Legal Decisions[1]

Income Tax

LD/66/33

Arvind Kalyan vs. Union of India

30th August 2017

Proceedings against the legal representative of the deceased upheld by Calcutta HC; Order passed by Tax Recovery officer u/s. 159 affirmed.

The assessee is the son of a deceased defaulter Sushil Kumar Kayan. Assessee is also a member of an HUF along with the deceased father till the time of death of the father. Assessee had purchased the shares belonging to his deceased father during his lifetime for valuable consideration. The purchase of such shares has been disclosed in the income tax return of the petitioner for the relevant assessment year. The Tax Recovery Officer (TRO) noted that the assessee and his deceased father had worked as directors of companies. The TRO took stand that such shares were succeeded to the assessee and further presumed that assessee was meddled with the estate of the deceased subsequent to his death. Proceedings u/s. 159 were initiated against the assessee. ITAT ruled in favour of Revenue and noted that assessee and his brother were heirs and legal representatives of their deceased father.

Before HC, assessee submitted that he had severed all relationship with the deceased in 1999 and not having intermeddled with the affairs of the deceased subsequent to his death, he ought not to be considered as a legal representative of the deceased.

HC observed that Section 2(29) of the Act of 1961 stipulates that the meaning of legal representative assigned to it in Clause (11) of Section 2 of the Code of Civil Procedure 1908 would apply to the Income Tax Act, 1961. Section 2(11) of the Code of Civil Procedure 1908 stipulates that a legal representative means a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased. It also includes a party who sues or is sued in a representative character on whom the estate devolves on the death of the party so suing or sued.

HC referred to SC ruling in Custodian of Branches of *BANCO National Ultramarino vs. Nalini Bai* [AIR 1989 SC 1589] and noted that the definition of legal representative given in the Code of Civil Procedure, 1908 is inclusive in character and its scope is wide. It is not confined to legal heirs only. It may be a person who may or may not be the heir, competent to inherit the property of the deceased. However, such person is representing the estate of the deceased. It includes heirs as well as persons who represent the estate even without title either as executors or administrators in possession of the estate of the deceased. Such persons are covered by the expression legal representative. Thus, ruling in favour of Revenue, HC noted that the assessee was the heir and legal representative of the deceased.

HC further remarked that a Writ Court is not the second Appellate Authority. A Writ Court is called upon to interfere in an order impugned before it, without the assessee before it, substantiating that, the impugned order is without jurisdiction, or is vitiated by the principles of natural justice, or is a non-speaking one or is vitiated by fraud or actuated by mala fides. As per HC, such were not the facts of this instant case.

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LD/66/34

J and K Bank Ltd. vs. Asst. Commissioner of Income Tax

29th August 2017

Loss on account of embezzlement by employees was incidental to assessee's banking business and should be allowed as deduction in the year when embezzlement is discovered by assessee-bank and not in the year of its detection.

The assessee, a Bank, filed the return for AY 97-98 claiming a loss on account of embezzlement of ₹1.65 lakhs. AO took stand that although the embezzlement came to the notice of the assessee on earlier dates yet the assessee claimed the deduction in the AY 1997-1998, and thus, AO disallowed the said. Similarly another embezzlement loss of ₹10.66 lakhs was disallowed for AY 2000-2001. CIT(A) relied on the decision of his predecessor for previous AYs and allowed the assessee's appeal. ITAT held that loss should be claimed in the year as soon as the same is detected and the case was remitted to

[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 AO to decide the claim in terms of the direction that the loss can be allowed if the same is claimed in the year it is detected notwithstanding whether the same has got crystallised and accordingly allowed the appeal preferred by the Revenue. Aggrieved, assessee filed an appeal before HC.

HC referred to SC ruling in *Associated Banking Corporation of India Ltd.* [(1965) 56 ITR 0001] wherein it was observed that embezzlement of funds by an agent, like a speculative adventure, does not necessarily result in loss immediately when the embezzlement takes place. So long as a reasonable chance of obtaining restitution exists, loss may not in a commercial sense be said to have resulted. It was also noted that SC in the case of *Badri Das Daga* observed that loss resulting from embezzlement by employee or agent of a business as deduction under Section 10(1), if it arises out of carrying on of business and is incidental to it.

A CBDT circular dated November 24, 1965 was also noted by HC. The Circular said *"In the light of the above decisions of the SC, the legal position now is that loss by embezzlement by employees should be related as incidental to a business and this loss should be allowed as deduction in the year in which it is discovered."* HC referred to ruling in *Jagannath Maheshwari Amritsar* [AIR 1957 PUNJAB 226] and observed that the expression detection and discovery have different connotations. When embezzlement comes to the notice of an employer, it can be said that such embezzlement is detected by the employer. However, the expression "discovers" indicates detection as the result of uncovering, revealing or laying open to view what was hidden, concealed or unknown. But words do not always retain their abstract or primary definitions and their meanings vary in accordance with contextual use. The word "discovers" has been interpreted by English Courts to means *"comes to the conclusion from the examination the Inspector makes, and from any information he may choose to receive"* or *"has reason to believe" or "finds or satisfied himself"* or *"honestly comes to the conclusion from information before him"*.

HC thus held that loss by embezzlement being incidental to the banking business ought to be allowed as deduction in the year it was discovered and not detected, and the expression "discovered" ought to be read in the context of CBDT Circular (supra).

Thus, HC ruled in assessee's favour.

LD/66/35

Commissioner of Income Tax
vs.
Sinhgad Technical Education Society
29th August 2017

SC quashes Section 153C proceedings initiated against assessee for AYs 2000-01, 2001-02, 2002-03 and 2003-04; Assessee's registration was cancelled u/s. 12AA pursuant to search conducted at one of the trustee's premises and incriminating material being found there.

The assessee is an educational institution registered under the Bombay Public Trusts Act, 1950 and the Societies Registration Act, 1860, and under Section 12AA of the Income Tax Act. During a search and seizure operation in case, Trustee-President of the assessee society and his wife, it was noted that assessee was taking a capitation fee from the students. AO recorded that activities of trust were not genuine and cancelled the registration of the trust u/s. 12AA(3), thereby treating it as an AOP. A satisfaction note was recorded by the AO of the person searched for use of those documents against the assessee. The assessee filed its revised return for the AY 2006-07 and in respect of other AYs, it relied to its original returns. The AO passed assessment orders for AYs 1999-2000 to 2006-07. The CIT(A) partially allowed the appeal. ITAT held notice u/s. 153C to be invalid and quashed it. HC also dismissed Revenue's appeal. Aggrieved, Revenue filed an appeal before SC. AY 1999-2000 was covered under re-assessment proceedings, AY 2006-07 was covered under scrutiny assessment and AYs 2000-01 to 2005-06 were covered by notice u/s. 153C and assessment order was set aside only in respect of AYs 2000-01 to 2003-04 which were the subject matter of appeal.

SC observed that incriminating material, which was seized, had to pertain to the relevant AYs whereas the documents which were seized did not establish any co-relation, document-wise, with the relevant four AYs [AY 01-02 to AY 05-06]. Since requirement u/s. 153C is essential for assessment under that provision, it becomes a jurisdictional fact.

SC observed that the Bombay HC had correctly distinguished Revenue's reliance on Gujarat HC ruling in *Kamleshbhai Dharamshibhai* since in that case it was found on facts that the documents seized, in fact, pertain to third party i.e. the assessee,

The Institute of Chartered Accountants of India(ICAI)

World/National Commerce Education Day

Organised By: Career Counselling sub-group under BoS, ICAI

10th November, 2017

Commerce Education for All

National/World Commerce Education Day will be celebrated on 10th November, 2017 with the theme "Commerce Education for All" will be conducted by the Career Counselling Committee of the Institute of Chartered Accountants of India in India as well as abroad.

Objectives of Celebrating National/World Commerce Education Day

National/World Commerce Education Day will be celebrated every year with the following objectives

- To widely spread a message about the significance of Commerce Education in the daily life of the people.
- To display all the activities, efforts and achievements in the field of Commerce for human welfare.
- To discuss all the issues and implement innovative strategies for the development of the Commerce education.
- To give an opportunity to showcase the talents of Commerce students in the country. To encourage the people as well as popularize the Commerce education.

The Commerce Carnival is going to be an event with a series of activities and programs involving school and college students, eminent Educationists and faculties of the state, country and abroad. We want to provide a real platform for the budding students to make their career and profession in Commerce.

