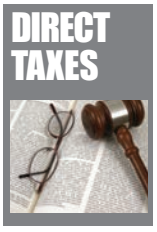
Legal Decisions[1]



Income Tax

LD/65/103

Prin. Commissioner of Income Tax
vs.
Quark Media House India P. Ltd.
Delhi
24th January 2017

FMV of the property cannot be substituted for the full value of consideration u/s 48 for the purposes of computing capital gains arising on transfer of land/building by assessee to its related party; in absence of any finding by Revenue that assessee received any consideration other than that which was disclosed, there was no occasion for AO to determine the FMV and hence the reference to DVO u/s 55A was without jurisdiction

The assessee, Quark Media House India Pvt. Ltd., is a fully owned subsidiary of Quark Media House SARL, Switzerland. Assessee filed its return for AY 2006-07 declaring income from other sources of ₹37.13 lakh after claiming exemption u/s 10B for ₹13.50 crore. The AO noticed that assessee had transferred land admeasuring 24,000 sq. yards together with the building constructed thereon for ₹25.10 crore to its group company, Quark City India Pvt. Ltd. which is a 100% subsidiary of F. E. Holdings Mauritius Ltd. The AO remarked that the transaction was not entered into at the market rate but was so arranged and structured that the assessee had no tax liability on account thereof and was therefore a colourable device to avoid the tax liability. The AO therefore made reference to DVO u/s 55A who estimated value at ₹70 crore.

The CIT(A) as well as ITAT held that AO was not justified in referring the matter to DVO u/s 55A.

Assessee submitted that the transaction value was more than the circle rate and the rate assessed by the stamp valuation authority. Assessee clarified that it did not receive any amount over and above the amount specified in the sale deed. Revenue on the other hand contended that for the purpose of computing the capital gains AO has power to ignore the consideration as per sale deed if he is satisfied that the same is far less than the fair value or the market value thereof. Revenue argued that even though Section 48 does not permit reference u/s 55A, assessee's case stood covered by Section 50C. Revenue also submitted that the Stamp Authority circle rates are only indicative and not determinative.

HC referred to SC ruling in *George Henderson and Co. Ltd. [66 ITR 622]* ruled in the context of Section 12B of the Income-tax Act, 1922 which was similar to Section 48 of Income-tax Act 1961. As per the said SC judgment, the expression 'full value of the consideration' cannot be construed as the market value but as the price bargained for by the parties to the sale. It is necessary for the AO to ascertain as to what the price was bargained for by the parties to the sale. HC remarked that the full value of the consideration is neither the market value nor necessarily the price stated in the document for sale but the price actually arrived at between the parties to the transaction. Further, HC referred to ruling in *Shri Dharam Pal Aggarwal [ITA NO. 462 of 2010]* wherein it was held that *"the expression "full value of consideration" appearing in Section 48 of the Act does not have any reference to the fair market value but to the consideration referred to in the sale deeds as the sale price of the assets which have been transferred."*

HC ruled that there was no occasion for AO to determine the fair market value and that the AO proceeded on the erroneous basis. HC noted that AO did not find the consideration to have been understated and therefore he was not entitled to determine the FMV. HC also clarified that reliance upon Section 50C was not well founded. HC thus ruled in favour of assessee.

LD/65/104

Commissioner of Income Tax (Exemptions)
vs.
Maharashtra Industrial Development Corporation
6th January 2017

Unless all the government bodies, their agencies and instrumentalities have reasonable and acceptable explanation for the delay and there is bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red tape in the process

The assessee, Maharashtra Industrial Development Corporation, is an industrial

[1] *Contributed by CA. Sahil Garud, Indirect Taxes Committee, CA. Mandar Telang and ICAI's Editorial Board Secretariat.*
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undertaking. The assessee's appeal to the High Court from the Tribunal was rejected on 19th November, 2015 by the Prothonotary & Senior Master, under Rule 986 of the Bombay HC (Original Side) Rules. Thus, the first Notice of Motion taken out by the applicant Revenue for setting aside order dated 19th November, 2015 was dismissed on 22nd April, 2016 after hearing the parties by a speaking order. Thereafter, the Revenue took out another Notice of Motion. This time the Notice of Motion was taken out to recall the order dated 22nd April, 2016. By order dated 19th August, 2016 and after hearing the parties this application was also rejected by a speaking order. Revenue's counsel had stated that because the Court entertained the second Notice of Motion seeking to recall the order leading to order dated 19th August, 2016, the present Notice of Motion had been filed.

The Bombay HC noted that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bonafides, a liberal concession had to be adopted to advance substantial justice, thus, the Department could not take advantage of various earlier decisions.

The Bombay High Court held that unless all the government bodies, their agencies and instrumentalities have reasonable and acceptable explanation for the delay and there is bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red tape in the process. It was further held that the government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. It was held *"...condonation of delay is an exception and should not be used as an anticipated benefit for the government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few.."*

The High Court put the revenue to notice that repeated applications for recall of speaking orders passed after hearing the parties could not be filed and dismissed the motion.

LD/65/105

Commissioner of Income Tax, Company Circle

vs.

Vinzas Solutions India P. Ltd.

