Legal Decisions[1]

Income Tax

LD/66/50

Nokia India Pvt. Ltd.
vs.
Dy. Commissioner of Income
21th September 2017

HC holds that the order was barred by limitation u/s. 153(2A) which prescribes time-limit for framing assessment pursuant to ITAT order setting aside or cancelling assessment; When the assessment on an issue is set aside and the matter remanded, with a direction that the issue has to be determined afresh, Section 153 (2A) of the Act would get attracted.

Assessee's return for AY 2007-08 was regularly assessed u/s. 143(3) read with Section 144C. The ITAT vide it order dated 18/05/2012 remanded the matter to AO for certain specific issues. Further, for AO also referred the matter to TPO for Transfer Pricing issues. AO issued notice in September 2015 to assessee for attending proceedings u/s. 144C read with Section 254. Assessee submitted that u/s. 153(2A) the fresh assessment order should be passed within 2 years from the end of the financial year in which the order of the ITAT had been received by the Commissioner, i.e. before March 31, 2015. According to the TPO, the limitation for passing the order in assessment proceedings had to be calculated under Section 153 (3) (ii). As per TPO, ITAT had only partly restored the original order.

Aggrieved, assessee filed a writ petition before Delhi HC.

Before HC, Revenue argued Section 153(3)(ii) would apply not only where 'appeal effect' had to be given but cases of "assessment and re-assessment" as well. Revenue held that 'fresh assessment' u/s. 153(2A) indicated cancellation or setting aside of the entire assessment and not just part assessment.

HC rejected Revenue's contention that order of the ITAT did not constitute a complete setting aside of the assessment with directions to the AO to pass a fresh order. The Court does not agree with the submission of the learned ASG that the AO was 'chained' by the ITAT's directions and could not have passed a fresh assessment order *de novo* pursuant to such remand. HC held that there is a distinction between an 'assessment' that is set aside and an 'assessment order' being set aside. When the assessment on an issue is set aside and the matter remanded, with a direction that the issue has to be determined afresh, Section 153 (2A) of the Act would get attracted. HC observed that Section 153(3) became applicable subject to provisions of Section 153(2A). and that, Section153(3) would apply only to such cases where Section 153 (2A) did not apply. Thus, as per HC Section 153 (2A) would apply even where one of the issues has been remanded to the AO for a fresh determination.

HC noted that in the given case out of seven issues, five were set aside and remanded for a fresh determination. HC held that, whether remand was to the TPO or the DRP would not make a difference as long as what results from the remand is a fresh assessment of the issue. Thus HC held that, the time limit for completing that exercise was governed by Section 153(2A).

HC thus ruled in favour of the assessee.

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LD/66/51

Anita Ajay Shad
vs.
Income Tax Officer
18th September 2017

Exemption u/s. 54 held to be allowable to assessee for investing capital gains in new residential property, though the investment is done within the extended time limit of return u/s 139(4) and not before the due date of 139(1).

For AY 11-12, the assessee earned LTCG of 35.23 lakh on sale of property which was jointly held by assessee with husband, for a total consideration of ₹1.15 Cr. The assessee claimed that sale consideration attributable to her was 50% of beneficial ownership in co-ownership property held together with husband. The assessee claimed exemption on LTCG of u/s 54 on the ground that she had jointly purchased another new residential house on 30/03/2013 for a consideration of ₹35 lakh. Entire LTCG was deployed towards purchases of new residential house and the LTCG was thus computed at 'NIL' by the assessee and the return was filed on 25.08.2011. The due date of filing of return u/s 139(1) was 31.07.2017. The AO observed that full amount was not invested before the date of filing of return of income u/s. 139(1).

[1] *Contributed by CA. Sahil Garud, CA. Mandar Telang, Indirect Taxes Committee, Insolvency and Bankruptcy Laws Group, Disciplinary Directorate and ICAI's Editorial Board Secretariat.*
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The AO further observed that the assessee had not acquired the new property before filing of return of income. On appeal, CIT(A) granted partial claim of exemption to assessee u/s. 54.