10th November - National/World Commerce Education Day-2017

Why

On November 10, 1494, a book titled *Summa de Arithmetica, Geometria, Proportioni et Proportionalita* (Everything About Arithmetic, Geometry and Proportion) was published in Venice. This was the first book that aimed to summarise the mathematical knowledge of those days. One of the tractatus of the Summa, entitled *"Particularis de computis et scripturis"* (About accounts and other writings) provides a detailed description of Venetian book-keeping. This was the first printed essay on double entry bookkeeping - called "Method of Venice" - and was direct base of some widespread works on mercantile accounting. The author of the book was Italian mathematician and Franciscan friar Luca Bartolomeo de Pacioli. Although double-entry bookkeeping had been around for centuries, Pacioli's 27-page treatise on the subject has earned him the title "The Father of Modern Accounting." The system he published included most of the accounting cycle as we know it today.

Commemoration of World/National Commerce Education Day

- The World/National Commerce Education Day will be expected to celebrate in capital cities of each state as well as other cities and in abroad destinations
- Career Counselling/Mega Career Counselling Programme will be organised to promote the Commerce Education in in each Branch/ Regional Councils/Chapter Abroad.
- Mega Career Counselling Programme cum Exhibitions will be organised to promote the Commerce Education in Branch/ Regional Councils/Chapter Abroad.

Activities to be organised during the Commerce Education Day in the Branches/ Regional Councils/ Chapters Abroad on 10th November, 2017

- Career Counselling Programme /Mega Career Counselling Programme
- Press Conference
- Radio/TV talk shows
- Public speech
- Commerce exhibitions
- Debate Competition
- Quiz competitions
- Elocution Competition
- Essay Writing Competition
- Marathon race/ Human Chain
- Variety of other programmes

The aforesaid programmes will be organized to popularise the Commerce education in the country as well as abroad amongst the student community and other stakeholders.

Convener

Career Counselling sub-group under BoS, ICAI

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and, therefore, the said condition precedent for taking action under Section 153C of the Act had been satisfied.

SC further opined that the necessary consequence would be that insofar as the conclusions of the AO in his assessment order regarding the activities of the trust not being genuine and not carried out in accordance with the trust deed or cancellation of registration, denial of benefits of Section 11 and 12 etc. were concerned, the same would not be affected by this judgment. Thus, SC clarified that this instant SC judgment is not dealing with the matter on merits insofar as incriminating material found against the assessee was concerned. SC remarked that *"this Court has not given any clean chit to the assessee insofar as the finding of the AO to the effect that the assessee had been indulging in profiteering and collecting capitation fee is concerned. Whatever other repercussions are there, based on these findings, they can follow. This Court was not informed and, therefore, unaware of any challenge to the assessment order in respect of other four Assessment Years and outcome thereof. Wherever any such proceedings are pending, same would be considered without being affected by the outcome of these proceedings."*

Thus, SC dismissed Revenue's appeal.

LD/66/36

Commissioner of Income Tax

vs.

Rural Electrification Corporation Ltd.

28th August 2017

SC held notices issued u/s. 148 on assessee as time barred u/s. 149 and held that relaxation u/s. 150 read with Explanation 3 to Section 153 was not applicable; Re-assessment notice was issued on assessee based on a ITAT order passed in case of another entity to whom assessee advanced loan, wherein it was held that interest income was not to be taxed in the hands of that entity but was taxable in the hands of assessee

The assessee had advanced loans to one cooperative electrical supply society ltd. which created a special corpus fund. The said society earned interest on the special corpus fund which was not disclosed by it in its returns stating that the income earned was on behalf of the assessee. ITAT in that case agreed with the said society and held that the said interest income was taxable in the hands of the assessee. Based on this ITAT order, notice u/s. 148 was issued in order to reopen assessments for AY's 1999-2000 to 2002-2003. Aggrieved, assessee filed writ petitions before Delhi HC.

Before HC, assessee held that since notices u/s. 148 had been issued beyond the period of six years as stipulated in Section 149, the bar of limitation u/s. 149 would be applicable unless revenue established that the present cases fall u/s. 150 read with Explanation 3 to Section 153. Thus, assessee submitted that Section 150 could be invoked only if the reassessment was done as a consequence of any finding or direction contained in an order passed by any authority in any proceeding by way of appeal, reference or revision or by a Court in any proceeding under any other law.

HC stated that Explanation 2 in Section 153 makes it clear that even where any income is excluded from the total income of the assessee from a particular AY, then, an assessment of such income for another AY shall, for the purpose of Section 150 and also Section 153 be deemed to be made in consequence of any finding contained in the said order. HC thus held that a finding in respect of a different year can also be used for the purposes of invoking the provisions of Section 150 by virtue of the deeming provision in Explanation 2 in Section 153. Further, Explanation 3 stipulated that where, by an order *inter-alia* passed by the ITAT in an appeal, any income is excluded from the total income of one person and held to be the income of another person, then, assessment of such income on such other person shall be deemed to be made for the purpose of Section 150 and Section 153 to give effect to any finding in the said order. However as per HC, the aforesaid deeming provision is subject to a proviso that such other person be given an opportunity of being heard before such an order is passed.

HC noted that ITAT did not give an opportunity to the assessee when it held that interest income was not taxable in the hands of the said society but was taxable in the hands of the assessee, thereby making Section 150 and Explanation 3 to Section 153 inapplicable. As per HC, deeming provision of Explanation 3 to Section 153 required that the person ought to be given an opportunity of being heard before an order is passed where under any income is excluded from the total income

of one person and held to be the income of another person.

In view of above inapplicability, HC held that the normal provisions of limitation prescribed u/s. 149 would apply as the notices u/s. 148 which were issued beyond the said period of six years were time-barred.

HC had therefore allowed assessee's writ petitions. The SLP filed by Revenue against this HC order was also dismissed by the SC, thereby ruling in favour of assessee.

LD/66/37

Principal Commissioner of Income Tax
vs.
Bikram Singh
25th August 2017

Unexplained credit addition u/s. 68 restored w.r.t loans/advances received from parties' whose creditworthiness/genuineness could not be established by the Assessee; Assessee failed to discharge 'initial onus'.

With respect to return filed by the Assessee for AY 2011-12, the AO made additions u/s. 68 in respect of loans/advances received from 8 parties, since the assessee was unable to establish the identity, creditworthiness and genuineness of the said persons and transactions. The CIT(A) upheld the additions whereas the ITAT deleted the additions in respect of 4 parties and restored the addition of remaining 4 parties to the file of the AO. Aggrieved Revenue filed an appeal before Delhi HC.

Referring to various HC and SC rulings, HC noted that the initial burden lies on the Assessee to establish the identity of the shareholders, the genuineness of the transaction and the creditworthiness of the shareholders. It is only after the initial burden is discharged that the onus shifts to the Revenue.

W.r.t. a creditor, HC observed that the bank account of that creditor was opened by a cash deposit of ₹1,000 and there are several sums running into lakhs withdrawn in cash and that ₹50

lakhs were be given as loan/advance to assessee in the absence of any loan agreement without interest or security specifications. W.r.t. another creditor, it was observed that his bank account was opened with just ₹500, and thereafter huge sums of cash were deposited into the account and then a sum of ₹1.10 crores was lent to the assessee without any agreement, interest payment or security. HC remarked that such transaction was 'fantastic' and `incredible'. Further, HC also remarked that just because a PAN card was filed, the genuineness of the transaction could not be established and the ITAT had failed to check the financial strength of the creditor to lend such a huge amount to assessee.

For another creditor, HC observed his annual income was between ₹1.75 lakhs to ₹1.8 lakhs and he also did not file an ITR and had no PAN number; thus raising serious doubt about his identity and genuineness.

HC held that since the assessee was unable to discharge the onus cast on him in respect of transactions with impugned 4 creditors, the onus did not shift to the Revenue.

HC observed that the transactions in the present appeal are yet another example of the constant use of the deception of loan entries to bring unaccounted money into banking channels. This device of loan entries continues to plague the legitimate economy of our country. As seen from the facts narrated above, the transactions herein clearly do not inspire confidence as being genuine and are shrouded in mystery, as to why the so-called creditors would lend such huge unsecured, interest free loans - that too without any agreement. Thus, the creditors failed the test of creditworthiness and the transactions failed the test of genuineness.

HC thus ruled in favour of Revenue.

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LD/66/38

Principal Commissioner of Income Tax

vs.

Late Rama Shankar Yadav

18th August 2017

Unexplained expenditure addition u/s. 69C restricted to 5% of amount spent on purchases, by HC; ITAT had restricted the addition to only 5% holding that the profits on those purchases could not be more than 5%

The assessee filed his return of income for AY 2005-06 and an assessment order u/s. 148 was passed on 16.12.2008 by the AO by making an addition of ₹60 lakhs as unexplained expenditure u/s. 69C which assessee had incurred in making purchases. The CIT(A) considering the past record of profits, confined the aforesaid addition to only 5% of the amount spent on purchases as the profits on the said expenditure/purchases. ITAT confirmed CIT(A)'s order. Aggrieved, Revenue filed an appeal before Allahabad HC.

