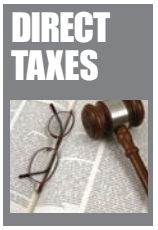
Legal Decisions[1]



Income Tax

LD/65/148

Prin. Commissioner of Income Tax vs. Sunny Infraprojects Ltd. 24th April, 2017

Seized material must have some nexus or relevance to the additions sought to be made and must be relevant for the belief formed regarding income having escaped assessment; Documents like Balance Sheets, Audit Reports etc. which were already available with the AO cannot constitute incriminating material which could justify the making of the additions.

A search operation was carried on one Minda Group of Companies and one Mr. Santosh Kumar Jain was stated to be an entry operator, who in his statement purported to have accepted that he was engaged in providing accommodation entries to the group companies of Mr. Ashok Minda. During the course of assessment proceedings in case of assessee, to facilitate independent verification of the receipt of the share capital and share premium, the AO sent notices u/s. 133(6) to the Principal Officer of each of the investor companies to furnish their response along with bank accounts, minutes of meetings, details of PAN cards, names and addresses of Directors etc. The AO then came to the conclusion that the replies submitted were not satisfactory as to the identity, genuineness and creditworthiness of the investment. The AO observed that it was gathered during the post-search proceedings that Sunny Infra Projects Limited was a paper company run by Mr. Santosh Kumar Jain and that the share capital and share premium inducted during the year was nothing but unaccounted business income of Ashok Minda Group of Companies which had been routed by entry operator through various bogus companies.

Subsequently, statement of Mr. Santosh Kumar Jain was again recorded on 27th February, 2014 in which he retracted from his earlier statement given on 10th January, 2012 during the course of search. The AO rejected the said retraction and proceeded to make the additions to the taxable income of the Assessee.

The issue before the Delhi HC was whether ITAT erred in law in holding that AO did not have any lawful and valid jurisdiction for initiation of proceedings and issuance of notice u/s. 153C of Income Tax Act, 1961, and whether what was recovered during the search could be considered to be incriminating material *qua* each of the Assessees.

HC observed that w.r.t. assessment proceedings on the assessee, satisfaction note prepared by the AO of the Assessee referred to the 'incriminating' documents/papers which were seized during the search and seizure action in the case of the Minda Group. These documents were copies of the balance sheet abstracts and company's general profile, balance sheet, profit and loss account, auditor's account, copies of income tax returns and copy of trial balances, and apart from this there was no other material referred to, that could give rise to the belief about income having escaped assessment. Each of these above documents was already available with the AO when the initial assessments were finalised under Section 143(3) of the Act. HC therefore concluded that these documents could not constitute incriminating material which could justify the making of the additions in exercise of the powers u/s. 153C. As per HC, the seized material must have some nexus or relevance to, the additions sought to be made and must be relevant for the belief formed regarding income having escaped assessment.

HC therefore held that ITAT was not in error in deleting the additions made by the AO in the hands of the assessee. HC thus ruled in favour of assessee.

LD/65/149

Nath Brothers Exim International Ltd. vs. Union of India & Anr 21st April, 2017

Constitutional validity of Sec. 80A(5) and fourth proviso to Sec. 10B(1), which discuss about mandatory filing of return in time for claiming tax holiday, upheld by HC.

As per fourth proviso to Sec. 10B, no deduction shall be allowed where return is not furnished within prescribed time limit. Also, Sec. 80A(5) provides that no claim u/s. 10B and other such sections shall be allowed where assessee fails to make the same in the return of income.

[1] *Contributed by CA. Sahil Garud, CA. Mandar Telang, Indirect Taxes Committee, Committee on International Taxation, Insolvency and Bankruptcy Laws Group, Disciplinary Directorate and ICAI's Editorial Board Secretariat.*
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The assessee is a company engaged in business of manufacture and export of readymade garments, garment made ups and silk fabric. During AY 2002-03, assessee had set up Export Oriented Unit (EOU) as an independent unit. The profits derived there from were eligible for deduction u/s. 10B. During AY 2007-08, assessee earned profit of ₹2.43 crore. However, it failed to claim deduction in the belated income tax return filed on 31.12.2008. The said claim of deduction u/s. 10B was only made by the assessee in the revised return filed subsequently on 26.03.2010. Revenue rejected the claim of deduction u/s. 10B. CIT(A) upheld the order of AO and further appeal was pending before Delhi ITAT. The assessee filed a writ before Delhi HC challenging the validity of Sec. 80A(5) as well as fourth proviso to Sec. 10B(1) as being violative of Article 14 of the Constitution of India.

Before HC, assessee argued that before insertion of Section 80A (5) and fourth proviso to Section10B (1), an eligible assessee was not mandatorily required to claim deduction in the return of income, and that the eligible assessee was only required to intimate the Assessing Officer about its claim for deduction at any time before completion of Assessment Proceedings. The assessee cited Circular No. 14(SL-35) of 1955, which required the officers of the department *"to assist taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs."* It was submitted that, therefore it is incumbent for the revenue to draw the attention of the assessee to any refunds and reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason. As per the assessee, in case of any *bona fide* reason preventing oneself from filing return of income within time, no recourse is given under any provision of the Act through which deduction could be claimed subsequently, and that the CBDT's power u/s. 119(2) is discretionary.

HC observed that the tax officers are required not more than to assist the assessee and it does not place any mandatory duty on the officer to allow a deduction if the assessee does not wish to claim it. HC noted that Sec. 10B(1) gives numerous benefits to assessee and fourth proviso merely requires compliance of the time line provided u/s. 139(1). Further insertion of Sec. 80A(5) did not curtail any vested rights of assessee, it only imposed upon it an obligation to claim deductions in a timely manner and in the return so filed.

HC remarked that it was open to legislate and prescribe different conditions in respect of those who claim benefits, just as the substantive provisions which stipulate the conditions. As per HC, provisions of special limitation in cases like this instant case, was justified and had a rational nexus with the object, which Parliament intended to achieve. Reliance was placed on decision in the case of *D.R. Industries vs. Union of India [(2008) 229 ELT 24*] wherein it was held that different periods of limitation can be prescribed by Parliament and as such the question of arbitrariness does not arise. Further, HC observed that a proviso is meant to limit the scope of the general enactment and therefore any proviso in respect thereof couldn't be held as invalid as long as the objective of the general provision is not frustrated. HC referred to SC ruling in *Prem Singh & Ors vs. Birbal [2006 (5) SCC 353)]* wherein it was held that these provisions are more like limitation periods, which are statutes of repose.

HC thus concluded that with the addition of the fourth proviso to Section 10B(1) of the Act, the manner of claiming deduction is now time barred under the provisions of the Section 139(1) and relief cannot be granted after expiry of the time mentioned in Section 139(1). The Parliament acted within its power to differentiate between a return of income filed under Section 139(1) and a belated return filed under Section 139(4) for the purposes of deductions claimed under Section 10B(1). HC thus dismissed the writ and ruled in favour of Revenue.

LD/65/150

Commissioner of Income Tax
vs.
Equinox Solution P. Ltd.
18th April, 2017

Sec 50: Special provision for computation of capital gains in case of depreciable assets

Sale of running business by assessee held to be a Long-term capital gain and not short term, by SC; Section 50 (2) would apply to a case where the assessee transfers one or more block of assets, which he was using in running of his business; In present case, assessee sold the entire business as a running concern.

The assessee was engaged in the business of manufacturing sheet metal components out of CRPA and OP sheds at Ahmedabad. The assessee sold its entire running business in one-go to one Amtrex Appliances Ltd. (AAL) for ₹58.53 lakh. The

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assessee filed its return for AY 91-92 and claimed deduction under Section 48 (2) of the Act as it stood then by treating the sale to be in the nature of "slump sale" of the going concern being in the nature of long term capital gain. AO held that it was covered under Section 50 (2) of the Act because it was in the nature of short term capital gain as specified in Section 50 (2) of the Act and hence did not fall under Section 48 (2) of the Act as claimed by the assessee. CIT(A) allowed assessee's claim of deduction. Both ITAT and HC ruled in favour of assessee. Aggrieved, Revenue filed an appeal before SC.

SC observed that Section 50 (2) applies to a case where any block of assets are transferred by the assessee but where the entire running business with assets and liabilities is sold by the assessee in one go, such sale, in our view, cannot be considered as "short-term capital assets". As per SC, provisions of Section 50 (2) of the Act would apply to a case where the assessee transfers one or more block of assets, which he was using in running of his business. Such was not the instant case because in this case, the assessee sold the entire business as a running concern.

SC placed its reliance upon rulings in *Artex Manufacturing Co. [1997(6) SCC 437 CIT]* and Bombay HC ruling in *Premier Automobiles Ltd. [264 ITR 193 (Bombay]*.

SC thus ruled in favour of assessee.

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LD/65/151

Commissioner of Income Tax
vs.
Alankar Business Corporation Ltd.
Chennai
12th April, 2017

For computation of capital gain, a further reduction from WDV is not warranted if such WDV has already been reduced by allowable depreciation and no breakages have been claimed in the computation of income; Payment of compensation charges is to be allowed as per Section 36(1)(iii) if it is payable to the supplier of the equipment as an interest liability; Amount for the goodwill is liable to be taxed, when it is clear that the transfer of such goodwill is complete.

The assessee is engaged in the manufacture of Soft drinks under a franchise from Coca Cola. The assessee entered into an arrangement for transfer of its entire soft drinks and beverage undertaking as a going concern to Hindustan Coca Cola Bottling South West Pvt. Ltd (in short 'HCC').

Issue 1: Reduction of the value of breakages of bottles and crates from the written down value ('WDV') in the computation of short term capital gains u/s. 50:

Assessee had sold bottles and crates to HCC offering short term capital gain of an amount of ₹ 8.28 Cr. to tax in terms of Section 50 of the Act, the WDV being adopted at ₹ 12.02 Cr. The assessee accounted for breakages of bottles and crates at the rate of 15% as against 33% for earlier years. As per the AO, the value of breakages should have been deducted from the WDV adopted for bottles and crates, whereas, according to assessee, the breakages had already been taken into account in its statement of income by way of *suomoto* disallowance and there was thus no need to reduce the same once more from the WDV. However, the AO noted that the sale to HCC as on 28.02.1999 could only be of the bottles existing as on that date which could not have included the broken bottles and crates. The AO estimated the breakages at ₹ 1.88 Cr. reducing the same from WDV, and the short term capital gain stood enhanced to ₹ 10.54 Cr. The CIT(A) ruled against the assessee, whereas the ITAT ruled in favour of assessee.