4th January 2017

Domestic software purchase payments by assessee is not royalty and so TDS u/s Sec 194J is not applicable

The assessee is a dealer in Computer software. During the course of assessment, disallowance u/s 40(a)(ia) was made on the ground that consideration for purchase was of the nature of "Royalty" and TDS u/s 194J ought to be have been. CIT(A) confirmed AO's order noting consideration paid would come within the ambit of the definition of 'Royalty' under Explanations 4 and 5 of Section 9(1)(vi) of the Act, and ITAT deleted the addition.

Aggrieved, Revenue preferred an appeal before Madras HC.

HC observed that the assessee is a dealer engaged in buying and selling software in the open market. The transaction in question is thus one of purchase and sale of a product and nothing more. HC concluded that the provisions of Section 9[1][vi] dealing with and defining 'Royalty' cannot be made applicable to a situation of outright purchase and sale of a product. HC relied on ruling in the case of *CIT vs. Neyveli Lignite Corporation Ltd. [234 ITR 458]*. Based on certain rulings, HC noted the difference between a transaction of sale of a 'copyrighted article' and one of 'copyright' itself and HC further remarked that the provisions of Section 9(1)(vi) as a whole, would stand attracted in the case of the latter and not the former.

HC held that the provisions of Section 9(1)(vi) as a whole, would stand attracted in the case of sale of 'copyright' and not to the case of 'copyrighted article'. HC observed that Explanations 4 and 7 relied by the authorities would thus have to be read and understood only in that context and cannot be expanded to bring within its fold transaction beyond the realm of the provision. HC thus ruled in favour of the assessee.

LD/65/106

Gopal & Sons (HUF)

vs.

Commissioner of Income Tax, Kolkata -XI

4th January 2017

Section 2(22)(e)–Deemed Dividend

Once the payment was received by the HUF and shareholder (being a member of HUF) had substantial interest in the HUF, the payment made to the HUF would constitute deemed dividend within the meaning of Section 2(22)(e).

The assessee, Gopal and Sons (HUF), received

certain advances from M/s. G. S. Fertilizers (P) Ltd. which is the manufacturer and distributor of various grades of NPK Fertilizers and other agricultural inputs. In the audit report and annual return, it was found that the subscribed share capital of the Company was ₹1,05,75,000/-. Out of this, 3,92,500 shares were subscribed by assessee who represented 37.12% of the total shareholding of the Company. From this fact, the AO concluded that assessee was both the registered shareholder of the Company and also the beneficial owner of shares, as it was holding more than 10% of voting power. On this basis, an amount was included in assessee's income as deemed dividend. On appeal, the CIT(A) upheld AO's order. On further appeal, the Tribunal ruled in assessee's favour, however the High Court restored AO's addition.

The High Court held that it had extracted the language of Section 2(22)(e) and sustained the addition made by AO with one line observation, viz., 'the assessee did not dispute that the Karta is a member of HUF which has taken the loan from the Company and, therefore, the case was squarely within the provisions of Section 2(22)(e).

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

The Supreme Court held that Section 2(22)(e) creates a fiction, thereby bringing any amount paid otherwise than as a dividend into the net of dividend under certain circumstances and it gives an artificial definition of 'dividend'. It was further held that the section does not take into account that dividend which is actually declared or received and the dividend taken note of by this provision is a deemed dividend and not a real dividend. The Supreme Court held that loan or payment made by the company to its shareholder is actually not a dividend and in fact, such a loan to a shareholder has to be returned by the shareholder to the company, it does not become income of the shareholder. Thus, Supreme Court held *"...unless all the conditions contained in the said provision are fulfilled, the receipt cannot be deemed as*

dividends. Further, in case of doubt or where two views are possible, benefit shall accrue in favour of the assessee."

The Supreme Court noted that the payment in question was made to the assessee which was an HUF and shares are held by Karta, who had substantial interest in the assessee/HUF, being its Karta. Thus, it was not disputed that he was entitled to not less than 20% of the income of HUF. It was further noted that though the share certificates were issued in the name of the Karta, in the annual returns, it was the HUF which was shown as registered and beneficial shareholder. Thus, the Supreme Court held that even if it was presumed that it was not a registered shareholder, as per the provisions of Section 2(22)(e), once the payment was received by the HUF and shareholder (being a member of HUF) had substantial interest in the HUF, the payment made to the HUF would constitute deemed dividend within the meaning of Section 2(22)(e).

Thus, the Supreme Court ruled in favour of Revenue.

LD/65/107

Mobility Solutions Ltd.

vs.

Asst. Commissioner of Income Tax

23rd December 2016

Section 36(1)(iii): Other deductions

Amount of the interest paid in respect of capital borrowed for the purposes of the business or profession

The assessee company, Mobility Solutions Ltd., filed its tax return for the relevant AY, which was selected for scrutiny and a questionnaire along with notice u/s. 142(1) was issued. During assessment, AO found that assessee had made interest free advances to M/s MSL GHE Auto Components Pvt. Ltd; and M/s GHE Automotive Pvt. Ltd. and that the assessee had raised secured loans from Banks on which interest had been paid by it.