HC noted that the language of Section 69C of the Act stipulates two conditions necessary for deeming the expenditure incurred by the assessee to be his income for the said year (i) where no explanation is offered; and (ii) where the explanation offered is not found to be satisfactory. Further, the use of the word "may" in the impugned provision made the deeming provision discretionary and not mandatory. Thus, as per HC, it was not mandatory to treat such unexplained expenditure to be the income of the assessee.

HC referred to SC ruling for *Smt. P. K. Noorjahan* wherein it was held that the provisions of Sec. 69A which are pari-materia to Section 69C are not mandatory in as much as the legislature had used the word "may" in the provision. Thus, the AO had full discretion to add or not to add any such expenditure or any part thereof in the income of the assessee even if no explanation was offered or if offered was not found to be satisfactory.

HC observed that a notice pursuant to Section 69C was served upon the assessee on 23/09/2011 fixing the date of 10/10/2011 as expiry of time for submitting the explanation, and that the assessee had died on 02/10/2011. The legal heirs of the assessee had submitted that they had no knowledge of the business of their deceased father. Thus, the assessee and his heirs were prevented by sufficient good cause from submitting the explanation to justify the expenditure or its source. HC remarked that to meet such contingencies, the legislature has in its wisdom, conferred a discretionary jurisdiction upon the AO to add or not to add such unexplained expenditure in the income of the deceased even if there is no explanation.

HC concluded that since the provisions of Section 69C were not mandatory in nature, the AO had full discretion either to add or not to add the unexplained expenditure in the income of the assessee based upon sound judicial principles. HC thus affirmed ITAT's order restricting the addition to 5% of expenditure. HC thus ruled in assessee's favour.

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Transfer Pricing

LD/66/39

Principal Commissioner of Income Tax vs. Interra Infotech (India) Pvt. Ltd. 25th August 2017

ITAT order rejecting adoption of comparables by AO without undertaking proper analysis and based on comparables for preceding AY, upheld by HC

The assessee is engaged in the business of development of computer software. The AO observed that there were no abnormal changes in the facts and circumstances of the instant case of AY 09-10 from assessee's own case for AY 2008-09. Therefore the AO did not make any reference to the TPO and proceeded to apply those comparables which were adopted for preceding AY. CIT(A) ruled in favour of assessee. ITAT also ruled in favour of assessee holding that the AO was not justified in adopting the comparables selected from AY 2008-09 without undertaking proper analysis.

W.r.t. Revenue's contention that there was no occasion for the CIT(A) to undertake a TP analysis in exercise of its appellate jurisdiction, HC noted that the Revenue in its appeal before ITAT had not taken any specific ground that the CIT(A) ought not to have itself undertaken the TP analysis and that it was a mandatory requirement in law for the AO to have made a reference to the TPO for the AY in question. HC also rejected Revenue's contention that since ITAT had itself remanded TP-issue for AY 2008-09, it ought to have passed a similar order for AY 2009-10.

As per HC, CIT(A) had given cogent reasons for not accepting AO's approach in simply following TPO's order for preceding AY as assessee was able to show that facts and circumstances in AY 2009-10 were different from preceding AY. HC thus held that the order of CIT(A) and ITAT do not suffer from any legal infirmity which warrants any interference by the HC. HC thus ruled in favor of assessee.

LD/66/40

PCM Strescon Overseas Ventures Ltd. and Anr.
vs.
Dy. Commissioner of Income Tax
11th August 2017

Reference made by AO to TPO without affording hearing opportunity to assessee or without passing a reasoned order on jurisdictional aspect, set aside by HC

The assessee had branches in Saudi Arabia and UAE. Assessee claimed that there were no international transactions with AEs in the relevant AY and so there was no question of determination of ALP. The AO issued a show cause notice [SCN] requiring assessee to reply with evidence to the AO's stand that there was an international transaction u/s. 92B between the branches and PE in India. After asessee's reply, the AO did not afford any opportunity of hearing to the assessee and referred the matter to TPO for determining ALP. A draft assessment order was forwarded to assessee based on ALP determination by TPO. Aggrieved, assessee filed the instant writ petition.

HC analysed the provisions of Section 92CA invoked by AO in referring the matter to TPO. HC noted that the *CBDT Instruction No. 3/2016 dated March 10, 2016* was issued subsequent to AO's reference to TPO. HC remarked that the AO was required to record his satisfaction about the existence of any income/potential income arising from and/or being affected on determination of the arm's length pricing of an international transaction or specified domestic transaction. The circular in clause 3.4 goes on to say that the assessing officer must provide an opportunity of hearing to the assessee before recording his satisfaction or otherwise. He should also pass a speaking order so as to comply with the principles of natural justice.

HC observed that although the circular was not in vogue at the material point of time, the applicability of the principles of natural justice and the requirement that AO need to decide a jurisdictional fact cannot be denied. Section 92CA(1) required the AO to take a decision on a jurisdictional fact which by itself implied that a reasonable opportunity of hearing should have been afforded to assessee and a speaking order ought to have been passed. HC remarked that *"The assessing officer has acted in breach of the principles of natural justice in doing so. The assumption of jurisdiction by the TPO and subsequently the ultimate reference to the dispute resolution panel are therefore at fault, in the facts of the present case."*

HC concluded that the interest of justice would be subserved by setting aside the writing dated April 16, 2015 of the TPO and the DRP subsequent thereto. The assumption of jurisdiction by the TPO was set aside by HC. HC directed that *"The assessing officer is requested to proceed on the basis of the show cause issued by him and the reply given thereto by the assessee concerned, and in consonance with the circular of the department dated March 10, 2016."*

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LD/66/41

Parexel International Clinical Research (P.) Ltd.
vs.
DCIT (Bangalore ITAT)

Location savings and advantages alone cannot form a basis for determining Arm's Length Price and consequently the Transfer Pricing adjustment

Facts:

The assessee is engaged in providing clinical research services in India. The Associated Enterprise ('AE') of the assessee had outsourced the work of clinical trial and research services in India to the assessee.

The Transfer Pricing Officer ('TPO') had undertaken to examine the location saving and application of profit split on location savings.

The TPO observed that conducting trial in India through the assessee had resulted in location saving for the AE as regulatory and compliance cost as well as investigatory costs were significantly lower in India in comparison to developed countries and thus, benchmarking against local comparables did not take into account the benefit of location saving.

Accordingly, the TPO applied the profit split on account of location saving method and consequently the location savings were allocated 50:50 between the assessee and the AE.

The Dispute Resolution Panel ('DRP') concurred with the view of the TPO and concluded that the location saving existed in the current business model of the assessee and, therefore, the decision of the TPO/AO was upheld.

Issue involved:

Whether the location savings and the benefits incurred due to the locational/geographical differences could be considered as the sole basis for carrying out transfer pricing adjustment?

Held:

The ITAT observed that the TPO proceeded to make assessment on the basis of location saving available to the assessee doing its research and trial activity in India in comparison to US.

The ITAT was of the view that there is no dispute that location saving is one of the primary factors of all cross border trade which includes exports and imports of articles, goods and services. The low cost of the location includes benefit in respect of low cost labour, low cost of raw-material, low fuel cost as well as location advantage being near to raw material and other supplies apart from the comparable infrastructure cost and available facilities.

Even though the low cost of regulatory and other compliance are also relevant factor adding to the location saving however the location savings and conditions are available to all parties irrespective of whether the transaction is between the related party or unrelated party. Therefore, if the comparable uncontrolled price is available then the location saving or condition cannot be itself the basis for determination of ALP and consequential adjustment.

It can be a relevant factor for conducting a proper enquiry for determination of arm's length price of the international transactions. Further the location saving and advantage are universally accepted in cross border trade so far as the transactions are not entered into solely for the purpose of avoiding tax and particularly the transactions between the related party with motive to shift the benefit of location saving and advantage to the counter part where either there is no tax or very low tax is attracted.

The ITAT also commented that the concept of Base Erosion and Profit Shifting ('BEPS') is relevant only in respect of the transactions which are entered into with the sole purpose of avoidance of tax and treaty shopping. To deal with such transactions between related parties the transfer pricing provisions have been introduced in the statute and are applied for determination of ALP. Therefore, the location savings and advantages are very much relevant in cross border transactions but for limited purpose of carrying out exercise of examination and investigation of the transaction and not as a basis for determining the ALP and consequent adjustment.