HC analysed provisions of Sec. 50 as per which, where a capital asset forms part of a block of assets and depreciation has been allowed in regard to the same, then, in the computation of capital gain on the transfer of such asset, the cost of acquisition shall be the written down value of the block of assets at the beginning of the previous year, as increased by the actual cost of any asset falling within that block acquired during the previous year. HC held that since the breakages were not claimed in the computation of income, there is no justification for any further reduction from WDV. HC thus ruled in favour of assessee.

Issue 2: Assessee had set up a new plant commencing production from March 1997. In this regard, an 'Agreement to enter into Lease' dated 23.02.1995 was entered into between the assessee and M/s. Sundaram Finance Limited ('SFL') for financing of the plant and machinery, the terms of which included payment of compensation at 21% in certain situations. After a gap of nearly two years, a lease agreement was entered into between the parties on 25.03.1997 for lease of the factory for a period of seven years. The assessee intended originally, to

defer the claim of compensation charges/interest payment over a period of seven years, i.e., during the period of lease. However, since the plant and machinery had been sold during the financial year under consideration, the lease agreement was terminated and the entire balance outstanding interest was claimed in the present year. The claim, in terms of Section 36(1)(iii), was rejected on the ground that there was no borrowal by the assessee *per se*. The alternate claim u/s. 37 was also rejected on the ground that the expenditure was capital in nature by the AO. The CIT(A) ruled against the assessee, whereas ITAT ruled in favour of assessee.

HC observed that the agreement dated 23.02.1995, while providing for the financial assistance extended by SFL for the purchase of the plant and machinery, also provided for the subsequent lease of the machinery to the assessee. Thus, the arrangement with SFL for financing the acquisition and leasing of the equipment was only for the business purposes of the assessee. HC observed that the provision of compensation charges was in the nature of the interest liability payable to the manufacturer or supplier of the equipment by SFL that the assessee made good and thus the assessee assumed the role of the borrower in this situation. The compensation charges paid were thus in the nature of interest u/s. 36(1)(iii). Further HC also noted that while the underlying new asset [plant and equipment] was acquired, it was for the purpose of the expansion of the existing business of the assessee and not for the development of a new line of business. The charges paid are consequently also allowable u/s. 37 of the Act being wholly revenue in nature. HC thus ruled in assessee's favour.

Issue 3: The assessee submitted that the actual closure of business was conditional on the completion of various statutory formalities and produced a letter from the purchaser HCC to the effect that the sum of ₹3 crore constituted only an advance in respect of which a Bank Guarantee had been given by the Assessee. The AO brought to tax the amount of ₹3 crore in the present Assessment Year being of the view that the transfer of goodwill of business had been effected in the present year itself. The CIT(A) ruled against the assessee, whereas the ITAT ruled in favour of assessee.

HC perused the agreements entered into for business transfer and for transfer of goodwill. HC noted that the execution of a Bank Guarantee as well as the Letter dated 28.03.2002 by HCC where the payment of ₹3 crore is shown as an advance has to be seen in the context of the agreements between the parties and the suspension of the business of the assessee. There was nothing whatsoever to indicate that the agreement was tentative or that the transfer was incomplete or subject to other stipulations. The finding of the Tribunal to the effect that the consideration on account of goodwill was not received is contrary to certain clauses of the agreement wherein the vendors specifically confirm the receipt thereof. HC thus held that ITAT erred in deleting the addition on account of goodwill when the same has, as a fact, been transferred as on 28.02.1999 and full consideration received then and there. HC thus ruled in favour of Revenue.

LD/65/152

Berger Paints India Ltd.
vs.
Commissioner of Income Tax
Delhi
28th March, 2017

35D(3) (Explanation): Definition of 'Capital employed in the business of the company'

Share premium collected by assessee on its subscribed share capital doesn't constitute 'capital employed' in the business for computing deduction u/s. 35D.

The assessee is engaged in the business of manufacture and sale of various kinds of paints. The AO disallowed proportionate deduction claimed u/s. 35D for preliminary expenses. While assessing the calculation of preliminary being written off at 2% of capital employed by the assessee, the AO denied assessee's contention that shares issued on 'premium' formed part of capital employed in the business of the company. The CIT (A) ruled in favor of assessee. The ITAT reversed CIT(A)'s order and ruled in favour of Revenue. Further, the Delhi HC also ruled in favour of Revenue, aggrieved by which the assessee filed an appeal before the SC.

SC observed that explanation to Sec. 35D(3) clearly mentioned that capital employed in the business of the Company included in it aggregation of three distinct components i.e. share capital, debentures and long term borrowings. As per SC, since reserves and surplus did not form part of the 'capital employed' in business as per the given explanation the same was restricted to share capital, debentures and long term borrowings and premium

was nowhere included in the same and therefore assessee was not entitled to claim deduction towards premium received.

SC remarked that if the intention of the Legislature were to treat the amount of "premium" collected by the Company from its shareholders while issuing the shares to be the part of "capital employed in the business of the company", then it would have been specifically said so in the Explanation(b) of sub-Section(3) of Section 35D of the Act.

SC observed that the Companies Act provides in its Schedule V- Part II (Section 159) a Form of Annual Return, which is required to be furnished by the Company having share capital every year, and column III of this Form, which deals with capital structure of the company, provides the break-up of "issued shares capital break up". This column did not include premium amount collected from shareholders on its issued share capital by the Company. This was indicative of the fact that such amount is not considered as a part of the capital unless it is specifically provided in the relevant section. Further, as per Sec. 78 of Companies Act, premium collected from shareholders is to be transferred in a separate account "securities premium account", which again clearly showed that premium collected would not form part the capital employed by the company.

SC thus held that share premium collected by assessee on its subscribed share capital did not constitute 'capital employed' in the business for computing deduction u/s. 35D, and ruled in favor of Revenue.

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LD/65/153

Hosanna Ministries

vs.

The Income Tax Officer (Exemptions)

07th March, 2017

HC condones 1902 days of appeal-filing delay and remits matter back to ITAT for fresh decision; Assessee did not give any lame excuses on medical grounds, etc, but it was a case of either non-advise by assessee's professional or ignorance of law by assessee itself.

Assessee is a charitable trust registered under Indian Trust Act. Assessee had applied for registration u/s. 12AA which was rejected by the CIT and no further action was taken by the assessee for the same. After some years of rejection of the application, the Revenue sent a recovery notice. Based on a professional advice, the assessee came to know that the order of rejection by CIT was appealable to the ITAT u/s. 253(1)(c). So the assessee filed an appeal before the ITAT with the application for condonation of delay of 1902 days. ITAT denied condonation holding that assessee was not vigilant in pursuing the appeal. Additionally, ITAT also noted that the assessee was not engaged in the activities in accordance with the objects specified in the Trust deed. Aggrieved assessee filed an appeal before Madras HC.

HC perused documents of registration of assessee trust with Directorate of Social Defence, State of Tamil Nadu, especially after the coming into effect of Juvenile Justice (Care and Protection of Children) Act 2015, and noted that the assessee was running under the provisions of the Juvenile Act and rejected ITAT's finding that the assessee was not engaging in activities in accordance with the objects specified in the Trust Deed.

HC noted that no doubt, the delay of 1902 days is a huge and enormous delay. But, when we look at the reasons given by the assessee for such a delay, it shows that it is not attributable to any lame excuses on medical grounds or otherwise. HC remarked that *"Assessee knew well that if a plea of ignorance of law is taken, that would be, on the face of it, rejected by the Court/Tribunal, nevertheless, such a plea alone had been taken by the assessee and that itself would show the inherent genuineness attached with the reason cited by the assessee for such huge delay."*

HC referred to SC ruling in the case of Collector, *Land Acquisition vs. M.S.T.Katiji and others [167 ITR 471(1987)]* wherein it was held that *"there is no presumption in this country that every person knows the law: it would be contrary to common sense and reason if it were so"*.

HC thus set aside ITAT's order and ruled in assessee's favour.

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LD/65/154

Noida Power Company Limited

vs.

Commissioner of Income Tax

6th March, 2017

Limitation of seven years as provided by amended Section 201(3) of the Act would not apply retrospectively even to returns filed in year 2009

The assessee filed its TDS return for Quarter 4 of FY 08-09 on 12.06.2009 w.r.t. TDS on salaries.

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Revenue issued a notice dated 05.01.2016 deeming assessee as a person in default. The assessee filed a writ petition against this notice alleging that Revenue had no authority of law to pass any order in connection with the above return considering the limitation period given in Section 201(3).

As per Section 201, no order shall be made deeming a person to be an assessee in default for failure to deduct the whole or any part of TDS from a person, at any time after the expiry of seven years from the end of the financial year in which payment is made or credit is given. HC observed that the limitation for passing the order is 7 years from the end of the relevant financial year; however, this was not the position earlier or at the time when the TDS return was filed. HC observed that unamended provisions of Sec. 201(3) were applicable in this case and as per Section 201(3) which stood then, the limitation for passing an order in connection with the TDS return was two years from the end of the financial year in which the statement of return is filed or four years from the end of the financial year in which the payment is made or the credit is given, in any other case.

HC observed that period had expired much before the issuance of the impugned notice and thus valuable rights have accrued in favour of the assessee as during this period no order was passed. On the issue of retrospective applicability of amended provisions, HC referred to SC ruling in case of *ITO vs. S. K. Habibullah [(1962)44 ITR 809]* wherein the SC had remarked that an amendment cannot be applied to affect the vested rights which have accrued to the assessee prior amendment. In other words, any right which had vested in the assessee due to the conclusiveness of any proceedings cannot be taken away by the subsequent amendment.

HC further referred to SC ruling in *K.M. Sharma vs. Income Tax Officer (2002) 254 ITR 772 (SC)]* wherein the SC had stated that taxing provision imposing a liability is governed by normal rule of presumption that it is not retrospective and the settled principle of law is that the law to be applied which is in force at the time of assessment order unless contrary is provided expressly or by necessary implication. Even a procedural provision cannot in the absence of clear contrary intendment expressed therein be given a greater retrospectivity then what has been expressly mentioned so as to enable the authority to affect the finality of the tax assessment or to open up liability which has become barred by lapse of time. Further the Gujarat HC in the case of *Tata Teli Services vs. Union of India and others* on 05.02.2016 had specifically held that amended provision of Sec. 201(3) was not retrospective in nature and that a right which has accrued to the assessee prior to the aforesaid amendment cannot be affected by amendment.

HC thus held that the provision of Section 201 (3) of the Act as amended by the Finance Act 2 of 2014 is effective from 01.10.2014 only and would not apply retrospectively to any returns or to the proceedings which may have become conclusive with the passage of time on the expiry of the limitation under the unamended provision.

