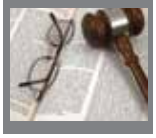
Legal Decisions[1]

DIRECT TAXES



Income Tax

LD/65/30

Girilal and Company
vs.
ITO
8th August, 2016

Section 148: Issue of notice where income has escaped assessment.

Failure of a builder/developer to disclose the exact size and actual assets of a plot before the commencement of new construction, in its return, constitutes sufficient reasons to believe that income chargeable to tax has escaped assessment, for purpose of invoking Explanation 2(c)(iv) of Section 147; Mere disclosure of actual assets of the plot in the valuation report, is not enough for such builder firm to plead that it has made full and true disclosure and therefore there remains no ground for initiating reopening u/s. 148

The assessee partnership firm was engaged in the business of construction of buildings and development of real estate. In the year 2000, the assessee was engaged in developing two housing projects on a plot which was acquired by the assessee originally as a capital asset but portion thereof was converted at different points of time into stock-in-trade. Consequent to filing of return by assessee, the same was taken up for scrutiny and a notice u/s 148 was served on the assessee alleging that assessee's income chargeable to tax for AY 2001-02 had escaped assessment within the meaning of Section 147. Thereafter, an assessment was passed determining the total income after allowing deduction u/s 80-1B (10).

AO gave reason for re-opening assessment that appellant had not correctly disclosed the actual assets of the said plot and hence the appellant was not entitled for deduction u/s. 80(1B) (10). It was noted that the information regarding the actual size of the plot used for the construction was only available in the valuation report and hence the case was covered under Explanation 2(c) (iv) of Section 147. The appellant objected assumption of jurisdiction u/s. 148 for the reason that the appellant had disclosed all the facts fully and truly and ITO was fully aware of the FSI. Aggrieved, assessee preferred a writ petition before the High Court challenging the notice issued u/s. 147. The High Court dismissed the writ petition.

Aggrieved, assessee preferred an appeal before the Supreme Court.

Supreme Court rejected assessee's submission that there was no reason to open the assessment when in the return filed by the appellant, full disclosure of all the relevant facts was made and it was merely a case of change of opinion which was not a valid ground for reopening of the assessment.

The Supreme Court held that the reason for issuing notice under Section 148 of the Income-tax Act was that the assessee had not correctly disclosed the actual assets of the plot and hence, it was not entitled for deduction under Section 80(1B)(10). Supreme Court further held that the Income Tax Authority itself has mentioned in the notice under Section 148 of the Act that such information was available only in the valuation report. Giving the information in this manner shall be of no help to the appellant as the Assessing Officer was not expected to go through the said information available in the valuation report for the purpose of ascertaining the actual construction of the plot.

Thus, the Supreme Court held that the Revenue was right in reopening assessment and the High Court has rightly dismissed the writ petition of the appellant challenging the validity of the notice under Section 148 of the Act.

LD/65/31

CIT
vs.
Hissaria Brothers
22nd August, 2016

Section 271D: Penalty for failure to comply with the provisions of Section 269SS. Section 271E: Penalty for failure to comply with the provisions of Section 269T.

Appeal Barred by Limitation-Penalty does not survive if provisions under Sections 271D & 271E are invoked after period of limitation

The assessee, Hissaria Brothers, was a firm doing business of *kachcha arhatiya* by acting as an agent for its farmer constituents. In its return, the

[1] *Contributed by CA. Sahil Garud, Indirect Taxes Committee, CA. Mandar Telang and ICAI's Editorial Board Secretariat.*
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Legal Update

Assessing Officer found use of money received from sale of crops owned by farmers constituents to be in the nature of deposits and invoked the provisions of Section 269SS as applicable to the amount received by a person as deposit from the depositors and the amount utilised by the farmers as withdrawal from the deposits by way of repayment inviting operation of Section 269T. Finding that such transactions of deposit and repayment were not through the bank, penalty proceedings u/s 271D and 271E were initiated and imposed penalties in each case.

On appeal, CIT (A) cancelled the penalties. The Tribunal as well as High Court held that since all the penalty orders were passed beyond 6 months from the end of the month in which assessments were completed the penalty orders were barred by time.

Aggrieved, the Revenue preferred an appeal before the Supreme Court.

The Supreme Court observed that penalty imposed on the respondent herein was also set aside on the ground that the provisions of Section 271-D and 271-E of the Income-tax Act were invoked after six months of limitation and, therefore, such penalty could not have been imposed. It was further held that, since the outcome of the judgment of the High Court can be sustained on this aspect alone, it is not even necessary to go into other aspects.

Thus, the Supreme Court dismissed the appeal.

LD/65/32

CIT

vs.