The ITAT observed that the orders of the TPO and DRP are not sustainable as they suffer from serious defect of considering the location saving as basis of adjustment. Further the computation of the location saving by the TPO is purely based on some articles and not on the basis of actual cost in the US in comparison to India. Therefore the price/cost as computed by the TPO is not based on actual data but on presumption of accepting the article on the subject as the comparable cost.

Further, since the functional comparability of the companies selected by the assessee has not been examined by the TPO as well as no steps were taken to find out the other comparables of the assessee for determination of ALP the issue of determination of ALP and consequential adjustment, if any, is required to be examined afresh at the level of TPO/AO.

Accordingly, the ITAT set aside the order of the TPO for fresh adjudication.

LD/66/42

CIT

vs.

C-Sam (India) (P.) Ltd.

Gujarat HC

In case of the assessee's subject to the transfer pricing assessment, the AO has to pass draft order under Section 144C before passing the final assessment order under Section 143(3) failing which the assessment is invalid

Facts:

The assessee was subjected to transfer pricing regulations on account of its international transactions with associated persons. Against returned income of Nil, the Assessing Officer ('AO') in the order of assessment computed the assessee's income at higher amount by making various additions and deletions as per the order of the Transfer Pricing Officer ('TPO').

On appeal, the assessee challenged such additions on the ground that the procedure laid down under Section 144C was not followed by the AO.

The Commissioner of Income Tax, (Appeals) ('CIT(A)') deleted the additions made by the AO. On appeal, the ITAT confirmed the view of the CIT(A).

In instant appeal, the Department did not dispute the factual aspects namely that upward revision was made in the income of the assessee on the basis of the order of the TPO and the same was done without following procedure laid down under Section 144C.

The Department submitted that this was a mere procedural requirement and, therefore, a curable defect. Therefore, the ITAT should have placed the matter back before the AO for passing a fresh order after following such procedure.

The Department also relied upon the CBDT Circulars and Notification: *CBDT Circular No. 5 dated 03-06-2010* and *CBDT Circular No. 09 dated 19-11-2013* to support its claim.

Issue:

Whether the assessment proceedings undertaken by the AO could be considered as valid proceedings on account of the failure to comply with the procedural requirements laid down by the statute?

Held:

The High Court observed that the statutory provisions of Section 144C make it abundantly clear that the procedure laid down under Section 144C is of great importance and is mandatory. Before the AO can make variations in the returned income of an eligible assessee, as noted, sub-Section (1) of Section 144C lays down the procedure to be followed notwithstanding anything to the contrary contained in the Act.

This non-obstante clause thus gives an overriding effect to the procedure 'notwithstanding anything to the contrary contained in the Act'. Sub-

Section (5) of Section 144C empowers the Dispute Resolution Panel ('DRP') to issue directions to the AO to enable him to complete the assessment. Sub-Section (10) of Section 144C makes such directions binding on the AO. As per sub-Section (13) of Section 144C, the AO is required to pass the order of assessment in terms of such directions without any further hearing being granted to the assessee.

The High Court further commented that the procedure laid down under Section 144C is thus of great importance. When an AO proposes to make variations to the returned income declared by an eligible assessee he has to first pass a draft order, provide a copy thereof to the assessee and only thereupon the assessee could exercise his valuable right to raise objections before the DRP on any of the proposed variations.

In addition to giving such opportunity to an assessee, decision of the DRP is made binding on the AO. It is therefore not possible to uphold the Department's contention that such requirement is merely procedural. The requirement under Section 144C is mandatory and gives substantive rights to the assessee to object to any additions before they are made and such objections have to be considered not by the AO but by the DRP and once the DRP gives directions under sub-Section (5) of Section 144C, the AO is expected to pass the order of assessment in terms of such directions without giving any further hearing to the assessee.

Thus, at the level of the AO, the directions of the DRP under sub-Section (5) of Section 144C would bind even the assessee. He may of course challenge the order of the AO before the ITAT and take up all contentions.

The High Court added that nevertheless at the stage of assessment, he has no remedy against the directions issued by the DRP under sub-Section (5). Provisions of Section 144C amply demonstrate that the legislature desired to give an important opportunity to an assessee who is likely to be subjected to upward revision of income on the basis

of transfer pricing mechanism and such opportunity could not be taken away by treating it as purely procedural in nature.

The High Court further held that reference by the Department to the circulars dated 03-06-2010 and 19-11-2013 in this regard would be of no avail. First of these circulars was an explanatory circular issued by the Finance Ministry in which it was provided that these amendments (which included Section 144C of the Act) are made applicable with effect from 01-10-2009 and will accordingly apply in relation to assessment year 2010-11 and subsequent assessment years.

In the latter clarificatory circular dated 19-11-2013, it was provided that in the earlier circular there was an inadvertent error and Section 144C would apply to any order which is being passed after 01-10-2009 irrespective of the concerned assessment year.

The latter circular was thus merely in the nature of a clarificatory circular and clarified which all along was the correct position in law. Sub-Section (1) of Section 144C itself in no uncertain terms provides that the AO shall forward a draft order to the eligible assessee, if he proposes to make any variation in the income or loss which is prejudicial to the interest of the assessee on or after 01-10-2009.

The statute was thus clear, permitted no ambiguity and required the procedure to be followed in case of any variation which the AO proposed to make after 01.10.2009. The earlier circular dated 03.06.2010 did not lay down the correct criteria in this regard. The High Court held that assessee cannot be made to suffer on account of any inadvertent error which runs contrary to the statutory provisions. Accordingly, the High Court pronounced that no question of law arises and the tax appeal is therefore dismissed.

International Taxation

LD/66/43

Caterpillar Global Mining Europe GmbH vs. ADIT (Hyderabad Tribunal)

When the assessee had Permanent Establishment ('PE') in India but did not have any role to play in the activities undertaken by its foreign AE, the income cannot be considered as that of the PE and cannot be taxed in India

Facts:

The assessee is a German company and a manufacturer of mining equipments and operating mines. Singareni Colleries Company Limited ('SCCL'), an Indian company, floated a single tender along with tender notices for introduction of Continuous Mines Technology ('CMT') with 5 years maintenance contract in SCCL Mines.

The assessee, in its bid documents, had assured SCCL to have overall responsibility of the entire turnkey contract in its capacity as a single bidder. In this regard, 3 separate parts of the Master Contract were entered into.

Contract I was for Scientific Site Investigation and obtaining of the approval of DGMS for the mining method. Contract II was to supply the equipment and spares. Contract III was for provision of maintenance services for 5 years before handing over the mines operation along with the machineries to SCCL.

The assessee performed its responsibility under Contract I and obtained the DGMS approval. Thereafter, the assessee manufactured the equipment and delivered the same to SCCL and proceeded to perform its responsibility under Contract III by setting up its project office in India. The assessee, therefore, offered the income from Contract III only, for taxes in India.

The Assessing Officer ('AO'), however, observed that the project was for introduction of CMT for mining in mines of SCCL in India as a total solution provider and not for supply of equipment which was only incidental to its composite business of introduction of the Technology. Therefore, he was of the opinion that the business of the assessee was carried out in India.

He observed that under both the Income-tax Act and also the DTAA between India and Germany, a fixed place from which business was carried out even partly would qualify to be treated as PE and also business connection in India. According to him, the activities of the assessee constituted sufficient nexus to establish business connection and also PE of the assessee in India for the entire project in which supply of equipment and other services get embedded.

Further, he held that the intent and object of the assessee was to enter into all the three agreements at the same time and, therefore, the activities envisaged therein were interdependent

and interconnected to the other agreements and receipts from offshore supply of equipments and therefore were taxable in India.

The DRP confirmed the view of the AO but, apportioned 35 per cent of the Contract II receipts towards Indian Operations. The AO, accordingly, passed the final assessment order.

Issue:

Whether the activities of the assessee constituted sufficient nexus to establish business connection and also PE of the assessee in India for the entire project in which supply of equipment and other services get embedded. Whether the income earned towards designing and manufacturing activities can be attributed to the PE of the assessee?

Held:

The ITAT was of the view that the turnkey project itself indicates that it is composite contract which involves activities from the initial stage to the final stage. All the activities are either interlinked and interdependent or consequent to one another. The SC in the case of *Ishikawajma-Harima Heavy Industries Ltd. vs. DIT* (288 ITR 408) has held that a contract must be construed keeping in view the intention of the parties.

Even in the case, though SCCL had issued a single tender document for whole of the project, the intention of the assessee to segregate the contract into three contracts was clear from the beginning.