HC remarked that impugned notice dated 05.10.2016 is just a notice under Section 201 (3) of the Act and it only requires the petitioner to furnish certain information and nothing else. It is not even a show cause notice which may be taken for the purposes of passing an order as contemplated under Section 201 (3) of the Act. HC thus directed the assessee to appear before the AO and submit the desired information to keep its record straight.

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LD/65/155

Sigma Corporation India Ltd.

vs.

Dy. Commissioner of Income Tax

15th February, 2017

Disallowance u/s. 40A(2) with respect to professional remuneration payment by assessee-Company to its Vice President, deleted by HC; The Vice President was responsible for multiple tasks for more than one concern which led AO to disallow his remuneration holding it to be excessive for assessee company.

In FY 08-09, the assessee paid remuneration to its Vice President [Marketing] [a related party] which was disallowed by the AO to the extent of 50%. The AO felt that the assessee had not adequately addressed the concerns with respect to the time spent for its work, having regard to the qualifications and expertise of the said expert. The CIT(A) overturned AO's order as he believed remuneration was reasonable in consonance to his qualifications. However, the ITAT affirmed AO's order. Aggrieved, assessee filed an appeal before Delhi HC.

HC perused the provisions of Sec. 40A. HC referred to decision in *Hive Communication's [[2011] 26 taxmann.com 287 (Delhi)]* which considered CBDT Circular dated July 6, 1968, which

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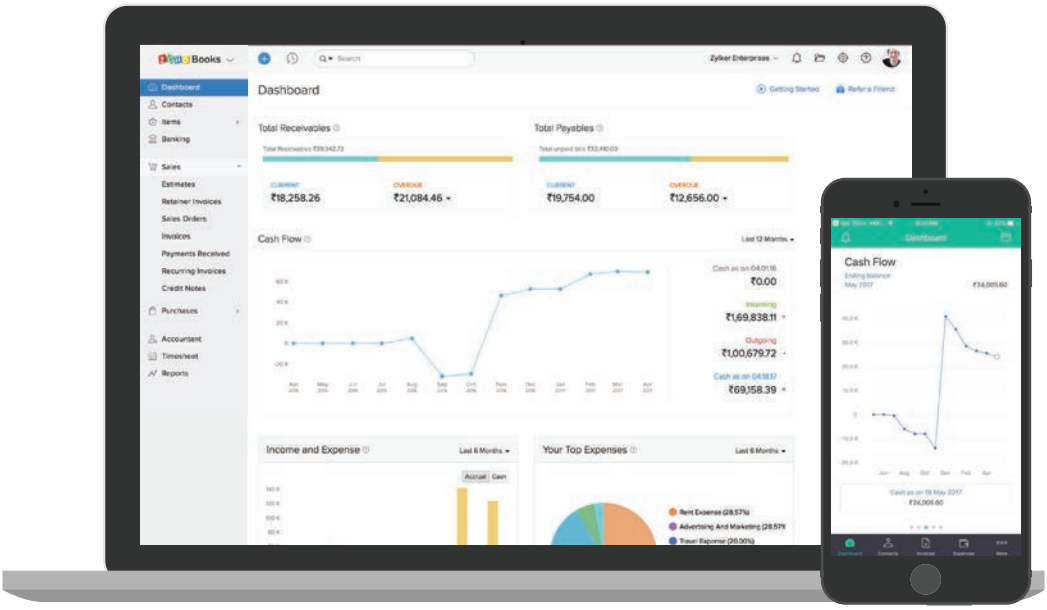

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clarified the meaning of "reasonable expenditure" in the context of the AO's discretion u/s. 40A. HC relied on Calcutta HC ruling in the case of *Edward Keventer Pvt. Ltd. [86 ITR 378 (1972)]* wherein it was held that reasonableness or otherwise of the expenditure should take into account firstly the legitimate business needs of the assessee or the company, secondly, benefits derived by or accruing to the company, and that while doing so, the view point of the company or concern having regard to prudent business practices, should prevail. The SC while affirming this decision of Calcutta HC had said that *"It is not for the Assessing Officer to dictate what the business needs of the company should be and he is only to judge the legitimacy of the business needs of the company from the point of view of a prudent businessman"*.

HC noted that AO nowhere benchmarked the concerned related party's expertise with any other consultant and AO proceeded on a wrong assumption that the related party could not have performed multiple tasks for more than one concern. HC remarked that *"such a stereotyped notion can hardly be justified in today's business world where consultants perform different tasks, not only for one concern but for several business entities.....Likewise in other fields i.e. journalism, the medical profession etc. more than one entity may engage or retain a single professional on the basis of his experience, learning and expertise, unless there is a deeper scrutiny that involves comparable analysis of like situations (a highly difficult task), additions made under Section 40A(2) would be suspect."*

Thus HC ruled in assessee's favour and set-aside ITAT's order.

Transfer Pricing

LD/65/156

BNT Global P. Ltd.

vs.

Income Tax Officer

26th March, 2017

Penalty u/s. 271BA upheld for assessee's failure in filing Form 3ECB in respect of its transaction of receipt of share capital/premium from its NRI director-shareholder; Bombay HC ruling in Vodafone India distinguished on facts.

During the course of assessment proceedings, the AO observed that since the assessee had entered into an international transaction of receiving foreign inward remittance of ₹11,47,21,471/- from its Director as well as beneficial shareholder, on account of share capital and share premium, the assessee was required to file Audit Report in Form 3CEB. AO levied penalty of ₹1lakh u/s. 271BA on account of the assessee's failure to file the Audit Report in Form 3CEB. CIT(A) upheld AO's order. Aggrieved, the assessee filed an appeal before Mumbai ITAT.

Analysing the relevant provisions, ITAT noted that for international transactions specified in Sec. 92B, it is mandatory for a person entering into international transaction/transactions to furnish a report [obtained u/s. 92E] from an Accountant setting forth the particulars of such international transaction(s). Further, u/s. 271BA of the Act, if any person fails to furnish a report from an Accountant as required by Sec. 92E, the AO may direct that such person shall pay, by way of penalty, a sum of ₹1 lakh. Admittedly, the assessee had not complied with provisions of Sec. 92E.

Relying on coordinate bench ruling in the case of *IL&FS Maritime Infrastructure Company Ltd. [Appeal no. 4177/Mum/2012]* ITAT observed that transaction of share investment falls within the purview of Sec. 92E of the Act and the assessee is required to file Audit Report in Form 3CEB for such transactions, by the prescribed date, before the authorities concerned and that failure to do so would attract levy of penalty u/s. 271BA of the Act. As per the ITAT, since the international transaction of investment in share capital of the assessee by the NRI Director of the assessee company fell within the ambit of Sec. 92E, assessee's contention that *"it was not required to file Audit Report in Form 3CEB, since the provisions of Section 92E of the Act were not applicable as it had only received payments from aboard for share capital and share premium from its NRI Director for allotment of shares and no other international transaction"*, was rejected by the ITAT.

ITAT rejected assessee's reliance on Bombay HC ruling in the case of *Vodafone India Services Pvt. Ltd. [(2014) 368 ITR 0001 (Bom)]* provisions of Chapter X are not applicable to international transactions of issuance of equity shares by resident company since the capital receipts cannot be considered as income. ITAT remarked that the Vodafone decision was distinguishable on facts as it did not deal with the issue of penalty u/s. 271BA of the Act. ITAT noted that in Vodafone case, Form 3CEB was filed by the assessee and on reference by AO, TPO made an adjustment to the ALP of issue of equity shares at a

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premium, which was dropped by HC. However, in the instant case, AO had neither attempted to nor made any adjustment to the ALP for issue of equity shares at a premium to its NRI Director-shareholder. Admittedly, the issue was simply whether penalty u/s. 271BA was attracted, since assessee had not filed the Audit Report in Form 3CEB within the period warranted u/s. 92E.

As per the ITAT, there was no plausible reason put forth by the assessee to establish how it was prevented by reasonable and sufficient cause from getting the Audit Report in Form 3CEB and filing the same before the concerned authority within the time specified u/s. 92E. ITAT held that failure on the part of the assessee to furnish the Audit Report in Form 3CEB from an Accountant in the prescribed proforma within the prescribed period, without reasonable cause, was a clear violation of the provisions of Section 92E of the Act, for which penalty u/s. 271BA was leviable.

LD/65/157

A.W. Faber Castell (India) P. Ltd.

vs.

Deputy Commissioner of Income Tax

Mum ITAT

Approval of payment of royalty received from FIPB/RBI does not automatically prove that the payment is at Arm's Length.

Facts and Background

The assessee, A.W. Faber Castell (India) P. Ltd ('Faber Castell India'), was engaged in the manufacturing and trading of wide range of stationary products during AY 2012-13. Faber Castell India sold its products in India as well as abroad to its Associated Enterprises ('AEs'). One of its AEs i.e. Faber Castell A.G., Germany was owner of trademarks and the corporate brand name which Faber Castell India used in its product. Since Faber Castell India used the trademark in relation to the sale of the products, therefore in consideration of grant of license and right to use the trademark, Faber Castell India paid to AE, royalty of ₹1.91 crore @ 3% on net sales excluding sales to AEs and sale of non-brand Faber's products. In its TP study, Faber Castell India benchmarked the royalty payment using Comparable Uncontrolled Price ('CUP') method. During assessment, Faber Castell India relied on approval granted vide letter dated March 9, 2005 issued by Foreign Investment and Promotion Board ('FIPB') Unit of Department of Economic Affairs of Ministry of Finance (Government of India) read with Press Note No. 2 dated June 24, 2003 issued by SIA (FC Division) of Department of Industrial Policy and Promotions, Ministry of Commerce & Industry, Government of India. Faber Castell India contended that though approval was granted for making payment up to 8% on exports and 5% on domestic sales, payment made by the assessee to its AE merely at 3% was at ALP as the payment was far below then the rate of approval granted by the government under Foreign Exchange Management Act ('FEMA') rules and industrial norms. Rejecting Faber Castell India's contention, AO held that no comparable royalty agreement was produced by assessee to justify the CUP method adopted by it. Accordingly, AO determined Arm's Length Price ('ALP') at Nil and made addition of the entire amount of royalty paid by assessee to its AE of ₹1.91 crores. In this regard, AO followed earlier year assessment orders passed in Faber Castell India's own case for AY 2010-11 and 2011-12. In appeal, DRP confirmed AO's order.

Issue:

Whether the approval granted by the FIPB/RBI for payment of royalty be considered as a valid CUP for determining the ALP of the royalty paid?