Karnataka Planters Coffee Curing Work Pvt Ltd

22nd August, 2016

Merely because fresh assessment proceedings have been carried out by the AO during remand, it would not preclude the Court from judging the validity and correctness of the order of Division Bench of High Court

The assessee, Karnataka Planters Coffee Curing Work Pvt. Ltd., preferred a writ against the revisional order upholding the order of assessment insofar as addition was concerned, which was claimed by Assessee as being legally liable for deduction. The writ was dismissed by the High Court. The HC held that there was no cause for interference in the present proceedings to approve the findings of the excellent investigation carried out by AO.

It was claimed before the AO that crop loans were raised in the names of planters within the family circle hailing from Chennai purportedly owning some estates. The loans raised by them from the bank where the assessee also operated its bank accounts were claimed to be given to the assessee. The investigation further revealed that these crop loan applications were prepared and signed by none other than the top man in the management of the assessee. The crop loans accounts in the bank were also operated by the same person from the assessee.

The Supreme Court noted that both AO and the CIT had recorded findings of fact adverse to assessee which has been upheld by the learned single judge of the High Court. The Division Bench of the High Court in the Writ Appeal thought it appropriate to reverse the said findings on the ground that the 37 persons who had advanced the loan to the Assessee ought to have been given notice. The jurisdiction of the Division Bench in a Writ Appeal is primarily one of adjudication of questions of law.

The Supreme Court further noted that in the face of the clear findings that the loan applications were processed by the Officers of the Assessee and the loan transactions in question of the aforesaid 37 persons were also handled really by the Assessee and further in view of the categorical finding that the loan amounts were not reflected in the returns of the 37 persons in question, the High Court could not have taken the above view and remanded the matter to AO.

Thus, the Supreme Court allowed the appeal and set aside the order of the Division Bench. It was held that merely because fresh assessment proceedings had been carried out in the meantime it would certainly not preclude the Court from judging the validity and correctness of the order of the Division Bench of the High Court.

LD/65/33

Income Tax Officer

vs.

Bhavna N. Patel

Assessee merely a front for executing transaction for sale of a flat-actual beneficial ownership of the flat with the builder-assessee cannot add sale consideration in his return

The assessee, an individual, filed return for the AY 2008-2009. During the assessment proceedings, the AO made addition treating the sale consideration of

the subject property amounting to ₹50,00,000/- as unexplained money u/s.69A. Aggrieved by the order of the AO, the assessee went in appeal before the CIT(A) after calling for remand report, deleted the addition. Aggrieved, Revenue filed appeal before the Tribunal.

The Tribunal noted the findings of the CIT(A) as per which the builder had shown the sale of flat in its books of accounts and also offered profit arising thereon in respect of sale consideration so received by it. Further, the assessee or her husband had not received any other benefit under this arrangement. Therefore, the beneficial ownership of the flat was always with the builder and the assessee was merely a front for executing the arrangement. As per the findings of CIT(A) since the income arising from sale of said flat had already been included in the total income of the builder, the same cannot once again be added in the hands of the assessee.

The Tribunal concurred with the observations and findings of the CIT(A) as per which even though the purchase agreement and sale agreement had been executed by the appellant and her husband, they were nothing but paper transactions and even though they were the signatories, they were merely name lenders to the arrangement since the agreements were executed only under the direction of the builder. Even at the time of sale of the said flat the appellant had not received any amount and the entire consideration of ₹50 lakh was received by the builder.

The CIT(A) in its order also referred to the decision in the case of *CIT vs. Poddar Cement (P) Ltd. (1997) 226 ITR 625 (SC)* wherein their Lordships had observed that "We are conscious of the settled position that under the common law, 'owner' means a person who has got valid title legally conveyed to him after complying with the requirements of law such as the Transfer of Property Act, Registration Act, *etc.* But in the context of Section 22 of the IT Act, having regard to the ground realities and further having regard to the object of the IT Act, namely, "to tax the income", we are of the view, "owner" is a person who is entitled to receive income from the property in his own right,". In the said case their Lordships had taken the view that the owner is the person who is entitled to receive income.

The Tribunal while dismissing the appeal of the revenue held that the beneficial ownership of the flat was always with the builder and the assessee was merely a front for executing the arrangement since the builder had shown the sale of flat in its books of accounts and also offered profit arising thereon in respect of sale consideration so received by it. Further, the assessee or her husband had not received any other benefit under this arrangement.

Service Tax

LD/65/34

Shlok Media Pvt. Ltd
vs.
Commissioner of Service Tax, Mumbai (Mumbai-CESTAT)

When assessee has deposited the service tax collected from its customers to government belatedly, but along with interest and before issuing show cause notice by the department, the extended period cannot be invoked, and penalty qualifies waiver under Section 80.

The appellant had been regular in making service tax payments till March 2006. However, after April 2006, the clients of appellant defaulted in their contractual commitments, which lead to situation of severe financial crisis for appellant. Consequently, there had been delay in depositing the service tax with the exchequer for the period April 2006 to March 2007. However, prior to issuance of SCN, entire service tax liability was discharged by it along with interest by obtaining bank loan. The Department invoked extended period of limitation alleging willful misstatement on part of appellant on the ground that appellant collected tax but did not deposit the same to government in time.