The ITAT also observed that the assessee negotiated with SCCL who ultimately agreed to execute three separate contracts with specific scope of work for each of the contracts and different time frames. Thus, the intention of the parties to have three different contracts is proved.

Under these circumstances, the ITAT was of the opinion that finding of the authorities below, that all the three contracts are part of a single and composite contract is not sustainable. The

consequential finding that in a composite contract, if there is a PE for one of the contracts, then the PE is there for all the contracts is also not sustainable.

The department argued that, the project office set up on 21-4-2008 is the PE even for the Contracts I and II. However, the ITAT did not accept this. The other ground on which the department contended that the business income of the assessee under Contract II is taxable in India is that there is a PE in India by virtue of Contract I during which the technical employees of the assessee company visited India for a total period of 37 days over a span of six months. Article 5(2) of the DTAA between India and Germany defines Permanent Establishment and clause (i) thereof includes a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or activities continue for a period exceeding six months. The activities under Contract I did exceed six months. Thus, the ITAT held that it can be said that there is a PE for Contract I.

However, the ITAT viewed that the Contracts II & III were to come into force only after approval of the DGMS is obtained. The results of the Contract I were the basis for the design, manufacture and supply of the plant and equipment under Contract II. The AO had not doubted the manufacture and delivery of the equipment outside India.

However, his basis for bringing to tax a part of the income under Contract II was that the findings of Contract I were the basis for the design of the equipment and, therefore, part of the income was attributable to activities in India. Even if there was a PE in India for the Contracts I and II, only such income which was attributable to activities of the assessee in India was taxable.

The ITAT held that there was no dispute that the entire activity of designing, manufacture and delivery of the equipment including the payment was made outside India. Therefore, even if there was a PE for Contract II, it cannot be said that the PE of the assessee had any role to play in any of the above activities and hence the income arising out of the designing and manufacturing activities cannot be considered as taxable in India.

LD/66/44

Prashant M. Timblo

vs.

CIT

Bombay HC

The requirements to produce Tax Residency Certificate to claim treaty benefit was introduced in Finance Act, 2012 with effect from 1-4-2013 and hence for the proceedings relating to the earlier assessment years there was no need of producing such certificate as on date

Facts:

The assessee, a tax resident of UAE, had claimed India UAE treaty benefits for AY 2005-06.

However Assessing Officer ('AO') issued notice under Section 148 on the ground that assessee did not establish that he was resident of UAE.

Further, as per the treaty, an individual who is present in the UAE for a period or periods totalling in the aggregate at least 183 days in the calendar year concerned shall be considered as a resident of UAE. The assessee was not present in UAE for 183 days and hence cannot be considered as a resident of UAE and hence cannot claim treaty benefits.

On account of his failure to produce Tax Residency Certificate ('TRC') the assessee should be taxed accordingly.

Held:

The High Court held that the requirement to produce the TRC was introduced in the Finance Act, 2012 with effect from 1-4-2013. The present proceedings were in connection with the AY 2005-06 and there was no need of producing such certificate as on that date.

The High Court observed that, the requirement of stay in UAE for a period of six months has been introduced in Article 4(b) of the amended DTAA between India and UAE which came into effect only from 28-11-2007.

Accordingly, as already pointed out, the subject AY being 2005-06 and, as such, the question of applying the said requirement for the subject assessment would not at all arise.

The High Court also observed that, during regular assessment, assessee had disclosed relevant information to show that he was entitled for the benefits of DTAA with UAE. Accordingly

in such circumstances, the High Court held the reassessment proceedings as invalid and quashed the reassessment proceedings.

Service Tax

LD/66/45

A.S. Babu Sah Designs vs. Commissioner of Central Excise (Appeals

Commissioner (Appeals) is empowered to remand portion of assessment to Adjudicating Authority for reconsideration

Though the assessee had effective alternative remedy of appeal before the CESTAT, assessee filed this writ petition by contending that the Commissioner (Appeals) had no power to remand the matter to the Adjudicating Authority, in light of the 2001 amendment to Section 35A of Central Excise Act. Assessee submitted that it would be put to great prejudice if it had to agitate some portion of assessment before Adjudicating Authority, and some before the Tribunal.

The assessee submitted that in terms of Section 85(5), the Commissioner (Appeals) was required to exercise the same powers and follow the same procedure as under Central Excise Act. The pre 2001 amendment Section 35A provided for a power to remand the matter to the Adjudicating Authority and this power had been specifically deleted when sub-Section (3) was substituted by Finance Act 2001. Revenue relied on SC ruling in *Union of India vs. Umesh Dhaimode* [1998 (98) ELT 584 (SC)], which considered the effect of Section 128(2) of the Customs Act and held that the said provision vested the Appellate Authority with powers to pass such orders as it deemed fit thereby confirming, modifying or annulling the decision appealed against. According to Revenue, order of remand necessarily annulled the decision which was under appeal before the Appellate Authority. SC had further held that the order remanding the matter to the Adjudicating Authority

would fall within the power of annulling the order-in-original.

HC analysed provisions of Sections 85 and 86 of Finance Act as well as Sections 35A and 35C of Central Excise Act, and observed that sub-Section (5) does not specifically state the provisions of Section 35-A of the Central Excise Act, and has to be read into the provisions of the Finance Act. In fact, Section 83 of the Finance Act enumerates the Sections, under the Central Excise Act 1944, which would apply to the matters relating to the Service Tax and it does not include Section 35-A of the Central Excise Act. This is a clear indication that the said provision cannot be superimposed into Section 85 of the Finance Act. HC also observed that provisions of Section 85(4) was *para materia* to Section 128(2) of Customs Act, which provision was considered by SC in *Umesh Dhaimode* (supra).

HC noted that power to annul a decision, necessarily, included remand and even after the amendment to Section 35A, the Appellate Authority had power to set aside the decision. HC observed that the amendment to Section 35A(3) in Finance Act 2001 did not in any manner impact power of Commissioner (Appeals) while dealing with an order passed under the Act.

HC thus ruled in favour of Revenue.

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LD/66/46

Indian Association of Tour Operators

vs.

Union of India & Anr

HC held that packaged tour services provided by Indian tour operators to foreign tourists, consideration for which has been paid in convertible foreign exchange, would not be liable to service tax even post 1.7.2012. Rule 6A of Service Tax Rules, 1994 was held to be ultra-vires Finance Act, 1994.

Facts:

Members of the petitioner are Indian tour operators, *inter alia,* engaged in the business of arranging tours for foreign tourists visiting India as well as her neighboring countries. They enter into contracts with the foreign clients either directly or through foreign tour operators, under which all arrangements are made for the foreign tourist including hotel accommodation, transport by all modes such as rail, tourist buses, monuments visits including entrance tickets, entertainment, food and restaurant bookings etc., i.e. a packaged tour which includes banquet of services. The foreign tourists/ foreign tour operators make the entire payment for the package tour in convertible foreign exchange through bank transfer, or bank draft or credit card payment etc.

As regards service tax liability on such package tour services, till 01.07.2012 i.e. prior to introduction of negative list based regime for taxation of services, even if a part of these services was performed outside India and remaining in India, such services were treated as having been performed outside India i.e. export of tour operator services and hence were not exigible to service tax. Post 01.07.2012, Rule 6A(1) of Service Tax Rules, 1994 dealing with 'export of services' enlisted certain conditions and for constituting export, fulfillment of all these conditions is mandatory. Said Rule 6A(1), *inter alia*, required that the place of provision of service be outside India in terms of clause (d). For determination of place of provision of service, government prescribed Place of Provision of Service Rules, 2012 by virtue of rulemaking powers bestowed on government under Section 94. As the services provided by Indian tour operators are composite in nature (place of provision of service for part of service is inside India and remaining part outside India), clause (d) of Rule 6A was fulfilled only in part and thereby, said services are coming under purview of service tax for not being export of services.