Held:

Faber Castell India contended that the royalty paid to its AE for use of its trade mark and brand name at the rate of 3% was within the rates allowed by the FIPB unit of Ministry of Finance and, therefore, it was ALP price and no further study or substantiation was needed. In this regard, Faber Castell India relied on Tribunal order in assessee's own case in AY 2011-12, wherein 3% royalty payment was accepted considering Govt. approval, relying on SGS India HC-ruling. On the other hand, AO/DRP were of the opinion that the payment of royalty has to be justified on the basis of ALP price to be determined on the basis of independent study to be carried out as per Transfer Pricing ('TP')-regulations and since no such proper study had been made by assessee, no ALP could be determined and thus same was taken at Nil. The ITAT observed that the main issue was whether rate of payment of royalty approved by the RBI under automatic route or the approval granted by the FIPB Unit of Ministry of Finance relying upon the rates prescribed under the automatic route, would itself *ipso-facto* constitute ALP under TP-

regulations provided in Chapter X. On review of Press Note No. 8 (2009 series) dated December 16, 2009, ITAT observed that the Government of India has now waived all the restrictions on payment of royalty under foreign technology collaboration and put the same under automatic route. Accordingly, ITAT held that *"Under these circumstances it is quite obvious now that Faber Castell India cannot be permitted to take this stand that since there are no restrictions on payment of royalty by the Government of India, therefore any amount paid by Faber Castell India on account of royalty would ipso-facto be its 'ALP' also."* Further, ITAT opined that *"If this kind of position is allowed to exist then it would amount to simply rendering the transfer pricing regulations as redundant. In our view that cannot be an ideal situation in the eyes of law. Thus, in our considered opinion, after taken into account this Press Note, the aforesaid controversy comes to rest."* Thereafter, ITAT clarified that this notification was not brought to the notice of Tribunal in AY 2011-12 and that was the reason Tribunal accepted 3% royalty payment in that case. Further, ITAT also noted that both parties had unanimously agreed that this Press Note brought out clarity in the legal position as compared to that as existed earlier. Distinguishing reliance on Bombay HC ruling in SGS India, ITAT highlighted that that case was confined to the factual aspect as to whether the payment made by assessee was covered in clause (iii) or (iv) of Press Note No. 9 (2000 series) dated 8th September, 2000 and on the basis of concession granted by Revenue, HC accepted assessee's claim that the payment of royalty made by assessee fell within the provisions of clause (iv) of the said Press Note. Accordingly, ITAT opined that *"no such ratio was propounded by Hon'ble High Court as has been claimed by assessee that royalty payment rates as approved by the FIPB/RBI would ipsofacto become 'ALP' under the Transfer Pricing Regulations also"*. ITAT also considered Revenue's reliance on various other judicial precedents like Delhi HC rulings in Nestle India, Oracle India, Sony Ericsson Mobile Communication India and Mumbai ITAT ruling in Sara Lee TTK Ltd. on the same issue. Further, ITAT noted that FIPB approval dated March 9, 2005 relied upon by Faber Castell India was not a specific approval but merely referred to rates prescribed under the automatic route under Press Note No.2 (2003 series) i.e. up to 8% on exports and 5% on domestic sale. ITAT also observed that the referred rates pertained to payment under technology transfer whereas Faber Castell India had admittedly made the payment on account of use of trademark/brand name and not on account of transfer of technology. Thus, ITAT opined that the rates of payment of royalty approved by the RBI or by the FIPB (relying upon the rates allowed by RBI under automatic route) would not become *per se* or conclusively or *ipsofacto* 'ALP' rates. The ITAT further held that independent exercise of ALP determination is needed to be done to find out if payment of royalty is at ALP, ITAT expressed that *"It has become all the more necessary now in view of Press Note No. 8 (2009 series) dated 16.12.2009 (supra) brought on record before us, since restriction on the rates of payment of royalty has been waived by concerned authorities."* However, ITAT accepted Faber Castell India's contention that *"if an authority by way of any specific approval has allowed a particular rate of payment, then it does carry persuasive value and can of course act as one of the supportive tools for carrying out bench marking of transaction of payment of royalty."* Accordingly, ITAT remitted the issue back to AO as had been done in Faber Castell India's own case in AY 2010-11. ITAT clarified that Faber Castell India would be free to carry out fresh TP-study and independently benchmark the international transaction with independent comparables for establishing ALP. AO/TPO shall also be free and duty bound to take on record and consider all the evidences as may be brought on record by Faber Castell India to justify ALP or carry out independent TP-study, if required. Further, Faber Castell India shall be free to file all the evidences as may be needed to support its claim and is also free to raise any legal and factual issue in this regard.

LD/65/158

Avery Dennison (India) (P.) Ltd.
vs.
Deputy Commissioner of Income Tax
Delhi ITAT

Assessee has to demonstrate actual receipt of intra group services with evidences.

Facts and Background

Avery Dennison, is a subsidiary of US company, and is engaged in the manufacturing and trading of pressure sensitive adhesive material, self-adhesive paper, self-adhesive film, tape, sheets, tags and lables. It is engaged in two business segments, namely, Pressure Sensitive Material

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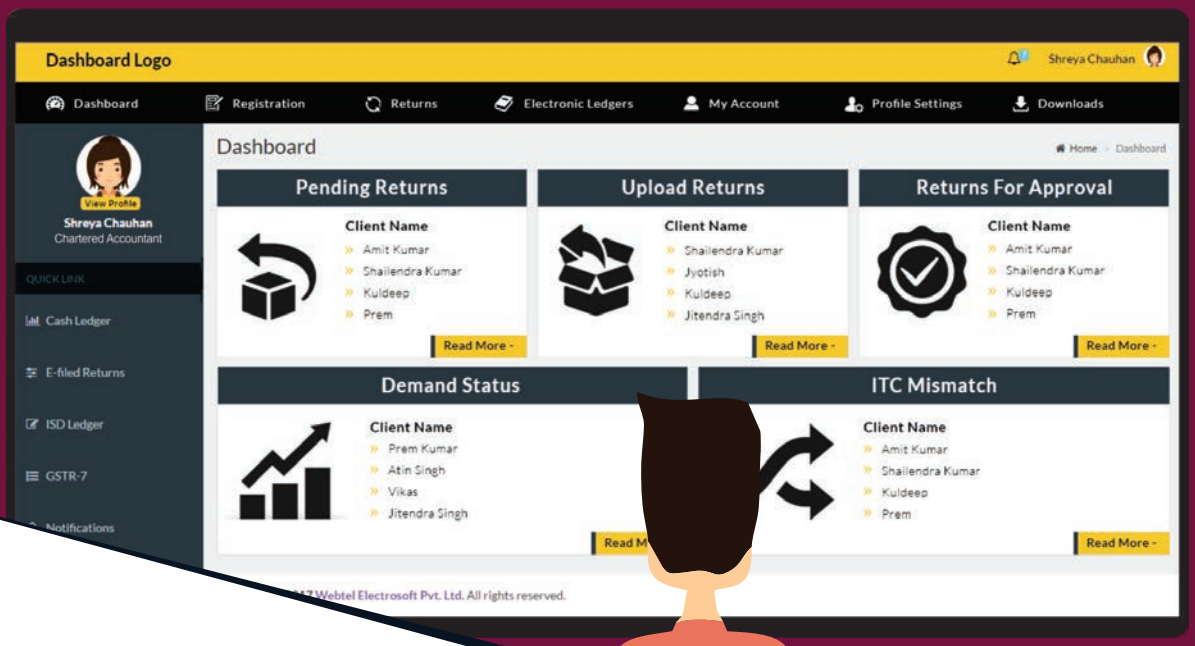

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('PSM') and Retail Information Systems ('RIS'). The assessee entered into international transaction with Associated Enterprise ('AE') for purchase of material, reimbursement of expenses and sale of material. Avery Dennison had also received intra group services of ₹28,20,46,989/- during the year for both the business segments. The services were in the nature of marketing support services, operating and logistic, technical assistant services, accounting and administration services, management information systems, labour law and employee relations, financial services, and corporate supports centre services with respect to its PSM segment. With respect to RIS segment, it received services of ticketing HUB, GVP services, VIPFS services and strategic support and guidance. The Transfer Pricing Officer ('TPO") held that Avery Dennison could not show as to when and how the various services were requisitioned from AE and whether the services were actually needed by it and whether the same were actually received by it by producing contemporaneous documentary evidence at the time of entering into agreement and what benchmarking analysis was done against huge payment made by the assessee to the AE. The TPO held that determination of Arm's Length Price ('ALP') was justified at NIL because the payments had failed need test, benefit test, rendition test, duplication test and shareholder's activity test. The DRP also confirmed the order of the TPO.

Issues

Whether the TPO's act of determining the ALP of the intragroup services as NIL was justified?

Held

The ITAT observed that, to determine ALP of intra group services, it is necessary for TPO to assess need test, benefit test, rendition test, duplication test and shareholder activity test. The ITAT also observed that need test and benefit test are required to be examined from the perspective of a businessman and not from the perspective of the Revenue. Services may be required by a person for its business need and at the time of availing it, the benefit accruing to that person is perceived, such benefit may or may not accrue but if services are rendered, the payment is required to be made for those services subject to the other conditions. The ITAT was of the opinion that no independent person pays for the activities/ services which are duplicate in nature. Person may also not pay for the services which he is not required to carry out but by others such as shareholders to protect their investments and control interest. It may not be possible always that direct and tangible benefit can be demonstrated by concrete evidence by the assessee. Therefore, if it is found that the normal business justifies the need of those services and it has some perceivable benefit, then revenue cannot question payment for those services provided those services are rendered and are neither duplicative or in the nature of shareholder services. This is for the simple reason that unless the services are rendered which are neither duplicate and are not shareholder activity, then only any independent person would be willing to pay for those services. This is a necessary ingredient for determination of ALP of intra group services. The earlier orders passed by the Tribunal for Assessment Year 2007-08 to Assessment Year 2011-12 also was concerning the same agreement which was also before TPO for determination of ALP of intra group services. The ITAT following the said order held that need test and benefit test are already satisfied for determination of ALP of those intra group services and, therefore, for this year also such test questioned by the TPO is incorrect. However, the rendering of such services is subject to determination for each assessment year independently based on the evidences for rendering of the services. Therefore, the assessee is required to demonstrate with credible evidence to satisfy that such services have actually been rendered by the foreign AE to the assessee for the year. Further, the Tribunal analysed whether the evidences submitted by the assessee are sufficient to conclude that services have actually been rendered by the foreign AE or not. It is found that it is a marketing brochure for labelling solutions. It is not understandable that how this marketing brochure can show that the marketing support services have been rendered by AE. With regards to the mails provided as an evidence for receipt of services, the mails are with respect to 'Beer in India' which is just the information asked with respect to some connectivity as well as communication from Executive Vice President. Similarly, some of the mails are very general and pertaining to team meetings and teleconference between the two parties. Similarly, such evidence with respect to other services were also perused by the ITAT. The assessee himself had not submitted any proof with respect to accounting and administrative services and management information system and with respect to financial services only, sector revenue forecast and Q3 forecast revenue were

mentioned. The ITAT analysed that there are no proper evidences led before the TPO that services had in fact been actually rendered by the AE. The ITAT held that it is expected from the assessee for proper benchmarking to lead evidence with respect to each of the nature of services with respect to each class of services with corresponding manner of rendering of the services, the time lag of initiation of services and closure of the services. The evidences produced were apparently very general and do not show the rendering of the services. In view of this, TPO/Assessing Officer should verify the evidence of rendering of the services by the AE with respect to nature of each of the services listed in the agreement.