The Hon'ble Mumbai Tribunal held that, there is no doubt that there is an obligation cast upon every service provider to collect the tax due through the service recipient and deposit the amount with the exchequer within stipulated period i.e. 5th of the following month. However, the law does contemplate and is not averse to use of the tax so collected within the business till the stipulated date for payment. In the present case, this period was unilaterally extended by the assessee. Yet, the contention of the assessee that delay is not evidence of intention to evade tax, is not one that can be dismissed out of hand. The Tribunal held that, there is no reason to disbelieve appellant's claim of inability to pay tax owing to lack of funds, as such possibilities can occur in the world of business. A delay is, without doubt, a delay but, in the

absence of any other convincing evidence, is more reflective of lack of promptitude than deliberate evasion. Tax and interest were paid without waiting for a show cause notice by recourse to loan from a bank. Therefore, extended period raised in the SCN is questionable. Accordingly, the Tribunal held that provisions of Section 80 are applicable and deleted the penalty.

LD/65/35

Phoenix International Freight Services Pvt. Ltd.
vs.
Commissioner of Service Tax
Mumbai-II

Surplus income earned by freight forwarder as a result of difference between prices paid to shipping lines and amounts recovered from customers, is not liable to service tax. However, incentive income paid by airlines to multi-model transporter as incentive for encouraging customers to book space on specific airline would be chargeable to service tax as said activity amounts to services of promotion and marketing of airline services.

Appellant, a multi-model transport agency was engaged in booking space in various shipping lines and was selling the same to their clients at a higher rate. Appellant did not discharge service tax on net/surplus income earned as freight forwarder i.e. difference between booking charges paid to airlines and amounts charged to the clients for selling the space. However, the department demanded service tax on such profits/net surplus income, under category of 'business auxiliary services' on the ground that this particular trading in space is nothing but rendering of service to the customers for the procurement of raw materials or inputs.

Further, in addition to booking of the cargo on behalf of airlines, appellant was also undertaking certain activities on behalf of the airline such as booking, preparation of bills, collection and realising the payments, *etc.*, which otherwise could have been carried out by the airlines and in turn received incentive income from airlines. The Department also sought levy service tax on 'airline incentive income' under the category of ' business auxiliary services' on the ground that appellant was promoting business of airline by encouraging their clients to avail the services of particular airline.

As regards net surplus earned as freight forwarder, the Hon'ble Mumbai Tribunal observed that appellant books the space and make payment to the shipping line in advance and/or, as and when the bills are raised, and sells the same to their customers at a profit and appellant cannot be said to be rendering any service either to shipping line or to the customer. By observing that appellant's case is squarely covered by the ratio laid down by the Hon'ble Mumbai Tribunal itself in the case of *Greenwich Meridian Logistics (India) Pvt. Ltd. vs. Commissioner of Service Tax, Mumbai 2016-TIOL-869-CESTAT-MUM* and *DHL Lemuir Logistics Pvt. Ltd. vs. Commissioner of Central Excise, Thane I 2016-TIOL-1455-CESTAT-MUM*, demand of service tax on surplus income as freight forwarder was set aside.

As regards incentive income received from airlines, the Hon'ble Tribunal observed that services related to booking, preparation of bill, collection of realisation by the appellant on behalf of the airlines *etc.* as rendered by appellant would fall under the category of promotion and marketing of airline services. Accordingly, demand of service tax on airline incentive income under category of 'business auxiliary services' was upheld to the extent of demand not hit by limitation period.

Further, since interpretational issues were involved in present case due to the confusion arising whether the amounts are chargeable to tax under specific heading under business auxiliary service or otherwise, penalties imposed on appellant were set aside.

Note: *In Greenwich Meridian Logistics (India) Pvt. Ltd. vs. Commissioner of Service Tax,* the Tribunal held that, freight paid to shipping line by multimodal transport operator and freight collected by him from client-shipper are two independent transactions and both this transactions are carried out on principal to principal basis. The surplus earned as a result of these freight differentials therefore, arises from purchase and sale of space on one's own account and not by acting for a client who has space or slot on a vessel. Section 65(19) of the Finance Act, 1994 does not address these independent principal-to-principal transactions carried out by multimodal transport operator and, with the space so purchased being allocable only by the multimodal transport operator, the shipping line cannot be regarded as a client whose services are promoted or marketed in consideration for such freight differentials. In the above case, department had contended that, such transporter are provider of services on behalf of

customer booking such space through multimodal transport operator. However, this contention has also been negativated by the Tribunal.

LD/65/36

Nihilent Technologies Pvt. Ltd.
vs.
Commissioner of Service Tax Pune

Since overseas branches are 'distinct person' from service provider located in taxable territory, turnover of such branches would neither qualify as 'export turnover' nor would be includible in 'total turnover' of such assessee located in taxable territory.