AO disallowed proportionate interest on the afore-referred interest free advances and further found that certain portion of capital work in progress had not been put to use and as per its P&L account the assessee had paid interest on the secured loans. Relying upon the proviso of Section 36(1)(iii) as also on the judgment of this Court in *Abhishek Industries ltd. [(2006) 286 ITR 1]*, AO disallowed proportionate interest on the same.

On appeal, the High Court noted that as per the appellant, M/s GHE Automotive Pvt. Ltd. was a Bangalore based company with which the appellant jointly formed a new Company i.e. M/s MSL GHE Auto Components Pvt. Ltd. It was further noted that the assessee company was a major shareholder in M/s MSL GHE Automotive Pvt. Ltd. and interest free advances had been made by the assessee to M/s MSL GHE Auto Components Pvt. Ltd. and M/s GHE Automotive Pvt. Ltd. The High Court held that as per the assessee's own case, how M/s GHE Automotive Pvt. Ltd. was a sister concern was neither borne out from the order of the CIT (A) nor the Tribunal.

The High court held that on both the above issues, the CIT(A) and the Tribunal had simply relied upon the order of Abhishek Industries case (*supra*) with inadequate discussion on the factual aspect of the matter. However, the law laid down through other relevant judgments including *M/s Hero Cycles Pvt. Ltd. vs. CIT[2015 (379) ITR 347]* and the judgments of the Apex Court including *S.A. Builders Limited vs. CIT[2007 (288) ITR 1]* had not been considered.

Thus, the High Court set aside Tribunal's order and remanded the matter back to the Tribunal for deciding the appeal afresh.

LD/65/108

Commissioner of Income Tax

vs.

M/s Likproof India Pvt. Ltd.

23rd December, 2016

Section 132(4)

Entry made in the pay-in-slips could not prevail over the entry in the books of account since the books of account would reflect the appropriate record

The assessee company is a sister concern of Hindustan Hotels Limited (HHL) and both had common Directors. HHL had undertaken a hotel project and entered into a construction contract with assessee which was abandoned in the year 1995. The building which was still under construction was then sold to one Peerless Finance in April/May 1995 for a consideration of ₹11 crores. Afterwards, assessee planned to increase its share capital and had approached HHL to contribute. HHL paid to the assessee a sum of ₹1 crore vide two cheques of ₹50 lakh each. HHL had disclosed the sum of ₹1 crore as "share application money". The assessee had

also treated the aforesaid sum as share application money. However during search the records show that such money was received on account of business receipts. Pursuant to search, in the return filed, assessee declared undisclosed income amounting to ₹2,34,000/-.

During the search, it was noticed from the bank slips that ₹1 crore was received by the assessee as compensation from HHL. After considering the assessee's response in respect of such sum, the AO treated the sum of ₹1 crore as compensation. On appeal, the Tribunal however observed that the nature of the sum of ₹1 crore had to be decided on the basis of entries in the books of account and the records and not on the basis of notings or narrations by the assessee's staff. The Tribunal therefore concluded that such sum was to be treated as share application loan.

Aggrieved, the revenue preferred an appeal before Bombay HC.

Before the High Court, the Revenue relied upon the fact that entries in the bank's pay-in-slips clearly indicate why the amounts were received. The fact that the assessee's bank records indicated that the amount was received as compensation could not be overlooked especially when the Managing Director's statements were vague and contradictory.

The assessee on the other hand supported the decision of the Tribunal and contended that entries made in the bank pay-in-slips could not determine the nature of the payment and the treatment of the amounts in the books of the company is what was material. This statement of the Managing Director though vague, could not be relied upon by the revenue since at one stage he clearly admitted that he did not know whether it was a compensation or loan.

The High Court held that statements recorded of the Managing Director of the company were not reliable and the consideration by the Tribunal of the records was appropriate. It was further held that the conclusion drawn by the Assessing Officer

that the amount received was compensation and amount which was undisclosed income of the assessee could not be sustained since the treatment of the receipts in the books of account of the company should prevail being maintained in the usual course of business.

The High Court remarked that the Revenue had not brought on record any material indicating that the amount received by assessee was by way of compensation. On the other hand, the employees of the assessee were cross examined in respect of the entries made in the pay-in-slips and this cross examination had revealed that narrations in the pay-in-slips accompanying the two cheques of ₹50 lakhs each were made by them on their own without any directions or instructions from assessee.

Thus, the High Court upheld the Tribunal's ruling that the entry made in the pay-in-slips could not prevail over the entry in the books of account since the books of account would reflect the appropriate record wherein treatment of receipts would be found and the amount of ₹1 crore could not be assessed as undisclosed income.

LD/65/109

Andrew Telecommunications India P. Ltd.

vs.