Petitioners submitted as under:

a) A collective reading of Section 66B read with Section 64(1) and Section 65B(52) makes it plain that service tax is leviable only on services provided or agreed to be provided in the 'taxable territory' i.e. the whole of India except Jammu and Kashmir and such service alone is 'taxable service' as defined under Section 65B(51). Therefore, services rendered outside taxable territory of India would not be a 'taxable service' for the purpose of service tax law and consequently, would not be governed by provisions of Chapter V of Finance Act as in light of Section 64(3) of Finance Act.

b) In terms of rulemaking power under Section 66C for determining place of provision of service, Central Government notified Place of Provision of Service Rules, 2012. In this

regard, petitioners submitted that these rules, as prescribed in terms of rulemaking power given under Section 66C, would only apply for deciding place of provision of 'taxable services'.

c) Section 94(2)(f) permits Central Government to make rules for 'determining export of taxable services'. Accordingly, petitioners submitted that while such rules can describe what would constitute 'export of taxable services', they cannot possibly determine the taxability of such export of service.

d) By invoking rule-making power under Section 94(2)(f), Rule 6A was prescribed for 'export of services'. For being export of services, fulfillment of all conditions enlisted under Rule 6A(1) is pre-requisite. However, in case of members of petitioners, as part of tour operator service was provided outside taxable territory, Rule 6A(1)(d) is getting fulfilled in part only & services of composite tour package to foreign tourists are attracting service tax. Further, petitioner pointed out that the provision by way of Rule 6A(2) dealing with power to Central Government to grant rebate of service tax/duty paid on input services/inputs in case of export of services, pre-supposes that such provision of service outside India is amenable to service tax, however, the entire Chapter V of the Finance Act applies only to taxable services and taxable services are those, which are provided in taxable territory i.e. whole of India except Jammu & Kashmir.

e) Petitioners pointed out that the education guide issued by CBEC clarifies that services provided by tour operator will fall under intermediary services, under Rule 9 of POPS Rules, 2012, and hence even if such services qualify as 'export of services', by virtue of the said rule, place of provision of service would be location of service provider, thereby covering them under service tax net, where in fact such services are not fully provided in India.

Thus, petitioners submitted that services provided to foreign tourists both inside and outside India are brought within the net of service tax by virtue of combined operation of Rule 6A(1) and (2) of Service Tax Rules, 1994 and Rule 9 of POPS Rules, 2012 and consequently, Rule 6A suffers from vice of excessive delegation, as non-taxable services such as services provided outside taxable territory to foreign tourists are sought to be brought within the ambit of service tax.

In support of their contention, petitioners relied upon decisions of Supreme Court in *Union of India vs. S. Srinivasan (2012) 7 SCC 683 and General Officer Commanding-in-Chief vs. Subhash Chandra Yadav (1988) 2 SCC 35*, to submit that since Section 94(2)(f) of the Finance Act enabled the Central Government to make rules only for determining export of taxable services, no tax thereon could be levied by the Central Government in terms of the said provision. That was an essential legislative function which could not have been delegated to the Central Government. Also, reference was made to the decisions in *Municipal Corporation of Delhi vs. Birla Cotton Spinning & Weaving Mills AIR 1968 SC 1232 and Union of India vs. Indian Charge Chrome 1999 (112) ELT 753 (SC).*

On the other hand, Revenue contended that Rule 6A of Service Tax Rules, 1994 was validly made in terms of power granted to Central Government under Section 94(2)(f) of Finance Act. Further, de hors Section 66B, the Central Government could make rules for determining the place of provision of services. Rule 9 of the POPSR 2012 read with Rule 6A of the Service Tax Rules permitted levy of service tax since the service to the foreign tourist was provided in India by the tour operator located in India. Further, as regards Rule 6A being ultra-vires, Revenue submitted that as Section 66C r/w. Section 94(2)(h) empowers the Central Government to determine the rate of service tax and the place of provision of taxable service, it could not be said that the Parliament has established no criteria, or no standard or that there was plenary, unguided and uncontrolled delegation of the essential legislative function to the Central Government and accordingly, the principle of purposive construction of statutes should be applied.

Held:

Hon'ble HC noted that the question that requires to be answered is whether the levy of tax on services is an essential legislative function that cannot be delegated? HC held that the answer perhaps lies in the language of Section 94 of the Finance Act itself. Section 94(1) is the general power given to the Central Government to make rules to carry out the provisions of Chapter V of the Finance Act. The words

'carry out' necessarily imply providing a mechanism for the levy enforcement and collection of service tax. The Rules in this sense are instrumental and intended to achieve the objects of the main statute. As regards Section 94(2)(f), HC held that said rule only empowers Central Government to make rules for 'determining' when export of 'taxable services' can be said to take place, it does not empower the Central Government to determine whether there can be an export of non-taxable services viz., services provided outside the taxable territory, and further, Section 94(2)(f) does not allow the Central Government to make rules levying or making amenable the provision of certain services to service tax i.e. making rules for determination of taxability of services is not permitted.

Accordingly, Hon'ble HC concluded that 'subjecting certain type of services to tax' is an essential legislative function and since the Finance Act, 1994 envisages Chapter V applying to the taxable services only, bringing non-taxable services within the ambit of service tax, is impermissible. High Court thus held that since from combined reading of Section 65B, Section 65B(51) and (52) and Section 64(1) and (3), the services of tour operator to foreign tourists are not amenable to service tax in first place, and is therefore, not 'taxable' service, Rule 6A is ultra vires the Finance Act, even Section 94(2)(hh) permits making rules to determine when there would be an export of 'taxable service' and not 'non-taxable service', accordingly, Rule 6A is held to be ultra-vires the Finance Act, as something which is impermissible under the Finance Act, cannot by means of the rules made thereunder be brought within net of service tax.

High Court further stated that viewed from another angle, since tour operator services are intermediary services and place of provision for such services would be India, being location of service provider, in terms of Rule 9 of POPS Rules, 2012, notwithstanding that some part of such services is provided outside India. As a result no Indian tour operator can expect the service rendered by him to a foreign tourist to be considered as an 'export of service' under Rule 6A as he will never be able to meet the requirement of Rule 6A (1) (d) of the ST Rules. Thus under a combination of Rule 6A of the Service Tax Rules and Rule 9 of POPS Rules, 2012 something which is non-taxable under the Finance Act is sought to be brought to tax. Therefore, High Court held that legal fiction of treating service rendered outside India to be a service rendered in India cannot be introduced by way of rules, as that too would partake the character of an essential legislative function, which cannot be delegated to the Central Government. Accordingly, HC held that Section 94(2)(f) or (hhh) of the Finance Act does not empower the Central Government to decide taxability of the tour operator services provided outside the taxable territory, but only enables the Central Government to determine what constitutes export of service, the date for determination of the rate of service or the place of provision of taxable service.

As regards composite nature of tour operator services, High Court opined that when the service is composite and a payment therefor is charged and made in a lump-sum, it is difficult to make the apportionment of the charges as being towards services rendered in the taxable territory i.e. India and the balance towards those provided outside India, therefore, apart from the fact that the provision for taxing export of services has to be found in the statute itself (and not in the rules) the statute must also provide the machinery by which it can be determined with some certainty how much of the composite service can be said to be rendered in the taxable territory and of what value for the purposes of levy and collection of tax. If there is no such machinery provided, that would be an additional ground of invalidation of the levy itself.

Accordingly, Hon'ble HC concluded that services provided by Indian Tour operators to foreign tourists during period July 2012-June 2017, which has been paid in convertible foreign exchange would not be amenable to service tax.

LD/66/47

M/s BCP Advisors Pvt. Ltd.

vs.

Commissioner of Service Tax, Mumbai-I

Mere fact that foreign service recipient has used advisory service provided by Indian service provider while taking decisions for making investment in India, would not invalidate the export nature of such service provided by Indian service provider.

In absence of time limit prescribed by CENVAT Credit Rule, 2004 for utilisation of credit, once the credit has been taken/availed, refund of such unutilised credit can be claimed without any time bar.

Facts:

Appellant, being exporter of services, filed refund claim of unutilised Cenvat credit under Rule 5 of Cenvat Credit Rules, 2004. While rejecting the refund claim, revenue, *inter alia*, alleged that since foreign service receivers had utilised advices provided by appellant for making investment in India, services provided by appellant would not constitute 'export' and refund claim being hit by unjust enrichment as the services are not exports. Further, for period 'April 2012-June 2012', since appellant had utilised Cenvat credit pertaining to period 'April 2008-March 2009', revenue alleged that for deciding whether services constitute 'exports or not', exports rules prevailing during period 'April 2008-March 2009' would be applicable and not those prevailing during 'April 2012-June 2012'.

Held:

As regards question of whether appellant's services would constitute export, Hon'ble Tribunal held that findings of lower adjudicating authority that, *"though the appellant has provided service to a foreign client from India for which payment were received from abroad, but services have been provided in relation to investment made in India"*, is misconceived in as much as the service has been used and received by the recipient of service located outside India. Thus, Tribunal held that it is of no consequence as to whether such advisory service received by the recipient located outside India, is used by recipient for taking investment decisions for making investment in India. Tribunal also referred to decision in case of *M/s Paul Merchants Ltd. vs. CCE, Chandigarh (Tri.-Delhi) 2013 (29) STR 257*.

