records of the Petitioner. By a reply dated 8th October 2014, the Petitioner referred to the decision in Travelite (India) and took the stand that the Department had no power to conduct an audit.

The Delhi HC clarified that while decision co-ordinate bench in Travelite (India) had been stayed by SC the present petition dealt with the question of constitutional validity of the amended Rules and which was independent of the decision in Travelite (India).

HC asserted *"there is a distinction between auditing the accounts of an Assessee and verifying the records of an Assessee. Audit is a special function which has to be carried out by duly qualified persons like a Cost Accountant or a CA. It cannot possibly be undertaken by any officer of the Service Tax Department".*

HC held that Rule 5A(2) exceeds the scope of the provisions under the FA. This is the result whether Rule 5A(2) is tested vis-a-vis Sec 72A of the FA which pertained to special audit or Sec 72 which pertains to assessment or Sec 73 which pertained to adjudication or even Sec 82 which relates to searches. HC further held *"...under the garb of the rule making power, the Central Government cannot arrogate to itself powers which were not contemplated to be given it by the Parliament when it enacted the FA. This is an instance of the Executive using the rule making power to give itself powers which are far in excess of what was delegated to it by the Parliament".*

HC further held that verification of the records can take place by the officers of the Department provided such officers are authorised to undertake an assessment of a return or of adjudication for the purposes of Sec 73 of the FA and it is not any and every officer of the Department who could be entrusted with the power to demand production of

records of an Assessee. Therefore, the Court does not agree with the submission that the expression 'verify' is wide enough to permit the audit of the accounts of the Assessee by any officer of the Service Tax Department.

HC quashed CBEC Circular No. 995/2/2015-CX prescribing detailed norms to be followed by Audit Commissioners, states that Circular did not have any statutory backing under Finance Act and cannot be relied to legally justify audit undertaken by Service Tax Department Officers. HC further noted that Circular or Manual could not travel beyond scope of the statute itself and striked down Circular No. 181/7/2014-ST which stated that legal backing for Service Tax Department Officers to conduct audit was available in terms of Sec 92(4)(k).

Thus, HC declared that Rule 5A(2) as amended in terms of Notification No. 23/2014 - Service Tax dated 5th December 2014 of the Central Government, to the extent that it authorised the officers of the Service Tax Department, the audit party deputed by a Commissioner or the CAG to seek production of the documents mentioned therein on demand was ultra vires the FA and, therefore, striked it down to that extent.

Excise

LD/65/13

CCE
Vs.
M/s. EID Parry (India) Ltd
20th June, 2016 (MAD)

Rule 6 of CCR 2004: Obligation of manufacturer of dutiable and exempted goods and provider of taxable and exempted services.

Madras High Court sets aside the order of CESTAT and remands the matter to Adjudicating Authority to consider the issue afresh; Earlier, CESTAT had allowed CENVAT credit on entire Captive Power Plant without examining eligibility of individual components used as 'inputs' or 'capital goods'.

The assessee, M/s. EID Parry, is manufacturer of sugar and molasses falling under Chapter 17 of the First Schedule to the Central Excise Tariff Act, 1985. The assessee had installed a captive power plant or co-generation plant in their sugar factory located at Kurumbur, Aranthangi Taluka, Pudukottai District. It availed credit of duty paid on the components and accessories used for setting up the cogeneration plant in terms of the CENVAT Credit Rules 2004 (CCR). Subsequently, show cause notice was served on the assessee stating that it have availed Cenvat credit of the duty paid on the Machineries, Components and other accessories used in installing the Captive Power Plant and 3 Captive Power Plant is a Turnkey project. The Revenue raised the demand contending that Captive Power Plant was a Turnkey project, and therefore neither excisable goods nor goods confirming to the description of any machinery which falls in the Chapters mentioned in Rule 2(a)(A)(i) of CCR.