Prin. Commissioner of Income Tax

23rd December 2016

CIT's order refusing to grant stay of demand for AY 2012-13 set-aside; Pending appeal before CIT(A), Revenue had rejected assessee's stay application and had directed to adjust entire refund due to assessee for past AYs against the current demand; AO can adjust the refund to the extent of demand required for granting stay which is 15% of disputed demand

Assessee, Andrew Telecommunications India Pvt. Ltd. is engaged in the business of manufacturing base station antennas, microwave antennas, R. F. cables, jumpers and connectors and trading in related products. For AY 2012-13, assessee filed a return declaring a loss. Regular assessment was carried out and a demand of ₹16.90 crore was raised, which was challenged by the assessee before the CIT(A). The assessee further applied for stay of demand till appeal is decided by CIT(A). Revenue rejected assessee's stay application and had directed to adjust entire refund due to assessee for past AYs [AY 06-07 and 07-08]. Also, the assessee sought a personal hearing, which was not acceded to.

Aggrieved, the assessee filed a writ petition before Bombay HC.

Before HC. the assessee submitted that AO was obliged to grant stay of the demand on payment of 15% of the disputed amount. The assessee argued that 15% of the amount could be adjusted against any pending refund. Revenue further submitted that assessee could seek appropriate stay in the appeal and thus writ was unsustainable. Revenue relied upon coordinate bench ruling in *Ulhas Jewellers Pvt. Ltd. [Writ Petition No. 906/2016 decided on WP No. 1021/2016 decided on 29.09.2016)]*. Revenue also submitted that refund being related to different AY had nothing to do with the said demand.

HC observed the order and noted that the assessee's case was fit for granting a stay till the disposal of the first appeal on payment of 15% of the disputed demand. HC perused the office memorandum [O.M.] dated 29.02.2016 and observed that as per para 4A of memorandum case where outstanding demand is disputed before the CIT(A) (as in the present case), the assessing officer shall grant stay of demand, till the disposal of the first appeal on payment of 15% of the disputed demand.

HC stated that O.M. contemplated for some additional conditions which might be imposed by AO while granting stay which also includes a right to adjust the refund to the extent of demand subject to Section 245. HC thus noted that the dispute was about the extent of such adjustment. HC observed that the order could be stayed subject to 15% of the total demand which could be adjusted towards the past refunds. HC thus partly allowed assessee's petition.

Transfer Pricing

LD/65/110

Commissioner of Income Tax

vs.

Lever India Exports Limited

23rd January 2017

Jurisdiction of TPO on determination of ALP

TPO has to examine whether or not the method adopted to determine the ALP is the most appropriate; it is not his part jurisdiction to consider whether or not the expenditure passes the test of Section 37 of the Act

The assessee is engaged in the business of manufacture and export of cosmetic and toiletry products. In order to develop its brands, the assessee had reimbursed 20% of the advertisement expenses incurred by its Associated Enterprises in respect of the new products. With respect to these reimbursements, the assessee applied Transaction Net Margin Method (TNMM) to determine the Arms Length Price. As these expenses were integral part of its export activity, the assessee took into account the profit margin of its entire export activity to determine the ALP not only of its exports but also with regard to the reimbursement of advertisement expenses of its Associated Enterprises.

The Transfer Pricing Officer (TPO) held that as the transaction between the parties were on principal to principal basis, no reimbursement of advertisement expenditure by the assessee to its Associated Enterprises can be allowed, and thus, determined the ALP at nil.

The High Court ruled that 'the TPO has to examine whether or not the method adopted to determine the ALP is the most appropriate and also whether the comparables selected are appropriate or not. It is not part of the TPO's jurisdiction to consider whether or not the expenditure which has been incurred by the respondent assessee passed the test of Section 37 of the Act and/or genuineness of the expenditure.' The High Court noted that the TPO has not disputed the determination of ALP set out in Chapter X of the Act and the relevant Rules and held that the adhoc determination of ALP by the TPO *dehors* Section 92C, which cannot be sustained.

Service Tax

LD/65/111

Safety Retreading Company Pvt. Ltd. vs. Commissioner of Customs and Central Excise

18th January 2017

In a contract for retreading of tyres, service tax is payable only on service component and not on entire gross value; Costs of parts or other material, if any, sold to the customer while providing maintenance or repair service is specifically excluded.

Legal Update

Revenue raised a demand for levy of tax on the gross value of the service rendered including the cost of materials used and transferred by the assessee. The CESTAT members took divergent views. The Technical member took a view that gross value of the service rendered would be taxable. The third member [TM] held that there was absence of evidence of sale of materials in rendering the maintenance and repairs service and the said service being specific would not be treated as service under the category of 'works contract'. Further, the concept of 'deemed sale' was relevant only in respect of services under the category of 'works contract' and not in respect of 'maintenance and repair service'. Further, the TM held that the assessee was unable to prove that the conditions under Notification 12/2013-ST were satisfied and hence he was not entitled for benefit of deduction of cost of raw materials consumed in providing the service. Aggrieved, assessee filed petition before the Hon'ble SC.

SC perused *Notification No.12/2003-ST dated 20/06/2003* and CBEC circular dated 07/04/2004 which provided exemption in respect of input material consumed/sold by the service provider to the service recipient while providing the taxable service subject to conditions that adequate and satisfactory proof in this regard is forthcoming from the assessee. SC observed that exigibility of the component of the gross turnover of the assessee to service tax in respect of which the assessee had paid taxes under the local Act whereunder it was registered as a Works Contractor, would no longer be in doubt in view of the clear provisions of Section 67 of the Finance Act, 1994, as amended, which deals with the valuation of taxable services for charging service tax and specifically excludes the costs of parts or other material, if any, sold (deemed sale) to the customer while providing maintenance or repair service.