As regards refund claim for the period April, 2012 to June, 2012, Tribunal held that since export of service is provided during the said period as per the Export Rules of India and as such the appellant is entitled to rebate, as they have both exported the service and discharged the tax liability on the same and appellant has utilised the credit earlier taken for discharge of service tax liability during the said period, appellant is entitled to refund of Cenvat credit without any time bar. Further, Tribunal held that neither there is any question of unjust-enrichment, nor the refunds of Cenvat credit under Rule 5 of CCR, 2004, are hit by time bar, as no time limit has been provided for utilisation of Cenvat credit, once it has been taken.

Accordingly, since appellant proved that due to its business being export of service, they have been unable to utilise the Cenvat credit taken, Tribunal held appellant to be entitled to refund of Cenvat credit without any time bar.

Excise

LD/66/48

A.P. Steels

vs.

Commissioner of Central Excise

Commissioner (Appeals) is empowered to grant a reduced penalty option u/s 11AC of Central Excise Act by Commissioner (Appeals)

The assessee, AP Steels, had assailed the judgment of the CESTAT wherein it allowed Revenue's appeal. The Commissioner (Appeals) had reduced the quantum of penalty to 25% of the duty payable, provided the same was paid within stipulated period, in terms of Section 11AC of Central Excise Act. The CESTAT ruled in favour of Revenue holding the option could not have been given by the Commissioner (Appeals) as it was a case of clandestine removal of goods. Aggrieved, the assessee preferred an appeal before HC.

HC analysed the provisions of Section 11AC and noted that the section operates in two parts. First where penalty imposed is equivalent to the duty determined u/s 11A(2) on account of fraud, collusion or any willful misstatement or suppression of facts, or contravention of statutory provisions with intention to evade duty; and second where duty, as determined under Section 11A(2) and the interest payable thereon, under Section 11AB, is paid within thirty (30) days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person, under Section 11AC, shall be 25% of the duty so determined.

HC observed that the first proviso, however, carves out an exception to the main section perhaps, to maximise the revenue, by holding out to the Assessee that, if, it were to accelerate the payment of dues, (i.e., duty and interest), by paying the same within the outer limit of thirty (30) days of the communication of the order of the Central Excise Officer, the penalty imposed would get reduced to 25% of the duty so determined.

According to Revenue, the period of 30 days would commence from the date when adjudication order is passed. According to assessee the expression "Central Excise Officer", as found in the first proviso to Section 11AC of Central Excise Act, should be read to include Commissioner (Appeals), in terms of Section 2(b) thereof.

HC noted that the duty as determined u/s 11A(2) will attain finality, only if it is sustained by the Appellate Authority (Commissioner). HC observed that the Order-in-Original, if, challenged, can only attain finality on the conclusion of the appellate proceedings. Therefore the time frame for the option given in proviso to Section 11AC will also commence from the date of the Appellate Order. HC concluded that the CESTAT had completely misunderstood the ratio of Bombay HC in *Commissioner of Central Excise and Customs, Aurangabad vs. V. V. Patil S.S.K. Limited* [2007 (215) E.L.T. 23 (Bom.)], wherein the Court held that there was no discretion vested in the Authorities to reduce the penalty below the minimum prescribed under the Act. HC further noted that it was incumbent on the part of the statutory authorities to bring to the notice of the assessee that it was entitled to a statutory "benefit" under the first proviso to Section 11AC.

HC thus set aside the CESTAT order and ruled in favour of assessee.

LD/66/49

MM Forgings Limited

vs.

The Customs, Excise and Service Tax Appellate Tribunal

Refund under Rule 5 of CENVAT Credit Rules, 2002 r/w Notification No. 11/2002–CE(NT) equals to amount of CENVAT credit balance lying in account as at end of relevant quarter is allowed.

The Assessee is aggrieved by the fact that while it had claimed the refund of unutilised CENVAT credit, amounting to ₹40.26 lakhs, the authorities below sanctioned the refund only to the extent of ₹39.19 lakhs. The refund was claimed in terms of Rule 5 of CENVAT Credit Rules, 2002 r/w *Notification No. 11/2002-CE (N.T.) dated March 1, 2002*. The said notification, in terms of Rule 5 of the 2002 Rules, provides for safe guards, conditions and limitations, for availment of refund of CENVAT credit of specified duty, allowed in respect of

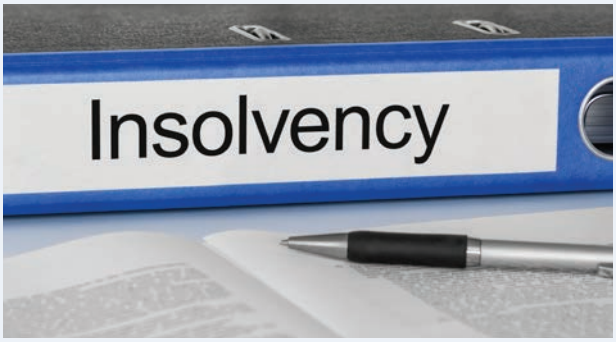
inputs, used in or in relation to manufacture of final products, which are cleared for export under a bond. Revenue declined assessee's claim pertaining to the amount of unutilised credit lying in its CENVAT credit account. Revenue adjusted the amount available as input credit against raw materials lying in stock and that relatable to finished goods available as on the said date.

Assessee submitted that methodology so employed by the Revenue of adjusting the input credit attributable to raw material and/or finished goods lying in stock was beyond the scope of Rule 5 and said Notification. As per Revenue the refund had to be restricted to the amount of unutilised credit.

HC observed that error in as much as in adjusting the input credit *qua* stock of raw materials and finished goods, available as on 31.12.2003. As is evident from the record, the period in issue is a quarter beginning from 01.10.2003 and ending on 31.12.2013. The Assessee is entitled to claim refund of unutilised credit in terms of Rule 5 of 2002 Rules r/w 2002 notification against the amount standing to its credit in the Cenvat credit account. HC remarked that there is nothing either in the Rule i.e., Rule 5 of the 2002 Rules or the 2002 notification, which provides for safe guards, conditions and the limitations which would have us conclude that the Revenue could have made the aforementioned adjustments against the closing balance reflected in the Assessee's CENVAT credit account.

HC thus ruled in favour of assessee.

Insolvency and Bankruptcy Code



M/s. Schweitzer Systemtek India Private Limited
vs.
Phoenix ARC Private Limited
National Company Law Tribunal (NCLT), Mumbai Bench, Mumbai
Special Civil Application No. 12434 of 2017
3rd July, 2017
Amount in Default: Rs. 4.69 Cr.

Section 10 of the Insolvency and Bankruptcy Code, 2016–Initiation of corporate Insolvency resolution process by Corporate applicant-Moratorium shall prohibit the action against the properties reflected in the Balance Sheet of the Corporate Debtor-Moratorium has no application on the properties beyond the ownership of the Corporate Debtor

Facts:

The main issue before the Tribunal was that "whether a property(ies) which is/are not 'owned' by a Corporate Debtor shall come within the ambit of the Moratorium?"

In the instant case the personal properties of the promoters have been given as security to the banks while taking loans.

Held:

This Code of 2016 has prescribed certain limitations which are inbuilt and must not be overlooked. The "Moratorium" indeed is an effective tool, sometimes being used by the corporate debtor to thwart or frustrate the recovery proceeding.

The plain language of Section 14 is that on the commencement of the Insolvency process the 'Moratorium' shall be declared for prohibiting any action to recover or enforce any security interest created by the Corporate Debtor in respect of "its" property. Relevant section which needs in-depth examination is Section 14(1)(c) of the Code.

There are recognised canons of interpretation. Language of the statute should be read as it existed. This is a trite law that no word can be added or substituted or deleted from the enacted Code duly legislated. Every word is to be read and interpreted as it exists in the statute with the natural meaning attached to the word. Rather in this section the language is so simple that there is no scope even to supply *'casus omissus'*. The Tribunal added that the doctrine of *'Noscitur a Sociis'* is somewhat applicable that the associated words take their meaning from one another so that common sense meaning coupled together in their cognate sense be interpreted. As a result, "its" denotes the property owned by the Corporate Debtor. The property not owned by the Corporate Debtor does not fall within the ambit of the Moratorium. Even Section 10 is confined to the books of accounts of the Corporate Debtor, due to the reason that Section 10(3) has specified that the Corporate Applicant shall furnish "its" books of accounts. This Bench has no legislative authority to expand the meaning of the term "its" even under the umbrella of *'ejusdem generis'*.