International Taxation

LD/65/159

Formula One World Championship Ltd.
vs.
Commissioner of Income Tax
Supreme Court

Facts:

Formula One World Championship Ltd. ('FOWC') is a UK tax resident company. FOWC entered into an agreement with the Federation Internationale de I'Automobile ('FIA') and Formula One Asset Management Limited ('FOAM'). As per the terms of this agreement, FOAM licensed all commercial rights in the FIA Formula One World Championship to FOWC for 100 year term effective from January 1, 2011. FOWC further entered into a "Race Promotion Contract" ('RPC') with Jaypee Sports International Limited ('Jaypee Sports') dated September 13, 2011. Under this agreement, Jaypee Sports was awarded the right to host, stage and promote the Formula One Grand Prix of India event for a consideration of USD 40 million. The taxability of the revenues of USD 40 million earned by FOWC was a matter of concern for both, the assessee as well as the Revenue. The matter was carried out to AAR to determine the taxability of the revenues earned by FOWC. The AAR held that the amount paid/payable by Jaypee Sports to FOWC would be treated as Royalty as per India UK Double Taxation Avoidance Agreement ('DTAA'); FOWC did not have Permanent Establishment ('PE') in India. However, Jaypee Sports is bound to make appropriate deductions from the amount payable to FOWC under Section 195 of the Income-tax Act, 1961 ('Act').

When the matter reached Delhi High Court ('HC') *390 ITR 199*, the Delhi HC, vide order dated November 30, 2016, reversed the ruling of the Authority for Advance Ruling and held that the amount paid/ payable by Jaypee Sports to FOWC would not be treated as royalty; FOWC had a fixed place PE at the circuit and therefore RPC fee attributable to PE in India is taxable in India. Further, the HC has not accepted the plea of the Department on dependent agent PE ('DAPE'). Accordingly, Jaypee Sports is bound to make appropriate deductions from the amount payable to FOWC under Section 195 of the Income-tax Act, 1961.

Aggrieved, the taxpayer filed an appeal before the Supreme Court ('SC').

Issue:

The major issues which were lying before the SC were as to whether FOWC had a PE in India through the Racing Circuit? Whether it carried on any business activity through the Circuit? Whether the Circuit was under the control and disposal of FOWC?

Held:

The SC held as under:

- Whether FOWC had a PE in India through the Racing Circuit and Whether it carried on any business activity through the Circuit?

SC referred to the Organisation for Economic Co-operation and Development ('OECD') Model Tax Convention commentaries by Philip Baker and Klaus Vogel, and noted that as per Article 5 of the DTAA, the PE has to be a fixed place of business 'through' which business of an enterprise is wholly or partly carried on. SC observed and held that the international circuit is a fixed place and since races are conducted from this circuit, it is an economic/ business activity. The Buddh International Circuit from where different races, including the Grand Prix was conducted was undoubtedly an economic/business activity. The SC completely agreed with the HC's stern view that Formula One "monetised" every commercial right that it possessed in conducting the event in India (in its capacity as the commercial rights holder). SC referred to the arrangement between assessee and its affilitaes on one hand and Jaypee Sports on other hand. SC held that various agreements cannot be looked into by isolating them from each other and their wholesome reading was necessary to bring out the real transaction between the parties. Such an approach is essentially required to find out as to who is having real and dominant control over the

Event. SC observed that FOWC is the Commercial Rights Holder ('CRH'). These rights can be exploited with the conduct of the F1 Championship, which is organised in various countries. It is FOWC and its affiliates which have been responsible for all activities required for conduct of a race (for example, racing track, participating teams, spectators, revenue from advertisement and media rights, etc). FOWC acquired all commercial rights in championship by way of an agreement with FIA which was entered way back in 2001 according to which said rights could not be transferred to any party outside Formula One group. It was observed that on the same day when assessee entered into RPC with Jaypee, another agreement was signed between Jaypee and three affiliates of FOWC whereby Jaypee gave back circuit rights, mainly media and title sponsorship, to Beta Prema 2 and paddock rights to Allsports. SC further observed that *"FOAM is engaged to generate TV Feed. All the revenues from the aforesaid activities are to go to the said companies, namely, Beta Prema 2, Allsports and FOAM respectively. These three companies are admittedly affiliates to FOWC."* Accordingly, SC held that the aforesaid arrangement demonstrated that the entire event was taken over and controlled by FOWC and its affiliates. SC rejected assessee's stand that it is Jaypee who was responsible for conducting races and had complete control over the Event in question. SC clarified that mere construction of the track by Jaypee at its expense will be of no consequence. Further, it clarified that its ownership or organising other events by Jaypee was also immaterial. SC observed that *"There cannot be any race without participating/competing teams, a circuit and a paddock. All these are controlled by FOWC and its affiliates. Event has taken place by conduct of race physically in India. Entire income is generated from the conduct of this event in India."* Thus, SC held that the commercial rights of this race were with FOWC which were exploited with actual conduct of race in India. It is also difficult to accept that FOWC had no role in the conduct of the Championship and its role came to an end with granting permission to host the event as a round of the Championship. Entire income generated in India from the conduct of the event in India. Exploitation of the commercial rights of FOWC became possible only with actual conduct of the races and active participation of FOWC in the said races, with access and control over the circuit. Further, by virtue of the Concorde agreement 2009, FOWC enabled participation of the teams and FIA

undertook to ensure that events were held and FOWC, as CRH, undertook to enter into contracts with event promoters and host such events. Thus, omnipresence of FOWC and its stamp over the event was loud, clear and firm. The SC relied upon Andhra Pradesh HC Ruling in the case of *Visakhapatnam Port Trust [(1983) 144 ITR 146]* to hold that there was a virtual projection of the foreign enterprise, namely, Formula-1 (i.e. FOWC) on the soil of this country. *Philip Baker* wherein to constitute PE three characteristics: stability, productivity and dependence need to be satisfied. According to the Court all such characteristics were satisfied in the present case.

In light of the above, the Court held that the aesthetics of law and taxation jurisprudence left no doubt in their mind that taxable event has taken place in India and the non-resident FOWC is liable to pay tax in India on the income it has earned on this soil. Most of the DTAAs provide a minimum threshold in terms of the number of days for the non-resident to form a PE in a country. Accordingly, the assessee was of the view that FOWC conducted business in India for a limited duration of three days of the event. SC rejected assesseee's stand that the total duration for which limited access was granted to it, was not sufficient duration to constitute the degree of permanence necessary to establish a fixed place PE. Assessee had submitted that duration of the event was three days and, therefore, control, if at all, would be for that period only. On this, Revenue had pointed out that the duration of the agreement was five years, which was extendable to another five years. SC clarified that *"The question of the PE has to be examined keeping in mind that the aforesaid race was to be conducted only for three days in a year and for the entire period of race the control was with FOWC."* SC affirmed HC finding that having regard to the duration of the event, which was for limited days, and for the entire duration FOWC had full access through its personnel, number of days for which the access was there would not make any difference. While pondering over the duration tests, reliance was placed on the rulings in the case of *Joseph Fowler v. M.N.R.* (1990) 90 D.T.C. 1834; (1990) 2 C.T.C. 2351 (Tax Court of Canada), Antwerp Court of Appeal, decision of February 6, 2001, noted in 2001 WTD 106-11 and *Universal Furniture Ind. AB v. Government of Norway* (Stavanger Court, Case No. 99-00421, dated 19-12-1999 referred to in Principles of International Taxation by Anghard Miller and Lyn Oates, 2012)

- Whether the Circuit was under the control and disposal of FOWC?

SC held that entire arrangement between FOWC and its associates on the one hand and Jaypee on the other hand, was to be kept in mind. Various agreements cannot be looked into by isolating them from each other. Their wholesome reading was essentially required to find out as to who is having real and dominant control over the Event, thereby providing an answer to the question as to whether Buddh International Circuit was at the disposal of FOWC and whether it carried out any business therefrom or not. SC observed that the fixed place of business in the form of physical location, i.e. Buddh International Circuit, was at the disposal of FOWC through which it conducted business. SC ruled that, based on the materials placed on record, the entire event was "taken over" and "controlled" by Formula One and its affiliates. According to the SC, this was borne out from the facts that the event was held physically in India and income was generated from the event in India; Commercial rights vested with Formula One, which were exploited by conducting the event in India; the physical control of the circuit was with Formula One and its affiliates from the inception till the conclusion of the event; and the participating teams and paddock were controlled by Formula One and its affiliates.

Accordingly, SC rejected assessee's argument that international circuit was not at its disposal.

In light of the above, SC held that payments made by Jaypee Sports to FOWC under the RPC were business income of the FOWC through PE at the Buddh International Circuit, and, therefore, chargeable to tax. Jaypee Sports was bound to make appropriate deductions from the amounts paid u/s. 195 of the Act. However, SC accepted assessee's submission that only that portion of the income of FOWC, which is attributable to the said PE, would be treated as business income of FOWC and the Tax Deducted at Source obligation is limited to the appropriate portion of income which is chargeable to tax in India and in respect of other payments where no tax is payable, recourse is to be made under Section 195(2). SC directed Assessing Officer to arrive at the profits attributable to PE in India, which would be chargeable to tax. SC further clarified that *"At that stage, Jaypee Sports can also press its argument that penalty etc. be not charged as the move on the part of Jaypee Sports in not deducting tax at source was bona fide. SC, thus, dismissed assessee's appeal".*

LD/65/160
Marck Biosciences Ltd.
vs.
Income Tax Officer
Abad ITAT

Payment made towards rendering of services and not for right to use any information concerning industrial, commercial or scientific experience cannot be considered as Royalty.