SC remarked that it cannot subscribe to the view held by the majority in CESTAT that in a contract of the kind under consideration there is no sale or deemed sale of the parts or other materials used in the execution of the contract of repairs and maintenance. As per SC, the CESTAT erred in holding that it is the entire of the gross value of the service rendered that is liable to service tax. SC held that the assessee is liable to pay tax only on the service component which under the State Act has been quantified at 30%. Further no dispute was raised by Revenue with regard to assessee's assessment on the turnover under the local/State Act, insofar as payment of VAT on 70% component was concerned.

SC perused a show cause notice and observed that in the notice, the details of the value of the goods, raw materials, parts, etc. and the value of the services rendered have been mentioned and service tax has been sought to be levied at the prescribed rate of ten per cent (10%) on the differential amount. Before SC, the Revenue argued that the said figures were furnished by the assessee himself and, therefore, must be understood not to be authentic. Against this, the SC observed that no dispute was raised with regard to the correctness of the said figures furnished by assessee in the notice issued, so as to now justify such stand before the SC. The invoices submitted by the assessee as illustration showed the break-up of the gross value received which was not argued by Revenue.

Ruling in favour of the assessee, SC thus set aside the majority order of CESTAT and directed the Revenue to refund the amount deposited by assessee without any interest and also discharged the bank guarantee furnished for penalty amount.

LD/65/112
McDonald India Pvt. Ltd.
vs.
CST, Delhi Tribunal
Delhi
16th December 2016

Notification No.19/2008 introducing Explanation to Rule 6 of Service Tax Rules, 1994 providing that, liability to pay service tax in respect of taxable services provided to associated enterprises arises on the basis of entries in the books of accounts even where the consideration for the same is not actually received, is prospective in nature.

The appellant provided management consultancy services to its holding company for undertaking franchise business in India. As consideration for providing such service, the appellant received service fee and discharged appropriate service tax liability on the basis of receipt of payment from the holding company. During the financial years 2006-07 and 2007-08, the appellant booked certain service fees as receivable from the holding company in its books of accounts, but did not pay the service tax since the said amount was not received by it during such period. However, on the

basis of book entry made by the appellant, in terms of the explanation inserted in Rule 6 of the Service Tax Rules, 1994,(w.e.f.10.05.2008) the Department initiated show cause proceedings and adjudicated the matter, in confirming the demand of service tax, interest and penalties. The Commissioner (Appeals) confirmed the demand.

The Tribunal observed that, as per Rule 6(1), as existed prior to 10.05.2008, service tax was required to be paid by the 5th/6th day of month immediately following the calendar month in which the payments were received towards taxable services. The said rule was amended w.e.f.10.02.2008 to the effect that, service tax would be required to be paid by the person liable to pay service tax on the taxable services provided to associated enterprises, even where the consideration for the taxable services provided, is not actually received. In such cases, service tax is required to be paid immediately upon crediting/ debiting of the amount in the books of accounts or receipt of payment, whichever event occurs earlier. The Tribunal held that the basic principle for ascertaining the retrospectivity of a legislation is the principle of 'fairness'. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability, have to be treated as prospective, unless the legislative intent is clear to give the enactment a retrospective effect. Further, an explanatory legislation is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous provisions of the legislation. The service tax statute holding the field at the relevant point of time does not contain any provision for demand of service tax by the authorities, prior to realisation of the value of taxable services. The legislative intention behind the amendments was explained by the CBEC vide letter dated 29.02.2008, which is for plugging avoidance of tax on the ground of non-realisation of money from associated enterprises. Since, by incorporating the explanation in Rule 6 ibid, the restriction was imposed for the first time that in case of transaction between associated enterprises, service tax has to be paid immediately on entry of the transaction in the books of account, the said amendment will be considered as prospective in effect, otherwise the doctrine of 'fairness' would be defeated. Further, *Notification No. 19/2008* introducing Explanation to Rule 6 ibid, nowhere specifies that the same will have retrospective application to deal with the past transactions. Thus, such Explanation placing restrictions prejudicial to the interest of the associated enterprises would not apply retrospectively.

LD/65/113

M/s Emirates Technologies Pvt. Ltd.

vs.

CCE & ST

CESTAT Allahabad

Tribunal considered earning of income as criteria for deciding allowance of CENVAT credit.

The appellant is registered with the department as a service provider under the classification "Renting of immovable property service". Show cause notice was issued proposing disallowance of CENVAT credit among others for professional charges paid to one property consultants in respect of Market Intelligence Report for Gurgaon, on the ground that services have not been used at Noida. Besides, CENVAT credit in respect of certain payments made to a real estate agent, as performance Bonus towards striking deal with Lessee towards performance for whole year was also disallowed. Aggrieved by the same appellant filed appeal.