Aggrieved assessee filed an appeal before Ahmedabad ITAT.

ITAT analysed Section 54, and noted that Section 54(2) enjoins that the capital gain is required to be appropriated by the assessee towards purchase of new asset before furnishing of return of income u/s. 139 of the Act. Further time limit under Section 139(1) has been specified for deposit in the capital gain account scheme. ITAT noted that the distinction between the two different form of expression of time limit can yield different results. Section 139 encompasses both Section 139(1) and Section 139(4) of the Act. This distinction assumes significance for interpretation of beneficial provision.

ITAT observed that a beneficial view may be taken to say that section 139 being omnibus would also cover extended time limit provided under Section 139(4) of the Act. Thus, when an assessee furnishes return subsequent to due date of filing return under Section 139(1) but within the extended time limit under Section 139(4), the benefit of investment made upto the date of furnishing return of income under Section 139(4) cannot be denied on such beneficial construction. However, any investment made after the furnishing of return of income but before extended date available u/s 139(4) would not receive beneficial construction in view of unambiguous and express provision of Section 54(2).

With respect to the remaining payments towards the new property which were made after the return was furnished u/s. 139(4), ITAT held that once the return had been furnished, the subsequent payments made towards purchase, though within Section 139(4) due date extension, would not be eligible for exemption unless the same was first deposited in capital gain account scheme and utilised therefrom.

Thus, ITAT remanded this issue back to the AO for the limited purpose of verification of extent of claim made by other joint-owner on payment towards purchase made out of joint Bank account.

Hence, ITAT partly ruled in the favour of the assessee.

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LD/66/52

M/s. N.K. Jewellers and Anr.

vs.

Commissioner of Income

13th September 2017

SC rejected assessee's stand that proceedings initiated u/s. 132 were invalid as it could not be based on a search conducted on a train by the police authorities; One of the assessee's employee was found in possession of ₹30 lakh cash pursuant to search carried by Railway Police; Block assessment upheld by SC

Assessee was running a jewellery shop. In May 2000, one of its employees was found in possession of cash worth ₹30 lakh by the Railway Police (RP). After making certain enquiries, the GRP station registered the case under Indian Penal Code in May 2000. The station report stated that, assessee's employee was working with one Neeraj Kumar in Delhi. The employee sold 40 gold biscuits in Amritsar and received cash of ₹30 lakh. A warrant of authorisation was issued u/s. 132A and cash of ₹30 lakh was seized. Block assessment proceedings were initiated u/s. 158BD for the period 01/04/1991 to 30/06/2000.

Assessee argued that employee had gone to Amritsar to make some purchases of gold but the transaction did not materialise. The Assessing Officer was of the view that the amount represented sales of gold made by the appellant on earlier occasions and the sale proceeds were being carried back to Delhi. After considering the statements of various persons and other material on record, the authorities came to the conclusion that it was concealed income and accordingly the appellant was assessed to tax.

Aggrieved, assessee filed an appeal before Supreme Court.

Before SC, assessee contended that proceedings initiated u/s. 132 were invalid as it was based on a search conducted by RP, and hence block assessment proceedings u/s 158BD were without jurisdiction. SC observed that, this plea was not raised by assessee before any of the authorities below. SC perused amendment made to Section 132A by Finance Act 2017 which stated that the 'reason to believe' or 'reason to suspect', shall not be disclosed to any person or any authority or the Appellate Tribunal as recorded by Income Tax Authority u/s. 132 or Section 132A. SC thus held that one cannot go into the given question at all.

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SC noted that explanation given by the appellant regarding the amount of cash of ₹30 lakh found by the RP and seized by the authorities has been disbelieved and has been treated as income not recorded in the Books of Account maintained by it.

SC thus ruled in favour of Revenue.

LD/66/53

Commissioner of Income Tax
vs.
Chet Ram (HUF)
12th September 2017

Enhanced compensation alongwith interest thereon received by assessee-HUF pursuant to HC's interim order in pending appeals relating to land acquisition matter, is taxable in the year of receipt.