Facts and Background:

The assessee, Mark Biosciences Ltd, ('MBL') made a payment of US $ 1,20,000 to a US based entity by the name of Mehta Partners LLC. This payment was made on account of professional fee for global biopharmaceutical strategic counselling and advisory services rendered by this entity which included the services of nature (a) business promotion; (b) marketing; (c) publicity; and (d) financial advisory. MBL did not deduct any tax at source from the payment so made, on the ground that the income embedded therein was not taxable in India in view of the provisions of India-USA Double Taxation Avoidance Agreement ('DTAA'). The Assessing Officer ('AO') was, however, of the view that the services rendered by the US entity are covered by the definition of royalty under Explanation 2 to Section 9(1)(vi) as also under Article 12 (3)(a) and, accordingly, tax should have been deducted at source @ 10%. On this basis, tax withholding liability under Section 201 r.w.s. 195, amounting to ₹9,33,306/- was raised against MBL. Further, the CIT(A) confirmed the addition levied by the AO.

Issue:

Whether the payments made by MBL towards the receipt of the services can be considered as Royalty?

Held:

The ITAT observed that the provisions of the Income Tax Act apply only to the extent such provisions are more favourable to the assessee. In other words, in a situation in which an entity fiscally domiciled in the United States is not taxable in India, under the provisions of the applicable DTAA, it is not taxable in India at all. Further, the ITAT observed that the sum and substance of the services received is business promotion, marketing, publicity and financial advisory. These services, under the agreement, are

termed as "Strategic and Financial Counselling Services". The payments made by the assessee are thus for rendition of these services and not for use of any information concerning industrial, commercial or scientific information. The fact that in the process of availing these services, the assessee benefits from rich experience of the service provider is wholly irrelevant in the present context. The payment is for rendition of services and not for right to use any information concerning industrial, commercial or scientific experience, in possession of the service provider. The ITAT held that the authorities below were clearly in error in holding that the impugned payment was covered by the definition of royalty under Article 12(3)(a). Accordingly, the assessee's appeal was allowed by the ITAT.

LD/65/161

Pearl Logistics & Ex-IM Corporation
vs.
Income Tax Officer
Rajkot ITAT

For determining the residential status, the forms of meetings held, Place of Effective Management and controlling status place a pivotal role.

Facts:

The assessee was an agent of a Denmark based ship broker Faber. Faber was disponent owner and CTI-Jordan was charterer of ship which carried cement to ports in India. Freight was payable by CTI-Jordan to Faber. The assessee filed return of income under Section 172 and claimed that it was not liable to pay tax because Faber was beneficiary of freight and, hence, it was entitled to benefit of Double Taxation Avoidance Agreement ('DTAA'). The Assessing Officer ('AO') observed that assessee had not submitted complete details called for by the AO except the copy of vessels registration certificate and that with help of incriminating and forged documents, the assessee had claimed that no TDS was to be deducted as per DTAA . Under the circumstances demand under Section 172(4) was raised. The Commissioner of Income Tax (Appeals) ('CIT(A)') had dismissed the appeal of the assessee.

Issue:

Whether the profits arising from the operations of ships in India are taxable in India?

Held:

The ITAT observed that Faber is owner and CTI Jordan is charterer. As per Charter Party Agreement, CTI Jordan is charterer and Faber Shipbroker, Denmark is the owner. According to Section 172, income of owner or charter who receives freight is chargeable to tax. In this case, freight is received by Faber and has earned the freight, so, the income of Faber is chargeable to tax in India. However, Faber Shipbrokers is resident of Denmark and tax residency certificate of which is available on record. The benefit of DTAA between India and Denmark shall be available to the Denmark resident. Further, as per Article 9, profits derived from the operation of ships in International Traffic shall be taxable only in the State where place of effective management ('POEM') of the enterprise is situated. In this case, the 'POEM' of Denmark entity is situated in Denmark as registration certificate, residence of shareholder and passport of owner, all shows that Faber is resident of Denmark and its 'POEM' is in Denmark. Further, it is noteworthy that in the case of same assessee and on identical facts, the CIT(A) has allowed the benefit of DTAA to the assessee. The ITAT observed that the assessee has proved the POEM of the assessee by furnishing several documents including declaration by director of company that it is completely 100 per cent owned by Faber Anderson, Copy of Passport of Director to prove that the nationality of director and company has been operating from Denmark. It can be concluded that the Director is resident of Denmark and has been operating business wholly from Denmark, all the important decisions are taken from Denmark in the form of meeting and therefore, the place of effective management and control is Denmark only. The principal company is also engaged in international traffic and residence is Denmark. Further, on the basis of Article 9 of the DTAA between India and Denmark, the income on account of operation of ship in International Traffic shall be taxable in the State in which the POEM is situated i.e. in this case Denmark. The ITAT, in the view of the above discussion and considering Article-9 of the Treaty between India and Denmark and also the decision taken by the Department in earlier cases of the assessee, the ships operated in International Traffic and therefore, the income from ship shall not be taxed in India as per Article 9 of the Treaty and allowed the appeal of the assessee.

Service Tax

LD/65/162

M/s Bhimas Hotels Pvt. Ltd.

vs.

The Union of India

Supply of food by employer to its employees at concessional rates as part of its industrial obligation cannot be construed as 'service' and has to be seen as part of the pay package that the workers have negotiated with the employer. Unless it is decided as to whether a particular activity falls under definition of 'service', mere non-inclusion of such activity in exemption notification cannot be taken as basis for charging service tax.

Facts:

The petitioner is a hotel engaged both in the business of boarding and lodging and also has a restaurant. The petitioner supplied food to workers employed by him at concessional rates in an area outside the registered premises. The Department confirmed service tax demand on food supplied by the petitioner to its workers on the ground that in the negative list regime, as introduced from 01.07.2012, activity will attract tax, unless it is exempted by way of inclusion in any exemption notification. Accordingly, the moot question before Hon'ble HC in present case, was to determine as to whether supply of food by petitioner to its workers at subsidised rates, regardless of whether the food is supplied within the premises or outside premises, would come within the meaning of expression 'service' as defined u/s. 65B(44) of Finance Act, 1994.

Held:

HC held that if the workers of the establishment are provided food outside the air conditioned dining hall of the establishment, at the place which is meant exclusively for feeding such workers, the conclusion that the establishment feeds its workers, but the place where they are fed does not constitute part of the establishment tantamount to creating a dichotomy, which does not exist. As, under the Factories Act, 1948 and even under the Industrial Disputes Act, 1947 the expression 'wages' would include within its purview, anything that is supplied at subsidised rate, and food supplied by an employer to its employees at a subsidised rate forms part of wages under Section 2(rr) of

the Industrial Disputes Act, 1947. Therefore, any supply of subsidised food to the workers by the Management of a Company, has to be seen as part of the pay package that the workers have negotiated with the employer. HC further held that once the activity of petitioners is understood to be a part of their industrial obligation, the same cannot be construed as 'service' falling within ambit of definition of 'service' u/s. 65B(44).

As regards Department's contention regarding non-inclusion of activity of petitioners in exemption notification, High Court held that unless an activity carried out by a person falls within definition of 'service', the question of analysing whether such activity falls under Mega Exemption Notification dated 20.06.2012, does not arise. High Court observed that, definition of service u/s. 65B(44), positively excludes certain activities including any transfer, delivery or supply of any goods, which is deemed to be a sale within the meaning of Clause (29A) of Article 366 of the Constitution. It further noted that, as a matter of fact, the petitioner has paid the value added tax on the value of the food supplied to its workers.

High Court therefore held that, once the State Authorities have treated the supply of food to the workers of the petitioner as sale, it is not open to the respondents to treat the same as service and impose a liability. Accordingly, impugned order demanding service tax from petitioners was set aside.

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LD/65/163

Commissioner of Service Tax

vs.

Awasti Traders

Tribunal held that undertaking activities of cleaning of nullah, roadside garbage etc. in terms of contracts awarded by Muncipal Corporation are not liable to service tax under category of 'business auxiliary services' as the same are not an activity of business but statutory responsibility of Municipal Corporation.

Facts:

Respondents were undertaking the work of cleaning of nullah, roadside garbage, soil etc. at designated places for Nagpur Muncipal Corporation (NMC). Revenue demanded service tax from respondents on the payments received by them from NMC on the ground that respondents were providing 'business auxiliary services' to NMC. When the Adjudicating Authority and First Appellate Authority set aside service tax demand by holding that activities undertaken by respondent are the statutory responsibilities of NMC, aggrieved by the same revenue filed present appeal before Tribunal. Revenue contended that the respondents are not any public or sovereign authority constituted under any law but is proprietorship concern working as a commercial organisation performing their functions/ activities with a profit motive and amounts collected by them are not in the nature of any compulsory levy and are not deposited in government's treasury. Revenue further contended that under the category of 'business auxiliary services', the provision of service on behalf of client does not require that the service should be in relation to any business. Accordingly, revenue pleaded for setting aside order of First Appellate Authority.

Held:

Tribunal noted that the respondents are undertaking the activities in terms of contract awarded by NMC. It also agreed with the conclusion that, the cleaning of nullahs, removal of roadside garbage and waste soil is a statutory activity of the NMC and the said activity has been undertaken by assessee on behalf of NMC for a fee received from NMC. Therefore, upholding the reliance placed by the First Appellate Authority on ratio laid down in decision of *CCE vs. Ankit Consultancy Ltd. 2007 (6) STR 101 (Tri-Del)*, Tribunal held that the assessee cannot be said to be providing any service to the NMC as this activity is not an activity of business to NMC and thus, these services do not qualify as services on behalf of client. Thus, revenue's appeal was rejected being devoid of merits.

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LD/65/164

MSM Satellite (Singapore) Pte Ltd.

vs.

The Principal Commissioner, Service Tax, Mumbai

CENVAT credit cannot be denied to assessee holding service tax registration number and regularly discharging service tax liability merely on the contention that assessee is not a service provider and liable to pay service tax. When revenue contends that assessee cannot be treated as service provider but accepts payment of service tax, the payment made by debiting

CENVAT credit account cannot be treated as payment of service tax but would amount to reversal of CENVAT credit availed by assessee.