Before the Tribunal, Appellant contended that, the definition of "input service" as given in Rule 2 (l) includes "market research" and that such search may be with respect to the existing output service or with respect to prospect of future output service. As regards, performance bonus paid to real estate agent, the appellant argued that, the service pertains to Real Estate Agency Services and the invoices relates to brokerage expenses for finding tenant. Appellant also provided details of tenants. Department contended that the market research report could not be utilised by the appellant service provider for providing taxable output service.

As regards market research services, the Tribunal held that, as the appellant has no rental income the appellant from Gurgaon and that he has not made any investment either prior to obtaining the report or after the obtaining of report for earning rental income from the tenants, the said expenditure is not in respect of earning of rental income from the tenants and hence the same is inadmissible as credit. As regards real estate agent services, the Tribunal remanded the matter to adjudicating authority for verification of the rent agreement with the tenants and if the appellant has earned the income from them.

Legal Update

LD/65/114

M/s Salora International Ltd.

vs.

Commissioner of Service Tax Delhi

Tribunal interpreted conditions of Notification No.52/2011 strictly and treating the same as substantive conditions thereby confirming the rejection of refund by lower authorities.

The appellant is a Merchant Exporter and filed claim for refund of service tax paid on input services utilised for the export of goods. The adjudicating authority while adjudicating the case, rejected the claim in respect of 15 shipping bills on the ground that refund application is filed after expiry of one year from the date of "Let Export Order". As regards the balance amount he observed that condition 3(j) of Notification No. 52/2011 requires an exporter to be registered with the Export Promotion Council sponsored by Ministry of Commerce or Ministry of Textile and in as much as the appellant has not fulfilled the said condition, refund cannot be sanctioned.

The Tribunal held that para 3 of the notification clearly lays down that the refund shall be filed within one year from the date of export of the goods and explanation attached to the said condition clearly lays down that the date of export shall be the date on which the proper officer of the Customs makes an order permitting clearance of the goods. Admittedly in the present case, the refund stands filed by the appellant after the "let go" order was passed by the Customs. As such the limitation aspect which stands provided in the notification itself cannot be diluted and the refund filed after that date cannot be held admissible. The Tribunal further held that condition mentioned in Para 3(j) of the said Notification is a substantive condition for allowing refund claim and being a part of the notification cannot be ignored. Accordingly, the appeal filed by the Appellant was dismissed.

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LD/65/115

M/s Jodhpur Vidyut Vitran Nigam Ltd.

vs.

Commissioner of Central Excise

Tribunal disallowed refund on the ground that as per provisions of the Finance Act,1994 read with Central Excise Act, 1944, time limit under Section 11B is applicable to any refund of any amount paid as tax and the decision of High Court in writ jurisdiction would be of no assistance.

The Appellant (service receiver) filed refund claim in respect of the service tax paid by them to service provider against invoice raised by the latter under the category of "business auxiliary services". The refund was claimed before the original authority arguing that no service tax was chargeable and payable on the services provided to it by service provider as such activities were not covered under BAS since they were in the form of "Information Technology Services" (ITS) which was not liable to tax during the relevant period. The Appellant contended that time limit provided in Section 11B would not be applicable since the tax stands paid by mistake. The refund claim stands rejected both on merits as well as on the ground of time bar.

The Tribunal observed that the service tax stands paid during the period August, 2004 to April, 2006 and the refund has been filed on 22.11.2007. It held that, refund of any amount paid as tax is necessarily to be governed by Section 11B of the Central Excise Act, 1944 which has been made applicable for purposes of refund of service tax by Section 83 of the Finance Act 1994. Consequently, refund of any amount of service tax has to satisfy the provisions of Section 11B of the Act. This section requires refund claim to be filed within a period of one year from the relevant date, which in this case is the date of payment of service tax. Since, the refund claim has not been filed within the time limit prescribed under Section 11B, the claim has been rightly rejected by the authorities below. The Tribunal distinguished the decision of Kerala High Court in the case of *Geojit BNP Paribas Financial Services Ltd. vs. CST, Kochi* [W.P.(C) No. 18126/2015, dated 06.07.2015 (M)] (Kerala High Court) relied upon by the Appellant on the ground that, such decision has been delivered by the Hon'ble High Court in exercise of its writ jurisdiction and cannot be held to be applicable as Tribunal is a creature of the statute and hence cannot travel beyond it.

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LD/65/116

G. R. Kulkarni & Co.

vs.

Commissioner of Central Excise CESTAT–Mumbai

Penalty cannot be imposed if before passing the adjudication order the assessee cease to exist.

The assessee, a proprietor, declared undisclosed receipts on rendering of taxable service but allegedly did not include certain amount which was claimed to be discharged tax liability during the declaration period. This claim was not found acceptable leading to confirmation of tax, interest and penalty under Section 78 of the Finance Act, 1994. The notice was issued on 1st October 2014 but before the matter could be adjudicated, the declarant proprietor, expired on 11th November 2014. The matter was subsequently handled by the legal heirs of the deceased and the fact of the demise of the declarant was noted in the order.