The issue before SC for consideration was whether the respondents-assessees who have received some amount of enhanced compensation as also interest thereon under an interim order passed by the High Court in pending appeals relating to land acquisition matter, are liable to be assessed for income tax in the year in which it is received. Revenue took stand that assessee was liable to pay tax for the impugned compensation. The ITAT as well HC, both ruled in favour of assessee. Aggrieved, Revenue filed present appeal before SC.

Before SC, Revenue relied on SC ruling for Ghanshyam (HUF) [(2009) 8 SCC 412] wherein the provisions of Section 45(5) of the Income-tax Act, 1961 were considered and this Court in paragraphs 53 to 56 has held that in view of the Amendment in the Income-tax Act, the person who has received enhanced compensation and interest thereon even by an interim order passed by the Court would be assessed to tax for that enhanced compensation.

SC observed the Ghanshyam (HUF) ruling (supra) wherein the scheme of Section 45 (5) of the 1961 Act was inserted w.e.f. 1-4-1988 as an overriding provision. As stated above, compensation under the LA Act, 1894, arises and is payable in multiple stages which does not happen in cases of transfers by sale, etc. Hence, the legislature had to step in and say that as and when the assessee claimant is in receipt of enhanced compensation it shall be treated as "deemed income" and taxed on receipt basis. It was also held that even before the insertion of Section 45(5)(c) and Section 155(16) w.e.f. 1-4-2004, the receipt of enhanced compensation under Section 45(5)(b) was taxable in the year of receipt which is only reinforced by insertion of clause (c) because the right to receive payment under the 1894 Act is not in doubt.

Thus, ruling in favour of Revenue, SC set aside the ITAT order and HC order, and held that assessees were liable to pay tax on the enhanced amount of compensation and interest received by them during the relevant year.

LD/66/54

Gujarat Ambuja Exports Ltd.
vs.
Dy. Commissioner of Income Tax
11th September 2017

HC upholds reopening of assessment beyond 4 years period based on fresh material unearthed by the IT Department through the investigation wing indicating that purchases made by assessee from one supplier were bogus; HC noted that purchases from relevant supplier per se were admittedly not part of original proceedings

The assessee is engaged in the business of trading activities of agro processing, maize processing, cotton spinning power plant and windmill. For a concerned AY, the assessee's return was taken up for scrutiny and the AO made several additions including addition for a 'bogus' purchase. On appeal, CIT(A) and ITAT limited disallowance to 5% of the purchases. The AO issued a re-opening notice for the same AY which was beyond a period of four years from the end of relevant AY. Assessee raised objections against such re-opening, which were rejected by the AO.

Aggrieved assessee filed a petition before Gujarat HC.

HC perused the reasons of re-opening given by the AO, where it was mentioned that purchases from certain parties which were now claimed to be 'bogus' were not part of the parties which were there in original assessment proceedings. HC observed that these transactions were not examined by the AO during the original assessment proceedings even though he did find sufficient evidence suggesting that not all purchases made by the assessee were genuine.

HC noted that the investigation wing had collected materials to suggest that in case of this new party [alleged bogus party from whom purchases were made], in the current bank accounts there were large cash withdrawals of ₹30 lakh during the relevant year, out of which

one of the sources of funds was the customer Sharda Traders. The Investigation Dept. sought detailed enquiry through summons which were returned as 'not served' by the postal authorities. The Investigation wing of the department observed accounts of S.R. Sales [alleged hawala party] had received funds of ₹4.48 crore from the assessee and these funds were followed by immediate cash withdrawals.

On this background, HC held that there was sufficient material available with the AO to reopen the assessment upon forming a belief that income chargeable to tax had escaped assessment and that the reasons recorded must be seen in entirety pointing out that there were serious infirmities noticed in the transactions of S. R. Sales Corporation.