The outcome of this discussion is that the Moratorium shall prohibit the action against the properties reflected in the Balance Sheet of the Corporate Debtor. The Moratorium has no application on the properties beyond the ownership of the Corporate Debtor. As a result, the Order of the Hon'ble Court directing the Court Commissioner to take over the possession shall not fall within the clutches of Moratorium. Even otherwise, the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (the SARFAESI Act) may be having different criteria for enforcement of recovery of outstanding debt, which is not the subject matter of this Bench. The Tribunal held that the SARFAESI Act may come within the ambit of Moratorium if an action is to foreclose or to recover or to create any interest in respect of the property belonged to or owned by a Corporate Debtor, otherwise not.

The Application under Section 10 of the Code was accordingly "Admitted".

Disciplinary Case

Shri VA
vs.
CA. MRK

Facts of the case:

A Complaint in Form I dated 07.01.2008 was received from Shri VA (hereinafter referred to as the "Complainant"), Managing Director, M/s. MSPPL (hereinafter referred to as the "Company") against CA. MRK (hereinafter referred to as the "Respondent"). The charges alleged in the Complaint are as under:

- The Complainant Company is registered with STPI as 100% EOU and the Respondent was the statutory auditor of the Company. In the Statements of Total Income prepared by Respondent for assessment years 2004-2005 and 2005-2006 he has claimed income tax exemptions for 90% only whereas under Section 10A of the Income-tax Act, 1961 the unit is eligible for 100% exemption. The Finance Act, 2002 had restricted the claim of 100% to 90% for the assessment year 2003-04 only as evident from the *CBDT Circular No. 8 dated 27th August, 2002*. The Respondent did not take action even on being informed by the Managing Director of the Company and opinion of M/s MCA, a leading firm of chartered accountants that the Company is eligible for 100% deduction for the assessment year 2004-05 and 2005-06 asking him to revise form 56F and file before the tax authorities.
- The Respondent has failed to discharge his professional duty by not analysing the international transactions properly. He has not filed form 3CEB for the assessment year 2002-03. For the assessment year 2003-04, 2004-05 and 2005-06, he has filed the form without applying his mind and has not filled it at appropriate places.
- The Respondent has signed the report for the F.Y. 2001-02 probably unaware of the changes in the auditor's report model by ICAI. After having come to know about this new audit report model, he prepared another audit report and submitted the same to the Company. His audit report for subsequent years remained the same as per the old model. Neither the audit reports nor any of the accounts signed by him bear any date. Despite several reminders, the Respondent failed to complete the audit of the Company for the financial year 2006-2007 and thus, has put the Complainant Company in great difficulty in complying with the statutory formalities. Moreover, the Company filed the petition before the Regional Director for removal of the Respondent as auditor u/s. 224(7) of the Companies Act, 1956 and the Regional Director has passed order removing him as auditor.
- The Respondent has engaged himself in insurance business and used to canvass for his wife who is an insurance agent. He has forced the Company to pay ₹1 crore under Bima Plus policy. The Respondent was both the statutory and internal auditor of the Complainant Company. In order to get monthly remuneration he has misled the Directors of the Company to appoint him both as statutory and internal auditors.
- The reimbursements claimed by the Respondent for the F.Y. 2001-02 in his handwriting (acknowledged the payment to him as payee) were not shown in the profit and loss account of the Complainant Company for the financial year 2001-2002 and withheld original ROC receipts

of the Complainant Company for the financial years 1997-98 to 2001-2002 and 2003-04. He has withheld other ROC files.

The matter was enquired into by the Disciplinary Committee and the committee, *inter alia*, gave its findings as under:

The Committee noted that the deduction u/s. 10A was restricted from 100% to 90% only for the one Assessment Year A.Y. 2003-04 which is evident from the *CBDT Circular No. 8 dated 27.08.2002*. The Committee further noted that the Respondent while issuing the certificate did not carry out the necessary checks as to whether proper books of accounts were maintained in this context and he was unable to offer any satisfactory explanations as to why the amount of deduction was restricted to 90%. The Company filed the revised income tax returns for both the aforesaid assessment years claiming the deductions @100% u/s. 10A of the Income-tax Act, 1961. Further, all the aforesaid reports were undated and the Respondent failed to comply with the requirements of provisions of AAS-28–The Auditors report on financial Statements.

The Committee noted that it is an admitted fact that the Respondent had given two audit reports for the period ending 31.03.2002 and both the reports were undated. The Committee further noted that the Respondent offered no explanation on this allegation and all the Audit report(s) were not in line with the standards as prescribed by the ICAI from time to time and also did not contain the basic explanations especially with regard to the responsibility of the preparation of the financial statements. As regard giving two different audit reports, the Committee is of the view that if the Respondent was changing/revising his audit reports, he should have given a reference to the old report and the circumstances under which a revised audit report is being issued and ought to have ensured that all the old audit reports have been destroyed. It is evident that the Respondent carried out his duties without application and taking into account adequate checks.

The Committee noted that it is an admitted fact that the Respondent delayed the audit of the Company for the said financial year 2006-07. The Committee further noted that the Company filed a petition before the Regional Director, MCA, Southern Region u/s. 224(7) for removal of the Statutory Auditors on 05.09.2007. The Regional Director (RD) vide its Order dated 07.12.2007 ordered for the removal of the Respondent as statutory auditor of the Company. The Respondent contented that he was not given proper opportunity by the RD for presenting his case. The Committee is not convinced with the contentions of the Respondent. It is on record that there was delay in finalisation of the accounts of the Company on the part of the Respondent and the same forced the Company to file petition before RD for removal of the Respondent as statutory auditors of the Company.

The Committee noted that though the insurance business was carried out in the name of the Respondent's wife yet the Respondent was canvassing for the same. However, there are no documents brought on record by the Complainant which corroborates that the Respondent insisted on the Company to pay ₹1 Crore under the Insurance. The Respondent cannot be held liable for the same. Further, it is on record that the insurance business was in the name of the Respondent's wife and for the same the Respondent cannot be said to be engaged in other business besides holding full time COP. Therefore, the Committee held the Respondent not guilty of professional misconduct with respect to this charge.

The Committee noted that the charge against Respondent that after taking up statutory audit he failed to do the internal audit relates to a period which is 10 years old and moreover, since the Respondent carried out internal audit only for one month, the Committee does not find much substance in this charge. Accordingly, the Committee holds the Respondent not guilty of professional misconduct with respect to this charge.

The Committee noted as regard the charge of non-incorporation of reimbursements claimed by the Respondent in the books of accounts, that firstly, the total amount which was not included was ₹8,876/- whereas the net profit of the Company before tax was ₹31,74,576/- and total expenses were for ₹1,67,29,159/- for that year. Secondly, the responsibility of preparation of accounts is vested with the management and the auditor does not have any role to play in it. Moreover it is evident that the amount which was claimed to be not debited in the books of accounts was not a material amount at all and the same does not have any effect on the true and fair view of the affairs of the Company. Accordingly, the Committee is inclined to give benefit of doubt to the Respondent and holds him not guilty with respect to this charge.

The Committee noted that the documents which were alleged to be withheld by the Respondent were

mainly original ROC receipts for filing of annual accounts for the A.Y. 1997-98 to 2003-04. Firstly, the Auditor cannot be assumed to be the person responsible for the filing of documents with the ROC unless he is appointed to do such work or there are circumstantial evidences to show the same. No documentary evidence was brought on record by the Complainant except a letter dated 14.08.2007, to establish that the Respondent was looking after the work relating to ROC and he is in possession of the ROC receipts. The Complainant also filed a letter from the Respondent wherein he undertook to have complied with the compliance of the Companies Act besides other things but the Committee is not taking cognizance of the said letter firstly, since the said letter is undated, secondly, the said letter is not on the letterhead of the Respondent and thirdly, no period/year was mentioned in that letter although the Committee also observed that the Respondent was the auditor of the Company since inception i.e. 1998 and was rendering all types of services to the Company. In view of the above, the Committee gave benefit of doubt to the Respondent and holds him not guilty with respect to this charge.

The Committee noted that the Respondent admitted that there was an error on his part as he had calculated the deduction @90% instead of 100%. The Committee also noted that he failed to verify and check before issuing certificates as to whether the export done by the entity is entitled to exemption or not. Keeping in view all the facts and circumstances as aforesaid and material on record, the Committee held him guilty of Professional Misconduct falling within the meaning of Clause (7) of Part I of the Second Schedule to the Chartered Accountants Act, 1949. The Disciplinary Committee, after giving an opportunity of hearing to the Respondent and after considering all the material on record, ordered that the name of the Respondent be removed from the Register of Members for a period of six months.

The Respondent, aggrieved by the orders passed by the Disciplinary Committee preferred an appeal before the Appellate Authority. The Appellate Authority after considering all the facts and circumstances, reduced the period of removal from the Register of Members to a period of three months in place of six months. ■