The Tribunal observed that the declarant was informed of short-declaration in letter dated 21.01.2014 calling for challans evidencing tax payment and that the shortfall was remitted by challan dated 8.01.2014. Accordingly, the Tribunal held that, declarant paid the entire amount that was computed by the adjudicating authority. As regard imposition of penalty u/s 78, the Tribunal held that, like all other penalties in tax statutes, is personal to the alleged offender. It is well settled that penalties cannot be visited upon a person who has ceased to exist. The declarant had expired when the adjudicating authority decided the matter and penalty was not liable to be imposed at that stage. Consequently imposition of penalty u/s 78 was set aside

Sales Tax

LD/65/117

Vizien Organics

vs.

Commissioner, Trade and Taxes and Anr

19th January 2017

Section 38 of DVAT Act: Refunds

Furnishing of statutory forms under the CST Act in terms of Section 38(7)(c) and (d) of DVAT Act is not a mandatory requirement for processing refund claims by Authorities

The assessee sought for directions that their refund claims, pending for long periods, should be processed and monies disbursed in a time-bound manner. As per the Revenue, the obligation to process refund claims and to pay interest would arise, only after all the necessary details-including Central Sales Tax (CST) documents are furnished; it also argues that after introduction of Section 38 (7) (d)-to the DVAT Act, in 2012, the assessee/dealers' refund claims cannot be said to be complete in case any amounts are due and owing under the CST regime.

The issue before the HC was whether Section 38(7)(d)-introduced on 18.06.2012 prevail over, and carve out an exception in respect of the binding period prescribed by Section 38(3) of DVAT Act for processing refunds in completed VAT assessments.

The Delhi HC in its rulings in *Swarn Darshan Impex (P) Ltd. vs. Commissioner, Value Added Tax [(2010) 31 VST 475 (Del)]* and *Prime Papers & Packers vs. Commissioner of VAT & Anr. [(2016) 94 VST 347(Delhi)]* had ruled about the obligatory nature of the time limit within which refund claims had to be processed. In both the cases, it was ruled that the period of 1-2 months' provided for examining and granting refunds is absolute and that the transgression of these time limits meant that the Revenue had to bear interest liability as long as the refund claims were not fully settled. Revenue argued that decision in *Swarn Darshan Impex* was not applicable due to the amendment in 2012, and that decision in *Prime Papers & Packers* did not properly consider the impact of the said amendment and other relevant provisions.

HC observed that as per isolated reading of Section 38(7)(d) of DVAT Act, the dealer is under an obligation to furnish "the declaration or certificate or forms" required by the CST Act. This obligation is an effectuation of Sections 8 and 11(2) of CST Act and Rule 12 of the CST Rules that prescribe preconditions for grant of concessional or NIL CST levies. However, as per HC, Section 38(7) (c) and (d) of DVAT Act nowhere states that the original paper declarations in CST Forms C, E1, E2, F, H, I etc. are to be furnished. Concededly, the DVAT Assessing Authority has to examine the claims under the local law as well as CST claims (and refunds).

HC observed that although the principles of taxation and the rate of tax are dictated by the Central Enactment, the mechanism for adjudication, assessment, recovery, refund etc. and all other related acts are to be found in the local law. HC noted that the amendment to the CST (Delhi) Rules w.e.f. March 5, 2014, altered Rule 4 and a new Form 9 (Reconciliation Form) had to be furnished by dealers. However, this form was both comprehensive and cumbersome which required dealers to provide exhaustive details

of their turnovers; including CST turnovers and the types of central forms (C, E-1, E-2, H, I & J). The Form required 4 years' details (2010-11, 2011-12, 2012-13 and 2013-14) that dealers were to furnish.

HC noted that even though the amendment to Section 38(7) of DVAT Act was made in June 2012, within 3 weeks, a statutory Notification followed by Circulars was issued advising all dealers to furnish requisite details online and not to file the original copies of the declarations. HC thus rejected Revenue contention that there is no obligation to frame the assessments and process refunds within the time frame prescribed u/s 38(3). HC observed that Revenue by various Circulars had extended the period for furnishing returns in Form-9. Further, by *Circular No.10 of 2012-13 dated July 13, 2012*, all registered dealers who had made stock-transfer or interstate sales at concessional rates of tax during 2009-10 and 2010-11 were asked to file requisite information online, to avoid inconvenience, adverse assessment and penalty at a later date.

Once both the parties agree that DVAT mechanism through the provisions of the Act and the Rules would prevail and apply for assessments in regard to both DVAT and CST liabilities and obligations, there is no warrant for the submission that the regime in CST has to be read in a manner different from the one understood in DVAT law.

HC remarked whilst the Central statutory forms are intended to enable the dealer concerned to claim concessional duty or exemption, as the case may be, and their verification is an important element, at the same time, the mechanisms evolved by the State (which prevail even for CST assessments etc.) should be pragmatic and simple. Revenue's argument before the HC was contrary to their consistent understanding after the introduction of Section 38(7)(d). As per HC, with the amendment of Rule 4 of the Central Sales Tax (Delhi) Rules with effect from 05.03.2014 and the introduction of the reconciliation form, which in fact includes four years details, the entire argument of the revenue as to the necessity and obligation for furnishing original certificates as a principal condition for processing refund claims, fails.