HC noted that since the purchase transaction from these S.R. Sales was not subject matter of the original assessment proceedings, there is no question of change of opinion. HC observed that the question of sufficiency of material available with the Assessing Officer to form a belief that income chargeable to tax had escaped assessment must be seen in light of limited jurisdiction, review and the self restraint imposed by the courts at the threshold stage. In a writ petition, the court would be primarily concerned with the question whether the Assessing Officer had information enabling him to form a bonafide belief that income chargeable to tax had escaped assessment. HC additionally remarked that HC will neither evaluate the evidence at that stage nor is the AO expected to demonstrate with certainty that the addition will certainly be sustained in the reassessment proceedings.

HC remarked that what is required to enable the Assessing Officer to issue the notice for reopening the assessment is the tangible material on record upon consideration of which he can form a reasonable belief that income chargeable to tax had escaped assessment. Such belief has to be one which is formed bona fide upon perusal of the materials at his command and unless it can be

stated that the formation of the belief is perverse in the sense no reasonable person could on the available material on record form such a belief, the court would not interfere with the notice for reopening.

HC thus ruled in favour of Revenue.

LD/66/55

Smt. Fathima Harris
vs.
Income Tax Officer
27th April 2017

HC holds that commission paid by assessee engaged in garments exports to an Indian agent on behalf of the foreign entity is taxable in India, and Sec. 40(a)(i) disallowance, if any is applicable for the same; Commission was paid in Delhi to the Indian agent of the foreign entity

The assessee is a proprietor of M/s Niyaz Apparels, engaged in the business of exports of garments. Assessee entered into an agreement with one Textile Services Limited, Hong Kong, pursuant to which, commission was paid for exports booked through this concern to M/s. Textile Services Ltd. During AY 2002-03, assessee paid commission of ₹17.84 lakh to M/s Textile Services Limited, Delhi which was agent of that Hong Kong based company and thus, claimed that commission payment as expenditure in the computation of income. AO disallowed the claim on the ground of non-compliance of the provisions of Sec. 40(a)(i), i.e., payment to foreign entity made without deducting tax at source. CIT(A) as well as ITAT AO's order. Aggrieved, assessee filed an appeal before Madras HC.

Assessee submitted that since the services were rendered outside India, the payments of commission would not be liable for deduction of tax at source. HC observed that the commission was actually received in India and no details were forthcoming to establish that the Indian entity received the same for onward transmission to Hong Kong. HC rejected assessee's reliance on CBDT circular No.786 dated February 7, 2000 where the taxability of "Foreign Agents of Indian Exporters" was considered. The CBDT circular, stated that "….where the non-resident agent operates outside the country, no part of his income arises in India. Further, since the payment is usually remitted directly abroad it cannot be held to have been received by or on behalf of the agent in India. Such payments were therefore held to be not taxable in India..." In the instant case, the commission was received in India by an agent of the foreign entity and hence, impugned Circular was inapplicable to this case.

The assessee argued that provisions of section 40(a)(ia) were inserted only with effect from 1.4.2004 and as such would not applicable to assessee's AY 2002-03. HC rejected assessee's argument noting that concerned disallowance was effected in terms of Section 40(a)(i) relating to a non-resident and not Section 40(a)(ia) relating to resident.

HC observed that any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest or any other sum chargeable under the provisions of this Act, shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force. HC further noted that the liability to deduct tax at source was in terms of section 40(a)(i).

Ruling in favor of Revenue, HC confirmed ITAT order and concluded that the commission payments received by the Indian agent on behalf of the Hong Kong entity, in India were taxable in India and thus, provisions of Sec. 40(a)(i) were applicable.

Excise

LD/66/56

Chandpaklal Ramanlal Shah and Anr
vs.
Reliance Industries Ltd.
12th September 2017

Subsequent omission of a procedural Rule for availing MODVAT credit cannot in any manner affect charge relating to duty evasion against assessee

The assessee was charged with the offense of duty evasion, for taking MODVAT credit without following the procedure under Rule 56A of Central Excise Rules, 1944 (Rules). The trial Magistrate had summoned the assessee. However, subsequently Rule 56A was omitted by a Notification. Therefore, assessee filed an application for discharge, but same was rejected and charge was framed for the offence punishable u/s. 9 of Central Excises & Salt Act, 1944 read with violation of Rule 52(A), 56(A), 173(G), 9(2) of Central Excise Rules and Rule 173(Q) read

with Section 11(A) of the Central Excises & Salt Act, 1944.