The Assessee replied that the various component machineries which are brought into the factory were by themselves capital goods as they individually fall under the chapter heading specified in the definition of capital goods and that the subject goods are used within the factory of production and they had not contravened Rule 6(1) and 6(4) of CCR 2004. Assessee contended that the Rule 6 of CCR 2004 is not at all applicable in the present scenario and that invocation of Rule 6(4) of CCR 2004 was not correct as the captive power plant was not used exclusively in the manufacture of electricity but only within the factory in the manufacture of sugar and molasses. However, adjudicating authority confirmed the demand towards wrong credit taken on component parts used in installing Captive Power Plant alongwith equivalent penalty. Aggrieved by the order, assessee preferred an appeal before CESTAT where assessee's appeal was allowed by relying on coordinate bench ruling in *Tata Engineering and Locomotive Co. Ltd. vs. CCE* [2005 (191) E.L.T. 209 (Tri. - Mumbai)].

Aggrieved, Revenue preferred an appeal before Madras High Court. However, assessee submitted that in the event of allowing the appeal, the matter may be remanded to the adjudicating authority, to consider afresh.

Thus, the Madras High Court set aside the order of CESTAT and remanded the matter to Adjudicating Authority to consider the issue afresh. Thus, the High Court ruled in favour of the Revenue while allowing the appeal.

Customs

LD/65/14

Bhatia Global Trading Ltd.
vs.
Commissioner of Customs (Karnataka)

Assessee's representation requesting for adjustment of duty/tax deposited during investigation/audit proceedings, towards mandatory pre-deposit for maintaining appeal cannot be rejected by revenue authorities summarily, without assigning any cognate reason. Further, after amendment by Finance Act 2014, Tribunal has no power to relax or waive such condition of pre-deposit- The High Court passed strictures on the approach adopted by Commissioner in rejecting assessee's representation.

An appeal was filed by the petitioner before CESTAT against an order confirming demand of ₹8.31 crores. Also, a detention notice was issued to the petitioner so as to restrict the petitioner from selling of any of goods belonging to it which were under control of customs authorities. During the course of audit and investigation, petitioner had made payment of ₹1.49 crores towards duty at various instances. Since, as per provisions of Section 129E of the Customs Act, 1962 (as amended by Finance Act 2014), the petitioner was required to pay mandatory pre-deposit of 7.5% or 10%, as the case may be, for maintenance of appeal before CESTAT, a representation was made by petitioner to the Commissioner of Customs for adjustment of such amount paid by petitioner during investigation proceedings towards the amount of mandatory pre-deposit. Without assigning any reason, the Commissioner rejected petitioner's representation by issuing communication through superintendent which was not even signed by the commissioner. Thus, petitioner's appeal was not entertained by CESTAT and it remained pending. The revenue department contended that the Commissioner has no control over deposits made by the petitioner as these deposits were made at different places subject to different proceedings during investigation and audit before various authorities. The revenue department further submitted that Tribunal itself being competent authority to pass order for such adjustment towards pre-deposit, petitioner's matter shall be relegated to the tribunal itself.

The Revenue's contention of relegating petitioner's case to tribunal for adjustment of sums paid earlier towards pre-deposit was rejected by the Hon'ble HC stating that, Tribunal's powers to relax or waive requirement of mandatory pre-deposit for maintaining appeal have been withdrawn by amendment to Section 129E made by Finance (No.2) Act, 2014.

As regards rejection of petitioner's representation by non-speaking order by the commissioner, the High Court passed strictures on the approach of the Department.

The High Court held that, the representations made by the petitioner assessee before the learned Commissioner of Customs was simple and depended upon the determination of the relevant facts and figures by the Commissioner as to whether any such excess deposit was available with the Department or not and a part of which could be adjusted against the mandatory pre-deposit. This determination of facts required a quasi judicial determination with the application of mind by the respondent Commissioner of Customs to the relevant facts and it required an opportunity of hearing to be given to the assessee before disposing or deciding the representations made by the assessee in this regard. Unfortunately, nothing of this sort appears to have been undertaken by the respondent Commissioner in this case. High Court further held that, the rejection purportedly made on the office files of the learned Commissioner appears to be blithely communicated to the petitioner. These kind of communications display arrogance and non-application of mind by responsible officer of the Department viz., Commissioner who, in fact, was expected to pass appropriate quasi-judicial order after giving an opportunity of hearing to the assessee on the representations made by it, since on the result of that order depended a substantive right of the assessee to maintain his appeal before the CESTAT in terms of S.129 E of the Customs Act.