HC observed that there was no conflict of the kind which the Revenue projected, between the Circulars which it issued (pursuant to which dealers furnished particulars online) and Section 38(7) of the DVAT Act or other provisions of the CST Act. HC referred to ruling *Commissioner Sales Tax vs. Indira Industries [122 STC 100 (SC)]* which stated that whilst Circulars are not per se binding and cannot override express provisions of law; nevertheless, if they are not inconsistent with law, they bind the statutory authorities.

HC thus held that the decision in P*rime Papers & Packers* is still a good law and does not call for a review. For the period beyond what is stipulated u/s 38(3), the Revenue would be under an obligation to pay interest till the point of time the refund claim is adjudicated and allowed. Further, if during the processing of the refund claim (but after the two month period), the assessee is called upon to furnish particulars relating to any inter-state transactions for the purposes of verification of any of the central forms, that time would stand excluded for the purpose of calculation of interest. HC clarified that only such time as is consumed by the dealer beyond the period given in the notice (say 15 days or so) in regard to details of specific transactions would be excluded. HC stated that once verification of documents is completed, and it is found that they are in order, while calculating interest on refund, the exclusion (of payment of interest) would be only for the period and the amounts relatable to such forms. In other words, interest for other amounts cannot be withheld.

Thus, ruling in favour of assessees, HC directed the Revenue to process all the pending refund claims of the assessees in respect of the documents by calling specific details within reasonable time, and dispose the refund claims within stipulated period. It directed Revenue to ensure that the dealers would be entitled to applicable interest in accordance with law, up to the date of payment. Hence, HC allowed all the writ petitions.

Customs

LD/65/118

Manali Petrochemicals Limited
vs.
Union of India & Ors
6th December 2016

CESTAT order which dismissed assessee's appeal against findings of Designated Authority and issue of Notification No. 9/2015-Cus (ADD) imposing anti-dumping duty was set aside by HC; Pendency of a writ petition cannot ever be a

ground to deny appellate remedy, which is created specifically by statute and exists as of right

The assessee impugned a final order of the CESTAT made u/s 9C of the Customs Tariff Act (CTA), dismissing its appeal by an unreasoned order, on the premise that writ petitions filed by other parties, challenging the order against which the petitioner was aggrieved as an appellant, were pending.

Pursuant to an anti-dumping complaint, investigations were carried out which resulted into findings recorded by Designated Authority w.r.t. injury as a result of dumping of concerned goods by foreign suppliers/manufacturers. On 07.04.2015 Customs Notification No. 09/2015-Customs (ADD) was issued, imposing the duty recommended. These findings and notification led to institution of two sets of writ petitions, the first set challenging the findings and second set, challenging the ADD levy. Both these petitions were pending before the HC.

The assessee preferred an appeal before CESTAT, being partly aggrieved by the final findings and Notification. Taking note of the fact that petitions filed by other parties, challenging order of Designated Authority and ADD Notification issued by Central Govt were pending before HC, CESTAT dismissed the appeal, directing the assessee to come again after having final verdict from HC, if needed, within the prescribed time.

Before the HC, the assessee contested that CESTAT could not have dismissed appeal in the manner it did, on the ground that third parties had approached the HC in petitions. The assessee stated that existence of an alternative remedy may be a ground for refusal for exercising writ jurisdiction, but pendency of a Writ Petition cannot ever be a ground to deny appellate remedy, which is created specifically by statute and exists as of right.

HC remarked that it is axiomatic that every order of a judicial or quasi-judicial authority who is responsible for deciding disputes concerning citizens as well as myriad body of litigants before it, should indicate the reasons which impelled the decision maker (judicial authority, judge, etc.) to hold what it did. Courts rigorously enforce– as an attendant value to the rule of law minimum standards of fairness of procedure (adequate notice, fair opportunity of hearing, a decision on the merits, by an unbiased tribunal or authority, based

on reasons) and that these values are bedrock of judicial functioning. HC remarked that "Bereft of reasons, an order, which might have momentous consequences to those affected by it, is incapable of redress; its sphinx like inscrutability would likely mask untenable reasons and considerations that lay buried forever in the mind of the maker. Unlike the executive and legislative branches whose functioning does not always mandate open scrutiny, courts are always obliged to dispense justice in the public gaze."

HC analysed provisions of Section 9C of Customs Tariff Act. HC observed that the Parliamentary intent in creation of an appellate forum in respect of findings by the Designated Authority was to provide meaningful redress by a competent appellate body. The order impugned was not only cryptic but mistaken in its assumption that the pending Writ Petitions (of others) could provide adequate redress to the assessee - an entirely erroneous assumption, because those petitions were merely pending and depended on exercise of discretion. HC held that the availability of an appellate remedy in this case, is conferment of a right to approach the higher forum for correction, on facts and law, whereas exercise of judicial review is within a restricted canvas. HC held that CESTAT had in essence, treated an appellate remedy (otherwise a compulsive jurisdiction) to be alternative and discretionary, robbing it of substantial content.

Thus allowing the Writ petition of assessee, HC issued a direction to CESTAT to constitute to bench as expediently as possible for hearing of the parties, after which the CESTAT shall, issue its final orders. ■