Aggrieved, the assessee moved before HC by way of a revision petition which was ruled in favour of assessee by the HC. HC observed that since Rule 56A was omitted without prescribing any saving clause, proceedings could not continue. Referring to Section 38A that was inserted in the Excise Act vide Finance Act, 2001, HC observed that an Explanation to Section 132 of the Finance Act, 2001, laid down that an act or omission, which would not have been punishable but for the said Section, was not punishable. It was also observed that omission of the provision was not at par with repeal and Section 6 of the General Clauses Act, 1897 did not apply to the repeal of a rule. Reliance was placed on *Rayala Corporation (P) Ltd. vs. Director of Enforcement, New Delhi [*(1969) 2 SCC 412] and *Kolhapur Cane Sugar Works Ltd. vs. Union of India* [(2000) 2 SCC 536]. Being aggrieved, Revenue approached the SC.

Revenue contended that the charge against assessee was of excise duty evasion u/s 9(1)(b) which remained unamended. The evasion was on account of the respondent having taken credit without following the procedure under Rule 56A. By omission of the said Rule, the charge did not suffer from any legal infirmity. Alternatively, it was submitted that Section 6 of the General Clauses Act applied to omission which was also repeal. It also applies to a Rule. In this regard, reliance has been placed on *Fibre Boards Pvt. Ltd. Bangalore vs. Commissioner of Income Tax, Bangalore* [(2015) 10 SCC 333], *Shree Bhagwati Steel Rolling Mills vs. Commissioner of Central Excise* [(2016) 3 SCC 643]. It was also submitted that retrospective amendment has been made to the Act by the Finance Act, 2001 making it clear that actions taken under a rule will not lapse even if the rule is omitted. The Explanation applied only to future action and not to continuing action.

It was submitted that retrospective amendment to the Act by Finance Act, 2001 made it clear that actions taken under a Rule would not lapse even if the same was omitted. Moreover, the Explanation to Section 132 applied only to future action and not to

continuing action. Further, reliance was placed on full Bench judgment of the Allahabad HC in *Simholi Sugar Mills Ltd. vs. Union of India* [2006 (205) ELT 141] and also submitted that penalty for wrongly taking credit was upheld by the Tribunal in *Reliance Industries Ltd. vs. CCE* [1995 (75) ELT 77] which had attained finality.

SC observed that the ingredient of the offence was the evasion, and that an omission of a procedural rule for availing the credit cannot in any manner affect the said charge. As per SC, the prosecution could not be deprived of the opportunity to prove evasion which by itself was an offense.

SC thus held that there was no justification for the HC to quash the charge merely on the ground of Rule 56A having been omitted.

SC thus ruled in favour of Revenue and set aside HC's order, thereby restoring the order of the trial court.

Service Tax

LD/66/57

Girna Orgnanics P. Ltd.
vs.
Commissioner of Central Excise and Service Tax
07th July 2017

CESTAT extends service tax exemption to manufacturer under Notification No. 6/2005-ST in respect of renting of open space within factory, finding no violation of any conditions stipulated therein with respect to non-availment of CENVAT credit

The assessee is engaged in the manufacture of excisable goods namely Gsol-140 thinner, 5- Methyl Pyrazine, 2 Carbozylic Acid, Piroline-1 falling under Chapter subheading 38140010, 29242990 and 29242190 of Central Excise Act, 1985. It had rented out open space in the factory premises during the period 2007-08 and 2008-09. As per Revenue, the assessee was liable to pay service tax on renting of leased-out immovable property and was not eligible for exemption Notification No. 6/2005-ST. Further, as per Revenue, assessee had violated the said notification, on the ground that it had availed CENVAT credit on capital goods and inputs received during the stated period.