The Appellant, a service provider engaged in export of IT services from India, was having branch offices in South Africa and UK. These overseas branches were providing services to foreign based service recipient, for which invoices were raised by foreign branches only and service charges were also received by these branches. A part of the proceeds received by foreign branches were repatriated in India to Appellant. When, in terms of Rule 5 of CCR, 2004, appellant filed refund claim of service tax paid on input services used for export of services, part of the refund claim was rejected on the ground that the turnover of services provided by the assessees' branches located in South Africa and UK would not qualify as 'export turnover' of the assessee. However, department included turnover of overseas branches while arriving at 'total turnover'. When appellant filed appeal before Commissioner (Appeals), refund claim was increased as Commissioner (Appeals) excluded the turnover of overseas branches from 'export turnover' (i.e. numerator) as well as 'total turnover' (i.e. denominator). Aggrieved by non-inclusion of foreign branch's turnover in 'export turnover', appellant filed present appeal. Appellant submitted that as per the explanation 4 to Section 65B(44) of the Finance Act, 1994, the branch of the assessee is treated as having an establishment in that territory, the turnover of the branches has to be included in the assessees' turnover. Appellant further submitted that Commissioner (Appeals) has overlooked the definition of 'Location of Service Provider' in as much as Rule 2(4) (b) (iii), where services are provided from more than one establishment. The establishment most directly concerned with the provision of the service should be considered as 'Location of Service Provider'. It further submitted that the service even provided from branch office falls under the definition of export of service as provided under Rule 6A of the Service Tax Rules, 1994. On the other hand, aggrieved by order of Commissioner (Appeals), whereby refund claim sanctioned to appellant was increased as a result of exclusion of overseas branches turnover in total turnover, revenue also filed appeal before the Tribunal.

The Hon'ble Mumbai CESTAT noted that overseas branch offices located in non-taxable territory are 'distinct person' from appellant in terms of explanation 3(b) to Section 65B(44) of The Finance Act, 1994 and business turnover of distinct establishment is not includible in export turnover of the assessee. It further held that definition of 'location of service provider' in terms of Rule 2(h) of POPS Rules, 2012, is applicable only in taxable territory. If the service provider is located in non taxable territory, he will be treated as distinct person and this definition of 'location of Service provider' will not apply. As per Rule 3 of Provisions of Service Rules, 2012 place of service in normal course, shall be location of service recipient. In case location of service receiver is not available, the place of provision shall be the location of the provider of services. In the present case recipients are located outside India and the provision of service is also by the branches in South Africa and UK. Since right from providing the services up to the receipt of the service charges, the overseas branches of the assessees are involved, the branches of the assessee is the location of the provider of service and not the assessee. The Tribunal further held that, as per Rule 6 A(a) of Service Tax Rules, 1994, the service provided by the branches of the assessee would not qualify as export of service as the branches of the assesse who are provider of service are not located in taxable territory.

As regards revenue's contention that value of service provided by the overseas branches should be added in total turnover, the Hon'ble Tribunal held that once it is held that branches' turnover is not export if branches are treated as distinct person than assessee, the same principle will apply for the purpose of total turnover of the assessee and accordingly the department cannot take contrary stand that in one hand the branch's turnover is not 'export turnover' and in other hand it is includible in 'total turnover' of the assessee.

Legal Update

LD/65/37

M/s. Marubeni India Pvt. Ltd.
vs.
Commissioner of Service Tax
New Delhi

The adjudicating authority should confine his findings only to the allegations raised in the show-cause notice (SCN). If show cause notice alleges the levy of service tax under one category of service, confirmation of demand under any other category is travelling beyond the scope of SCN which is not permissible in law.

In this case, the demand was initially raised under the category of "Business Support Services" but stand confirmed by the adjudicating authority under the "Information Technology Software Services". Relying upon *Hindustan Polymers Co. Ltd. vs. Collector [1999 (106) ELT (12 (SC)], Bhor Industries vs. Union of India [2011 (266) ELT 444 (Born)]* and *Deepak & Co. vs. CCE, New Delhi [2015 (38) STR 1010 (TriDel)*], the Hon'ble Tribunal held that, allegations are required to be made by the Revenue very clearly in the show cause notice and adoption of classification of service under the heading different than the one proposed in the show cause notice amounts to passing the order beyond the scope of show cause notice which is not permissible. The Tribunal accordingly ordered quashing of the impugned order.

Note: Recently, similar view has also been taken by the Hon'ble Mumbai CESTAT in *J. H. Mirza (Civil and Labour Contractor) vs. Commissioner of Central Excise Aurangabad 2016-TIOL-2181-CESTAT-MUM.*

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LD/65/38

C. Ramachandran
vs.
Commissioner of Service Tax
Chennai

Tribunal deleted penalty u/s 76 even in case of recurring defaulter by holding that provisions of Section 73(3) are retrospective in nature. Further, Tribunal treated the amendment to Section 67 of the Finance Act, 1994 introduced w.e.f. 14th May 2015 as prospective amendment, while deleting penalty u/s 78 for non-payment of tax on amounts received as reimbursements towards milk and cooking gas.