Facts:

The appellant, an entity registered in Singapore is engaged in providing broadcasting services to various clients located all over the world including India. Prior to introduction of negative list, appellant had not obtained service tax registration in India. Subsequently, the appellant obtained service tax registration in India by giving a c/o address of its sole agent in India and started discharging service tax liability under 'broadcasting services'. (The department considered this as MSM India – separate entity from MSM-Singapore). The said MSM-India does not have any physical establishment, infrastructure or equipment in India for production and uplinking of programs, i.e. IPL, T.V. Serials & Films. Actual production and broadcasting is done by MSM Singapore from Singapore by uplinking the said programs. MSM Singapore does not have any employees on its payroll in India. It maintains books of accounts in Singapore. The MSM Singapore entered into contract with an Indian service provider for distribution of TV channel and charged distribution fees to him. MSM Singapore entered into contract with its various advertisement and subscription customers in India through its agent in India (MSMPL). MSMPL were authorised to collect payment on behalf of Singapore entity in INR and deposit the same in MSM Singapore's NRO A/c in India. Service tax was paid on the service tax registration no. of MSM India. MSM-Singapore also made payment to service providers for the domestically procured services in India from the funds received in the NRO A/c of MSM Singapore in India. As the appellant obtained service tax registration in India, all the input service providers of appellant raised invoices in the name of MSM-India instead of appellant's Singapore entity. MSM-India paid the service tax and also availed CENVAT credit in respect of various input services. Revenue sought to deny said CENVAT credit on the ground that, MSM India and MSM Singapore are two distinct entities. All services are provided by Singapore entity and no services are provided by Indian entity and consequently, CENVAT credit utilised by MSM-India against services not provided by them is illegal.

Held:

Tribunal observed that, Revenue granted registration to the appellant enabling them to pay service tax on the service provided by the MSM Singapore, after knowing the entire facts of the entire activity of the appellant. There is no dispute that the entity in India and Singapore is the same entity i.e. M/s. MSM Satellite (Singapore) Pte. Ltd, therefore the service provider is the same company even though the service was provided from different location i.e. Singapore. Tribunal held that, Adjudicating Authority has proceeded on the wrong presumption that, there are two different entities like MSM Singapore has provided the services and MSM India has not provided the service, whereas in the fact it is the same M/s MSM Satellite (Singapore) Pte. Ltd which is located in Singapore as well as in India

Tribunal also observed that, it's undisputed that, services were received in India therefore service *per se* is taxable and the government is legally required to collect the service tax on such services and it had indeed collected. In such a situation CENVAT credit is legally admissible to the appellant. The revenue knowing the status of the appellant granted registration to the appellant without raising any objection that the service are provided by the Singapore and regularly collected the service tax. Therefore once registration was granted by the department and the service tax was collected consequent CENVAT credit cannot be denied. Tribunal referred to various judgments to hold that, even though service is not taxable and if the assessee paid service tax, the CENVAT credit is allowable. Tribunal further held that, in the present case the service are very much taxable, therefore the appellant's case is on better footing and therefore also the appellant is legally entitled for the CENVAT credit.

Tribunal also held that, as the activities of Singapore entity in India are liable to service tax in India, service tax registration obtained by it in India is absolutely in order. Tribunal also concurred with the contention of the Appellant that on one hand Revenue sought to disallow the CENVAT credit on the ground that appellant is not service provider and on the other hand, service tax was collected from the appellant even if it is accepted that appellant is not service provider. In such a case the payment of service tax made by appellant also does not remain as payment of service tax. In such a situation, whatever CENVAT credit was taken by the appellant, it stands reversed in the form of debit towards payment of service tax. Hence, in such case payment made by the appellant by debit to CENVAT credit account should not be treated as payment of service tax but would amount to reversal of CENVAT credit availed by them, and for this reason also demand of CENVAT credit does not exist. Based on these findings Tribunal set aside the order demanding CENVAT credit taken by appellant.

LD/65/165

Commissioner of Central Excise & Service Tax,
vs.
M/s Zensar Technologies Ltd., Pune

Turnover pertaining to onsite services provided at locations of clients abroad would not form part of export turnover, while calculating refund claim in terms of Rule 5 of CCR, 2004.

Facts:

The respondents were providing services to foreign customer in the nature of offshore services from India as well as onsite services at the locations of clients abroad and raised invoices for the entire value of services and received payments in convertible foreign exchange for entire contract value. As regards respondent's refund claim in terms of Rule 5 of CENVAT Credit Rule, 2004, revenue alleged that turnover pertaining to onsite services shall also be included in calculation of export turnover and total turnover for formula prescribed for arriving at value of eligible refund. The First Appellate Authority not accepting contentions of Revenue sanctioned the refund claim, aggrieved by which Revenue filed present appeal.

Held:

Tribunal noted that from conjoint reading of provisions of Rule 6A of Service Tax Value Rules, 2006 dealing with export of services, Section 65B(44) of Finance Act, 1994 read with Section 64(1), it emerges that services provided from outside the taxable territory to a person located outside the taxable territory are not services for the purpose of Rule 6A and Rule 5 of CENVAT Credit Rules, 2004 and consequently, services provided onsite to clients located abroad cannot be considered as part of export turnover as well as part of total turnover. Tribunal also referred to its own decision in case of *Nihilent Technologies–2016-TIOL-2262-CESTAT-MUM* wherein it has been held that onsite services

are to be excluded from both export turnover as well as total turnover. Accordingly, Revenue's appeal challenging order of Commissioner (Appeals) sanctioning refund claim to respondent was dismissed.

Delhi Sales tax

LD/65/166

Sony India P. Ltd.
vs.
Government of NCT, Delhi and Ors
17th April, 2017

HC directs Delhi VAT authorities to issue F-Forms giving bifurcated details in respect of stock transfers, following the reconstitution of State of Andhra Pradesh and formation of Telangana; There was no tax effect insofar as Govt. of Delhi was concerned.

Writ petition was filed before Delhi HC by the assessee seeking to direct the Revenue to issue F-Forms from Delhi with bifurcated details for the States of Andhra Pradesh and Telangana or allow petitioner to revise DVAT returns to correct discrepancies in the stock transfer details for the period June to September 2014 so that correct F-Forms can be printed.

Assessee, Sony India Private Limited, had stock transferred goods from State of Andhra Pradesh to Delhi. HC observed that the necessity for the Petitioner having to bifurcate the F-Forms arose as a result of the creation of the separate State of Telangana & Andhra Pradesh. Before the HC, assessee stated that there was no tax effect as far as the Govt. of Delhi was concerned.

HC observed that assessee had not set out the quantity in value of the stock transfer from Telangana and Andhra Pradesh on a consolidated basis which though reported correctly to the authorities could not be done with the TIN numbers as a result of the above bifurcation of states. HC observed that the facts and circumstances of assessee's case were similar to case of *Ingram Micro India Pvt. Ltd. vs. Commissioner, Department of Trade & Taxes [(2016) 89 VST 312 (Del])*. Thus, following this decision, the HC directed the DVAT Department to issue requisite F-Forms to the assessee. HC further stated that in the event the Department desired that an indemnity bond be furnished, it shall communicate such requirement to the assessee within two weeks from this order and proceeds issue the F-Forms not later than three weeks.

Legal Update

Excise

LD/65/167
Mangalam Organics Ltd.
vs.
Union of India
24th April, 2017

Section 11C: Power not to recover duty of excise not levied or short levied as a result of general practice.

SC rejects assessee's request to issue Notification u/s. 11C of Central Excise Act dispensing with excise duty on manufacture of Rosin and Turpentine using Bhatti process without the aid of power; Equality clause enshrined in Article 14 of the Constitution is a positive concept and cannot be applied in the negative; Issuance of Notification u/s. 11C is in the nature of subordinate legislation and directing the Government to issue such Notification would amount to Court taking a policy decision in a particular manner, which is impermissible.

The issue before SC was if it is found that the goods which are excisable goods liable for levy of duty under the Act, but there has been generally prevalent practice not to demand duty or levy the duty, or demand lesser duty on such goods, whether it is mandatory on the part of the Central Government to issue a notification under Section 11C of the Act requiring that no such duty shall be payable or lesser duty shall be payable on such goods; and whether the Court could issue and impose a mandamus to the Central Govt. to pass such a Notification in the event Central Govt. choose not to exercise this 'power'?

The assessee is in the business of manufacturing Rosin and Turpentine. There are two methods of such manufacture, viz. Vacuum chemical treatment process which uses power in almost all the processes, and second one the Bhatti process which is entirely manual except for the use of power to operate the pump for lifting up the water to the storage tank for the purpose of condensing.

SC observed that there are around 300 units which are using the Bhatti method. Referring to coordinate bench ruling in *Commissioner of Central Excise, Nagpur vs. Gurukripa Resins Private Limited*, SC noted that even the Bhatti process would be treated as manufacturing process with the aid of power even when such power is used to a limited extent. SC noted that in case of one assessee *Gurukripa Resins Pvt. Ltd.[[(2011) 13 SCC 180]]*, similar issue had arisen where the Revenue's appeal was allowed by SC holding that process would be treated as manufacturing process with the aid of power even when such power is used to a limited extent. After the judgment of this Court in *Gurukripa Resins Private Limited*, several trade associations made representations to the Government with a request to grant benefit under Section 11C of the Act. The Finance Ministry decided on 15.09.2014 not to issue any such Notification u/s. 11C as it was going to benefit only two companies, which included the assessee. Challenging the aforesaid decision, the assessee filed writ petition in the HC, however, the writ was dismissed by the HC.

Assessee argued that once conditions of a particular statutory provision were fulfilled, the Government was obligated to exercise the power with the issuance of a required Notification. As per assessee, the solitary reason furnished by the Revenue for not exercising its powers u/s. 11C was that such a Notification, if issued, was going to benefit only two assessees. Assessee argued that it was never a tenable ground for the Government to refuse such a Notification, more so, in a situation where the demand notices were issued to two assessees only and other similarly situated persons were spared. Assessee thus contended that the issuance of Notification became all the more necessary and imperative in order to remove discrimination.

SC observed that Revenue issued show cause notice to two units which were registered but not paying the duty. At the same point, some of the units which were availing SSI exemption ceased to be SSI units. SC observed that Revenue remained unaware of this fact and it was for this reason that notices could not be issued to the others. Therefore, it is difficult to draw an inference that there was a conscious practice not to demand duty.

SC further observed that insofar as the units adopting Bhatti process were concerned, where power was used to operate the pump for lifting up the water to storage tank for the purpose of condensing, whether this process would amount to manufacturing or not, was unclear.

SC remarked that a clear distinction had to be made between the duty to act in an administrative capacity and the power to exercise statutory function. If a public authority is foisted with any duty to do an act and fails to discharge that function, mandamus can be issued to the said authority to perform its duty. However, that is done while exercising the power of judicial review of an administrative action. It is entirely different from judicial review of a legislative action. Further, SC observed that as per de Smith [Judicial Review of Administrative Action], generally

subordinate legislation cannot be held invalid for unreasonableness, unless its unreasonableness is evidence of *mala fide* or otherwise shows the abuse of power. But in case of unreasonable administrative order, the aggrieved party is entitled to a legal remedy. Further, only in most exceptional circumstances can legislative powers be sub-delegated, but administrative powers can be sub-delegated; and duty to give reasons applies to administrative orders but not to legislate orders. According to SC, issuance of a notification under Section 11C of the Act is in the nature of subordinate legislation. Directing the Government to issue such a notification would amount to taking a policy decision in a particular manner, which is impermissible.