Recording its displeasure on the tenor of the letter, the High Court also stated that, no public authority or public servant much less a quasi-judicial authority like the Commissioner of Customs can be allowed or permitted to pass these kind of communications or direct their subordinates to communicate such orders in the aforesaid kingly manner. The High Court concluded by saying that there was not only a breach of principles of natural justice but the said communication also smacks of arbitrary act and non-application of mind by the learned Commissioner of Customs.

In the facts and circumstances of the case, and considering that, the reconciliation of the deposits and the extent of pre-deposit required to be made for maintaining the present appeal in question

Legal Update

before the CESTAT, the matter was remanded back to the learned Commissioner to decide the representations of the petitioner once again by a detailed speaking order, after giving him an opportunity of hearing.

High Court also granted stay in respect of operation of detention notice in respect of petitioner's goods under control of officers of customs and directed the Tribunal not to reject the appeal for want of mandatory pre-deposit. It further held that, after verification of assessee's representation, the amount to the extent of pre-deposit required can be adjusted out of such 'spare' or 'extra' amounts already lying deposited with the same Department, irrespective of the different locations of the deposits and subject to pending 'Investigation & Audit', and the Commissioner will issue the requisite Certificate of 'such pre-deposit requirement' having been satisfied by the assessee petitioner. Otherwise, the cogent reasons will have to be recorded by the said respondent Commissioner for not accepting such representations of the petitioner assessee.

LD/65/15

Mr. Fayaj Gulam Godil

Vs.

Union of India

6th June, 2016 (MUM)

Section 2(33) of the Customs Act, 1962: 'prohibited goods'.

Act of smuggling in relation to any goods is covered by section 2(39) of the Customs Act, 1962; Foreign currency cannot be taken out of India unless compliances made with the other law for the time being in force, namely, Foreign Exchange Management Act, 1999, r/w Foreign Exchange Management (Current Account Transaction) Rules, 2000.

The assessee smuggled foreign currency to Hong Kong concealed in their baggage. These persons were deported back from Hong Kong. Upon landing back in India, they were intercepted by the Directorate of Revenue Intelligence (DRI) officials after crossing the green channel on their arrival from Hong Kong. On examination, it was found that the foreign currency was concealed. On search of one of the person's the foreign currency was found. Thus, the statements were recorded, Panchanamas drawn and after the requisite formalities were completed, both confiscation proceedings and criminal prosecution were launched.

Aggrieved, the assessee preferred an appeal before the Bombay High Court.

The High Court held that the act of smuggling in relation to any goods is covered by Section 2(39) of the Customs Act, 1962. The High Court further noted CESTAT's observation that the foreign currency could not have been taken out of India unless compliances were made with the other law for the time being in force, namely, Foreign Exchange Management Act, 1999, r/w Foreign Exchange Management (Current Account Transaction) Rules, 2000. HC further held that once this was the act attributed to these persons, then, it was the discretion of the Adjudicating Authority to allow redemption or to resort to absolute confiscation.

The High Court observed that the definition of 'prohibited goods' given u/s 2(33) of the Act meant *"any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported, have been complied with."* Thus, the acts of assessees were falling within the meaning of Sec 113 since foreign currency was attempted to be improperly exported. Thus, HC concluded that it is at the discretion of authority to either confiscate the goods or allow payment of redemption fine.

High Court rejected assessees' reliance on Division Bench ruling in *Rostam Parvaresh* and held that in Rostam Parvaresh case, the Revisional Authority had failed to consider a specific contention raised by the assessee. Whereas in the instant case, HC observed that all the contentions raised were already been duly noted and considered by the CESTAT.

Thus, the High Court upheld CESTAT ruling wherein it upheld confiscation of property in light of Sec 113 and rejected assessees' appeal. ■