The appellant was a proprietary concern providing outdoor catering services to industrial units and educational institutions. In the course of service tax audit, department noticed that, there was a non-payment of service tax from January 2008 to September 2008. It was also noticed by the Audit Team that appellant had not discharged the service tax liability on TDS amount and reimbursements received towards LPG gas and Milk from the recipient of services. The Appellant contended that, he was paying service tax on the basis of invoices issued (although provision at the relevant time required him to pay tax on receipt basis) and hence was of the view that, issue of non-payment of service tax on TDS would not arise. With regard to the non-inclusion of reimbursement of expenses incurred on behalf of the recipient of services in respect of LPG and Milk, the Appellant was under the bona fide impression that as per the Agreement, it is provided by the recipient of services and payments were made on their behalf which was later reimbursed to the Appellant. Thus, the Appellant acted as a pure agent of the recipient of services, which are not includible in the value in terms of Rule 5(2) of Service Tax (Determination of Value) Rules, 2006.

The Tribunal observed that, Penalty under Section 76 has been invoked on the ground that the Appellant is a recurring defaulter in payment of tax and that the delay ranges around 150400 days. There has been delay in payment of tax owing to the cash flow problems faced by the Appellant.The said amounts have already been disclosed in the ST3 returns and that the tax along with interest has already been deposited during the course of audit and before the issuance of Show cause notice. Relying upon decision of the Madras High Court in the case of Tamil Nadu *Small Inds. Corporation Limited vs. Commissioner of Central Excise Chennai 2009 (234) ELT 413,* the Tribunal held that, provisions of Section 73(3) of the Act are clarificatory in nature and hence, where entire demand along with interest is paid before issue of SCN, the penalty u/s 76 cannot be levied.

As regards service tax on LPG/milk reimbursements from customer, the Tribunal held that the issue revolves around interpretation of law i.e. whether reimbursement of expenditure was subject to levy of service tax in terms of Rule 5(1) of Service Tax Rules, 1994 and that the Delhi High Court in the case of *Intercontinental Consultants & Technocrats Pvt. Ltd.vs. UOI 2013 (29) S.T.R. 9 (Del.)* has held that reimbursements would not be subject

to levy of service tax. The Tribunal further observed that, an amendment was introduced in Section 67 of the Finance Act, 1994 (with prospective effect from 14th May 2015) to effect that gross amount charged shall include value of reimbursement received by the service provider. Hence, the Tribunal held that the Appellant's case deserves a waiver of penalty under Section 78 of the Finance Act, 1994

LD/65/39

VSCV Radhakrishnan Chettiyar & Sons

vs.

Commissioner of Central Excise & Service Tax Trichy

Penalty for non-submitting list of records cannot be invoked after 5 years from introduction of Rule 5(2) [i.e.31.01.2008] for assessees already registered prior to said date.

The Appellants were registered with the service tax department and obtained Registration Certificates respectively in the year 2003 under the category of "Business Auxiliary Service". They wereserved with show cause notices dated 4.7.2013 for their failure to submit the list of records maintainedby them in accordance with Rule 5(2) of the Finance Act, 1994. After the proceedings, the adjudicating authority imposed a penalty of ₹10,000/ on the appellants under Section 77 (2) of Chapter V of theFinance Act, 1994 which was upheld by ld. Commissioner (Appeals) in the impugned order.

The Tribunal held that the show cause notice itself is vague in as much there is no evidence on record that Appellants have not submitted the list of relevant documents at the time of filing of return for the first time, in terms of Rule 5(2) of S.T. Rules, 1994. Based on a mere premise that appellant appeared not to have filed the returns and imposing penalty after a period of 10 years is not legally sustainable especially when Rule 5(2) came into effect from 31.01.2008 and Rule 5(3) provides for preservation of records for a maximum period of 5 years.

Excise

LD/65/40

Commissioner of Central Excise

vs.

Addison & Co. Ltd.

29th August, 2016

Assessee entitled for filing a claim for refund on the basis of credit notes raised towards turnover discount; Assessee who did not bear the burden of the duty, though entitled to claim deduction, is not entitled for a refund as he would be unjustly enriched.

The Supreme Court approved the normal practice under which discounts are given and held that the discount is known to the dealer at the time of purchase. It did not agree with the said submission as it was held by the Court in *Union of India vs. Bombay Tyre International* that trade discounts shall not be disallowed only because they are not payable at the time of each invoice or deducted from the invoice price.