SC observed that when an executive authority exercises a legislative power by way of subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact the law which it has been empowered to do under the delegated legislative authority.

SC remarked that when 'power' is given to the Central Government to issue a notification to the effect not to recover duty of excise or recover lesser duty than what is normally payable under the Act, for deciding whether to issue such a notification or not, there may be various considerations in the mind of the Government. Merely because conditions laid in the provisions are satisfied, it would not be a reason to necessarily issue such a notification. Where the statute vested a discretionary power in an administrative authority, the Court would not interfere with the exercise of such discretion unless it is made with oblique end or extraneous purposes or upon extraneous considerations, or arbitrarily, without applying its mind to the relevant considerations, or where it is not guided by any norms which are relevant to the object to be achieved.

SC concluded that it would neither be a case of discrimination nor could it be said that the assessee had any right under Article 14 or Article 19(1)(g) of the Constitution which had been violated by non-issuance of Notification u/s. 11C of the Act. For similar facts, if some other assessees had escaped payment of duty for certain reasons, assessee cannot say that no duty should be recovered from it by invoking Article 14 of the Constitution. Equality clause enshrined in Article 14 is a positive concept and cannot be applied in the negative.

SC thus dismissed assessee's appeal and ruled in favour of Revenue.

Insolvency and Bankruptcy

NCLT-Mumbai Bench
Edelweiss Asset Reconstruction Co. Ltd. (Financial Creditor)
vs.
Murli Industries Ltd. (Corporate Debtor)
5th April, 2017
Amount in Default - ₹1365.40 Cr.

Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016 – Initiation of corporate insolvency resolution process by Financial Creditor

The corporate debtor entered into a master reconstructing agreement with Bank of Baroda (Monitoring Institution) and other Lender Banks. The agreement states that the corporate debtor has requested the lenders for financial assistance for setting up/implementation of a project and for other requirements for its operations. The lenders sanctioned the term loan and working capital facilities to the corporate debtor and the corporate debtor from time to time created security by way of hypothecation of its moveable assets and/or mortgage of its immovable properties. The corporate debtor requested the lenders for debt restructuring as the project under implementation has come under strain due to various internal or external reasons. Hence, the lenders and the corporate debtor agreed to enter into the master restructuring agreement to give effect to the corporate debt reconstruction package.

Bank of Baroda which is the lead bank under consortium arrangement issued a notice to the corporate debtor u/s. 13(2) of the SARFAESI Act for recovery of ₹1365.40 crore due to the consortium banks. Bank of Baroda has also issued a possession notice stating that it has taken symbolic possession of the property owned by the corporate debtor u/s. 13(4) of the SARFAESI Act read with Rule 9 of Security Interest (Enforcement) Rules 2002. Further, Auditor's Report has stated that the company has defaulted in repayment of dues to financial institutions and banks amounting to ₹1896.65 crore.

The Edelweiss Asset Reconstruction Company Limited in its capacity as financial creditor filed this petition for initiation of corporate insolvency resolution process.

This petition clearly reveals that there is a debt as defined in Section 3(11) of the Code and also there is default in this case within the meaning of Section 3(12) of the Code. Further, Section 5(7) clearly provides that an assignee of a financial debt is also a financial creditor and hence the petition is well within the ambit of Section 7 of the Code. The Tribunal therefore admitted the petition and appointed an Interim Resolution Professional.

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NCLT-Chandigarh Bench
Sky Blue Papers Pvt. Ltd. (Applicant/Corporate Debtor)
7th April, 2017
Amount in Default - ₹18.29 Cr.

Section 10 of the Insolvency and Bankruptcy Code, 2016 read with Rule 7 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016–Initiation of corporate insolvency resolution process by corporate applicant

This is an application filed by a 'Corporate Debtor' company itself in Form 6 as prescribed by Rule 7(1) of the application to Adjudicating Authority Rules. The total amount of default in respect of Financial and Operational Creditors is ₹18.29 crore. Due to default in making the payment of dues the Punjab National Bank has issued notices under Section 13(2) and also under Section 13(4) of SARFAESI Act, 2002.

The Financial Statements of the company indicates the losses and fall in revenue. It seems that the applicant has fallen into debt trap and is competent to set in motion the insolvency resolution process as contemplated under the Code. On the basis of the Financial Statements of the company the total debt raised by the 'Corporate Applicant' with regard to the financial and operational creditors is ₹18.48 crore and it is further represented that the total amount of default is ₹18.29 crore.

The Tribunal therefore held that the petition deserves to be admitted and accordingly appointed an interim resolution professional.

The Tribunal however observed that the Applicant Company has, save some sketchy particulars, not given any road map as to how it is going to keep itself afloat as a going concern. However, keeping in perspective the objects for which the Code has been brought into force and to balance the interest of all stakeholders, it is satisfied that the instant application warrants to be admitted to prevent further erosion of capital and to safeguard the assets of the Applicant Company/Corporate Debtor.

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NCLT-Ahmedabad Bench
Hero FinCorp Ltd. (Financial Creditor)
vs.
Steel Konnect (India) Pvt. Ltd. (Corporate Debtor)
19th April, 2017
Amount in Default - ₹6.63 Cr.

Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016– Initiation of corporate insolvency resolution process by Financial Creditor

On the basis of Master Facility Agreement entered between the Financial Creditor and the Corporate Debtor, a loan amounting to ₹7 Cr. was advanced. As per the agreed terms, instalments were required to be paid through ECS by way of Equated Monthly Instalments. The Corporate Debtor defaulted in making instalments and from November 2016 it had completely stopped making payments. The Corporate Debtor disputed that the claimed amount was not correct but could not deny the default or the Loan Agreement.

From the material placed on record, this Adjudicating Authority is satisfied that a default has been committed by the Corporate Debtor in repayment of the loan amount.

The petition was therefore admitted and Interim Resolution Professional was appointed.

NCLT-Mumbai Bench
Ashok Alco-Chem Ltd. (Operational Creditor)
vs.
Unimark Remedies Ltd. (Corporate Debtor)
4th April, 2017
Amount in Default - ₹61.36 lakh

Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016–Application for initiation of corporate insolvency resolution process by operational creditor

Insolvency resolution process under Section 9 of the Code was initiated on the ground of non-payment of debt owed to Operational Creditor. The petitioner had given statutory notice under Section 433 and 434 of the Companies Act, 1956 and filed winding up petition before the High Court. The debtor company raised an objection that notice under Section 8 of the Code was not issued before filing the petition.

The NCLT vide its order dated 24th February, 2017 held that the debtor company could not raise such objection as this petition happens to be transferred from High Court by virtue of jurisdictional change. The Tribunal further held that the petitioner has complied all statutory compliances and thus no dispute is in existence between the financial creditor and the corporate debtor in relation to the debt claim and admitted the petition and appointed the Insolvency Resolution Professional.

The corporate debtor filed an application for recalling/review the order dated 24th February, 2017 on the grounds that dispute between the parties has been resolved and that the application has been filed before the order has been communicated.

The Tribunal held that when orders are passed in open court on the date of hearing after notice has been issued to the corporate debtor, such order cannot be called *ex-parte* order, that apart, it is not that this bench should not pass orders unless corporate debtor appears.

Further, this matter has been transferred from the Hon'ble High Court on the basis of the notification dated 7th December 2016. On perusal of this notification dated 7th December, 2016, it is understood that all applications that have been transferred under this notification have to be treated as application under Sections 7, 9 or 10 of the Code. Therefore, issuing another notice u/s. 8 of the Code in the transferred case is not necessary, because the precondition of issuing notice u/s. 8 will not apply.

Further there is neither a section of law which envisages recalling its own orders, nor a Rule set out to recall orders, and moreover the moratorium being rem in nature, this application is hereby dismissed in *limine* as not maintainable.

Disciplinary Case

Council of the Institute of Chartered Accountants of India
vs.
CA. T

Chartered Accountant Reference No. 4 of 2014 decided on 10th November, 2014 by Hon'ble High Court of Delhi under Section 21(5) of the Chartered Accountants Act, 1949.

Facts of the case

Information received from the Delhi Stock Exchange (DSE) and Securities Exchange Board of India (SEBI) containing allegations against CA. T (Respondent) in incorporating two companies. The allegations against the Respondent *inter-alia* includes (a) incorporation of a company by forging the signature of parties and its subsequent conversion into Limited Company with fraudulent means and by breach of trust (b) passing of false and fake resolutions in the name of incorporated company under the forged signatures of a dead person (c) managing the company and bank accounts with the signatures of a person who is no more.

SEBI brought to the notice of the Institute that the Respondent, who was the Lead Manager in the public issue of Zed Investments Limited, made a number of mis-statements and concealment of material facts in the prospectus, besides a number of irregularities committed in the issue process; that Respondent was instrumental in acts of omission and commission of the affairs of the said company including its fraudulent incorporation, fraudulent

public issue and fraudulent operations. Based on the above set of allegations, two information cases were registered against the Respondent.

The Council of the Institute *prima facie* opined that the Respondent was guilty of professional and/or other misconduct, and referred the case to Disciplinary Committee for enquiry.

The Committee, on perusal of available record, found that the act of the Respondent has tarnished the reputation of the profession and brought the profession to bad light in the eyes of general public. The Respondent has maintained silence and there is no communication, no reply or no representation from his side. The Respondent has purported a serious fraud and brought great disrepute to the profession. In view of the serious irregularities brought to light and the Respondent not cooperating with the Committee nor submitting any document to prove his innocence, the Committee held the Respondent guilty of "Other Misconduct" under Section 22 read with Section 21 of the Chartered Accountants Act, 1949.

The Council on consideration of the Report of the Disciplinary Committee accepted the Report of the Disciplinary Committee and decided to recommend to the High Court that the name of the Respondent be removed from the Register of members for a period of five (5) years each in the two cases. As required under Section 21(5) of the Act, the matter was referred to the Delhi High Court by way of filing two Reference cases.

Decision of the Hon'ble High Court

The Hon'ble High Court, in a combined order dated 10th November, 2014 expressed its satisfaction as to the compliance of principles of natural justice while holding enquiry and the findings arrived at by the Council. The Court observed that though the jurisdiction of High Court under Section 21(6) of the Act is wide, but the findings of the members of the Disciplinary Committee and the views of the Council cannot be set aside lightly as they are experts with regard to the matters pertaining to profession of Chartered Accountants, hence in such matters court would be slow to interfere with the impugned orders.

On overall consideration of the matter, the Hon'ble High Court accepted the findings and recommendations of the Council and ordered for removal of name of the Respondent for a period of 5 years, in each case, from the Register of Members. ■