The Supreme Court accepted assessee's submission that the turnover discount is known to the dealer even at the time of clearance and the assessee was entitled for filing a claim for refund on the basis of credit notes raised by him towards turnover discount

On the issue of 'Passing on the incidence of duty to the buyer - immediate buyer or ultimate buyer of the goods', the assessee admitted that the incidence of duty was originally passed on to the buyer. There is no material brought on record to show that the buyer to whom the incidence of duty was passed on by the Assessee did not pass it on to any other person. The Supreme Court noted that there was a statutory presumption u/s. 12-B of the Act that the duty has been passed on to the ultimate consumer and it is clear from the facts of the instant case that the duty which was originally paid by the Assessee was passed on. The Supreme Court held that the refund claimed by the assessee is for an amount which is part of the excise duty paid earlier and passed on and the assessee who did not bear the burden of the duty, though entitled to claim deduction, was not entitled for a refund as he would be unjustly enriched.

The *sine qua non* for a claim for refund as contemplated in Section 11-B of the Act is that the claimant has to establish that the amount of duty of excise in relation to which such refund is claimed was paid by him and that the incidence of such duty has not been passed on by him to any other person. The word 'buyer' in Clause (e) to proviso to Section 11-B (2) of the Act cannot be restricted to the first buyer from the manufacturer. Another submission which remains to be considered is the requirement of verification to be done for the purpose of finding out who ultimately bore the burden of excise duty.

It might be difficult to identify who had actually borne the burden, but such verification would definitely assist the Revenue in finding out whether the manufacturers or buyers who makes an

application for refund are being unjustly enriched. It was held that if it is not possible to identify the person/persons who have borne the duty, the amount of excise duty collected in excess will remain in the fund which will be utilised for the benefit of the consumers as provided in Section 12-D.

On the issue of 'entitlement for refund', the supreme Court observed that the refund claim was rejected by the Deputy Commissioner of Central Excise, on the ground that the assessee did not submit either the credit notes or the Chartered Accountant's certificate at the time of filing the refund application. Since the Deputy Commissioner was not satisfied with the genuineness of the documents, he rejected the refund claim. The Commissioner (Appeals) allowed the appeal filed by the Assessee by taking note of the certificate issued by the Chartered Accountant and the credit notes.

The Supreme Court held that except for a factual dispute about the genuineness of the certificate issued by the Chartered Accountant and the credit notes raised by the Assessee regarding the return of the excess duty paid by the Assessee, there was no dispute in this case of the duty being passed on to any other person by the buyer.

Thus, as it was clear that the Assessee has borne the burden of duty, it was held that could not be said that the assessee was not entitled for the refund of the excess duty paid.

VAT

LD/65/41

Verma Roadways

vs.

Government of NCT Delhi

4th August, 2016

Failure to produce documents does not constitute sufficient ground for Assistant Commissioner to seal the premises under Section 60(2) (a) to (f) of the DVAT Act

The assessee, Verma Roadways, a partnership firm, carries on the business of transportation goods of dealers and at around 12 midnight the Assistant Commissioner along with other officers visited the godown of the assessee and finding that the premises was locked, sealed the premises. The assessee stated it moved an application before the AC for de-sealing the premises. The assessee stated that the goods lying at its premises were value added tax ("VAT") paid goods and traceable to bona fide dealers registered under the DVAT Act. Thereafter, the assessee sent a letter by speed post and visited the office of the AC sought de-sealing of the premises. An application was filed for de-sealing of the premises.

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

The High Court commented that it was plain to the Court that Spl. Commissioner, who issued the order did not understand or was not aware of the legal requirement and despite several judgments of this Court emphasising that the action under Section 59 of the DVAT for a survey of the premises and for seeking information, records *etc.* could not automatically permit the coercive actions, including sealing of the premises, under Section 60 (2) (a) to (f) of the DVAT Act.

The High Court reiterated that the mere failure to produce documents cannot constitute a sufficient ground to take any of the coercive actions under Section 60(2) (a) to (f) of the DVAT Act and every such action has to be preceded by a justification in the file recording that the Commissioner has reasonable grounds to believe that *"any person or dealer is attempting to avoid or evade tax or is concealing his tax liability in any manner."* The High Court observed that in the past one year several judgments have been pronounced by this Court on the limitation of powers u/s. 59 and 60 of the DVAT Act. Despite this, the Court finds that a person holding a responsible position like Spl. Commissioner, Enforcement Branch is continuing to issue orders in mechanical and irresponsible manner authorising officers to take any action which they may like under Section 60 of the DVAT Act.

The High Court directed the Commissioner, VAT who was present in the Court to call for an explanation from Spl. Commissioner, as well each member of the team of officers who proceeded to act under Spl. Commissioner's directions issued under his signature in the form of the order (under Section 60 of the DVAT Act), as to why disciplinary action should not be taken against each of them for dereliction of duty and for acting in violation of the law. The High Court further directed the Commissioner, VAT to consider their replies and after giving them a hearing pass appropriate orders and to pass such orders take into account the observations contained in the Court's order. He was further directed to file an affidavit of compliance in the Registry of this Court within a period of four weeks.

The High Court held that inconvenience, hardship and prejudice had been caused to the

Petitioner on account of the illegal actions of sealing of its premises on two occasions by the officials of the DT&T. Thus, reserving the right of the Petitioner to seek other appropriate remedies for such loss, hardship and prejudice in accordance with law, the Court awarded the assessee costs of ₹20,000 in this petition which would be paid by the Respondent to the Petitioner within two weeks.

The High Court also held that in the event there is a failure to comply with the directions issued, it would be open to the Petitioner to apply to the Court for directions.

Customs

LD/65/42

Commissioner of Central Excise
vs.
Gujarat Ambuja Exports
8th August, 2016

Crude palm oil which was imported was used for making edible products like refined oil/Vanaspati. In the process of said manufacture, 25% of fatty (palm) was produced and 75% was oil which was edible. Thus, when the main manufacturing activity relates to edible product which is 75%, if in the process 25% of fatty (palm) emerges as a by-product it cannot be said that first requirement of exemption notification is satisfied

The assessee, Gujarat Ambuja Exports, was the manufacturer of refined edible oil, Vanaspati, cotton yarn, starch, cattle feed, wheat flour *etc.* It was registered with Kadi Division of the Central Excise. From April, 2002, the assessee engaged itself in refining of various edible oils. During the course of refining, it used to get Palm Fatty Acid Distillate as a by-product which was classified under Chapter Heading No. 38231900 and cleared it duty free claiming the benefit of Notification No. 1175/75-CE dated 30.04.1975. During the period September, 2003 to January, 2004, the assessee imported 1990.031 metric tons of crude palm oil. At that time crude palm oil having Free Fatty Acid (FFA) 20 percent, or more was eligible for concessional rate of duty under Notification No. 21/2002-Cus dated 01.03.2002. No condition was attached to avail that exemption.

Thereafter on 16.01.2004, Notification No. 21/2002-Cus dated 01.03.2002 was amended by Notification No. 20/2004-Cus dated 16.01.2004 wherein the words "for the manufacture of soap" were inserted in the original notification. The assessee imported 8435.816 metric tons of crude palm oil (industrial grade) valued at ₹17,15,88,508/- and cleared the same on payment of customs duty of ₹3,47,95,453/- (@20% basic + 2% education cess) under Notification No. 21/2002-Cus dated 01.03.2002 read with Notification No. 66/2004-Cus dated 09.07.2004 during the period 12.09.2004 to 12.08.2005. As per the said notification, crude oil (non-edible oil) could be imported by paying customs duty @20% only when the said crude oil is to be used in the manufacture of soap or Industrial Fatty Acid. The manufacturing process is one of distillation. As a result of this process, a product called "Palm Fatty Acid Distillate" emerges. The assessee after the processing of the imported 8435.816 metric tons of crude oil (non-edible grade) has manufactured 2219.895 metric tons of palm fatty acid distillate (industrial grade) i.e. approximately 25% and approximately 70% as refined palm oil.

The Revenue was of the view that the assessee was not entitled to the benefit of Notification No. 21/2002 read with Notification No. 66/2004. The Department, thus, issued show cause notice to assessee demanding custom duty in the sum of ₹7,89,89,868/- under para 8 of Customs (Import of goods at concessional rate of duty for manufacture of excisable goods) Rules, 1996 (hereinafter referred to as the 'Rules') as well as interest under Section 28AB of the Customs Act, 1962. In the show cause notice the Department also proposed imposition of penalty under Section 112/114A of the Act.

The assessee submitted that the reliance placed by the Tribunal on HSN Explanatory Notes was perfectly justified and stressed upon the reasoning that was adopted by the Tribunal in this behalf. He further submitted that there were various methods/processes that may be used to produce Industrial Fatty Acids like hydrolysis, saponification, vacuum distillation, splitting, *etc.* Any of such processes may be used by an importer intending to avail the benefit under Sr. No. 30 of Notification No. 21/2002-Cus. The description for Sr. No. 30 during the relevant period did not specify any specific process to be followed by the importers, which implies that the importers were free to choose any of the different processes available. In this regard, amendment made to Notification No. 21/2002-Cus *vide* Notification No. 11/2006-Cus dated 01.03.2006 is important. For the first time, an entry (S. No. 30(A)) was introduced which also mentioned that the importer must have the facility for splitting of oils. He argued

that it was, in a sense, built-in condition of the process (splitting of oil) that must be employed to obtain fatty acids. However, even then clause B of S. No. 30 of the Notification continued to exist as such. In other words, after the amendment, the requirement of splitting of oils, does not exist in Clause B, which is identical to Clause A prior to amendment covering the respondents. According to him, the 2006 amendment makes it clear that prior to such amendment clause (a) of Sr. No. 30 covered all the process that are possible for manufacture of Industrial Fatty Acids.

On the second issue, assessee again maintained the stand which was taken before the Authorities below, namely, it was not possible to obtain 100% PFAD by distilling the crude palm oil (non-edible grade) and, therefore, due to technological necessity, the assessee could not be denied the benefit of exemption. It was also submitted that merely because the proportion of PFAD is 25%, would not mean that PFAD is a by-product. It was submitted that the assessee was engaged in manufacture of PFAD and refined palm oil. PFAD is sold to soap manufacturers and refined palm oil is used to manufacture Vanaspati.

The Supreme Court held that in the instant case, crude palm oil which was imported was used for making edible products like refined oil/Vanaspati. In the process of said manufacture, 25% of fatty (palm) was produced and 75% was oil which was edible. Thus, when the main manufacturing activity relates to edible product which is 75%, if in the process 25% of fatty (palm) emerges as a by-product, it cannot be said that first requirement of exemption notification is satisfied in the instant case. Even if Industrial Fatty Acid is to be treated as separate manufacturing activity and it is non-edible, the same is only to the extent of 25%.

The Supreme Court accepted the reasoning adopted by the Commissioner that HSN Explanatory Notes, in case where exemption notification was to be construed, would only serve as guide and is not used to interpret the same. Even here, we find that the HSN in question categorically mentions the product which is included by the said heading and specifically mentions 'fatty acid distillate' as under:

"Fatty acid distillate, obtained from fats and oils which have been subjected to vacuum distillation in the presence of steam as part of a refining process. Fatty acid distillate is characterised by high free fatty acid (ffa) content."

Thus, it categorically stipulates that Fatty Acid Distillate is characterised by high free fatty acid which cannot be 25%. So the by-product is rightly discarded by the Commissioner as not coming within the nomenclature of PFAD.

Thus, the Supreme Court held that reliance on subsequent notification of 2006 was of no relevance.

LD/65/43

M/s. Safari Fine Clothing Pvt. Ltd.

vs.

Union of India

12th August, 2016

Sufficient guidelines and safeguards to ensure, on one hand that the executive is vested with sufficient discretionary powers to deal with different kinds of cases of contraventions and at the same time, providing internal safeguards to control the discretion have been provided in the Act; Legislature while granting discretion to the executive has also provided for sufficient guidelines and safeguards so that such discretion does not convert into arbitrary or discretionary exercise of powers

The petitioners, Safari Fine Clothing Pvt. Ltd., challenged an order in appeal passed by the Government of India, by which, the petitioners' appeal against the order in original came to be dismissed. In the result, the penalty on the company and personal penalties on the Directors came to be confirmed. The petitioners have also challenged the constitutional validity of Section 11 (2) and 11 (3) of FTDR Act, 1992. Prime contention of the petitioners was that the said provisions vest unlimited discretion in the competent authority to impose punishment without providing any guidelines for governing such discretion.

The High Court noted that the principle that the legislature cannot abdicate its essential legislative function into the executive is all too well accepted principle. At the same time, looking to the wide range and complex nature of activities that a welfare State engages itself into, there is a degree of tolerance to vesting of discretionary powers in the executive within the range or boundaries laid down in the legislation.

The High Court held that the *vires* of an Act enacted by the parliament can be struck down only on the ground of legislative incompetence or the law being violative of any of the fundamental rights or the other provisions of the Constitution.

The High Court further held that in view of the complex requirements of foreign trade and import export policy, the executive would have to have sufficient powers to control contraventions of essential conditions of import export restrictions. It is, in this respect, sub-section (1) of Section 11 provides that no import or export shall be made by any person except in accordance with the provisions of the Act, the Rules and the orders made there under and the foreign trade policy for the time being in force. It was further held that no restriction would be effective unless contravention thereof can be visited by penal consequences. It is in this respect, sub-section (2) of Section 11 provides that where any person makes or abates or attempts to make any export or import in contravention of any provision of the Act or the Rules or orders or the foreign trade policy, he would be liable to penalty.

The High Court noticed that as per Section 13 of the Act, such penalty could be imposed only by the Director General or subject to restrictions which may be provided, by any such officer as the Central Government by a notification in the official gazette authorise. However, the power of such authorised officer to impose penalty would be limited as may be specified. It opined that the whole scheme of the Act lays down sufficient guidelines and safeguards to ensure on one hand that the executive is vested with sufficient discretionary powers to deal with different kinds of cases of contraventions and at the same time, providing internal safeguards to control the discretion. The penalty itself is to be imposed making export or import or abatement or attempt in contravention of any provision of the Act, Rules or orders or foreign trade policy.

By the very nature of things, the contravention could be of various kinds and of range of provisions beginning with mere technical breaches of procedural provisions or could be wholly malafide, fraudulent and with intention to evade duty. All such cases cannot be put in the same bracket. Thus, the legislature while in view of such situation has granted discretion to the executive, at the same time, provided for sufficient guidelines and safeguards so that such discretion does not convert into arbitrary or discretionary exercise of powers.

Thus, the High Court dismissed petitioners' challenge to the validity of the statutory provisions. ■

Judge your success by what you had to give up in order to get it. - Dalai Lama