Being aggrieved, assessee approached the CESTAT.

Assessee submitted that renting of open space of the factory premises had no connection with the manufacturing unit. The CENVAT credit availed was in respect of inputs/capital goods used in relation to the manufacture of its final product in the factory. Therefore, there was no violation of Notification No. 06/2005-ST. Further, the value of rent [₹8 lakh] was well within exemption limit in each FY, and hence no service tax was payable.

CETSTAT analysed Notification No. 06/2005-ST, and observed that as per clause (iii) of Para 2, provider of taxable service is not entitled of cenvat credit availed on capital goods received in the premises of provider of such taxable service. In the present case, the assessee was service provider only in respect of rented premises and no capital goods were received and used on which the credit was taken. CESTAT observed that clause (iii) of the Notification was not violated.

CESTAT observed that the availment of cenvat credit in respect of input, input service or capital goods by the appellant only in relation to the manufacturing activity will not debar an assessee from availing the exemption notification No. 6/2005-ST for their service of renting of immovable property. As per CESTAT, the excisable activity in the manufacturing unit and the service related to renting of immoveable property were two distinct activities and therefore, availment of Cenvat credit in relation to manufacturing activity cannot be applied to the service of renting of immovable property.

Thus, CESTAT ruled in favour of assessee.

LD/66/58

Verizon Communication India Pvt. Ltd.
vs.
Assistant Commissioner, Service Tax, Delhi – III
12th September, 2017

Merely because services provided by Indian service provider to foreign service recipient, are 'used' by Indian entities of foreign customers of said foreign service recipient, it cannot be said that services are rendered by Indian service providers to such Indian entities, in India.

Facts:

In this case, the questions before Hon'ble HC were who is the recipient of service provided by petitioner i.e. Verizon US or Indian entities of

foreign customers of Verizon USA and whether place of provision of services provided by Verizon India is outside India. Brief Facts of the case are as under:

Verizon US, located outside India, entered into contracts with foreign service recipients wherein Verizon US provided services of collecting data from Indian entities of such foreign companies and raised invoice on foreign customers. For the said purposes, Verizon US entered into a Master Supply Agreement with the petitioner i.e. Verizon India, for rendering connectivity services for purpose of data transfer. The nature of services provided by Verizon India was only data transfer services and not voice/telephony services for which separate license and spectrum was required. Petitioner was registered with service tax department for 'business support services'. However, petitioner raised invoices on Verizon US without charging service tax by treating such services as 'export of services'. In the process of gathering the data from the entities in India for transmission to Verizon US, petitioner availed services of a telecommunication services providers like Vodafone and Airtel. These service providers raised invoices on petitioner by charring service tax. Being engaged in export of services to Verizon US, petitioner filed refund claim for unutilised cenvat credit, which was rejected by the department. Department alleged that the petitioner is providing 'telecommunication services' to Verizon US and not 'business support services' as contended. Further, it was alleged that since recipient of services provided by petitioner is not Verizon US but an Indian entity from where electronic data is collected or to whom data is transmitted; petitioner is providing services in India, which cannot be regarded as 'export of services', thus, as provision of telecommunication services by petitioner is entirely within India, services provided by Verizon cannot be termed as 'export of services'.

While rebutting department's allegations, petitioners submitted that classification of services provided by petitioners to Verizon US i.e.

'telecommunication services' or 'business support services' is irrelevant for determining refund claim in as much as in terms of Master Supply Agreement, it is providing services to Verizon US and there is not privity of contract between petitioner and Indian entities of foreign customers of Verizon USA, whose data is required to be collected by Verizon US in terms of separate contract between Verizon US and foreign customers.

Held:

Hon'ble High Court held that the 'recipient' of the service is determined by the contract between the parties and by reference to (a) who has the contractual right to receive the services; and (b) who is responsible for the payment for the services provided (i.e., the service recipient). From Master Supply Agreement between the Petitioner and Verizon India, it is clear that recipient of services provided by the petitioner is Verizon US, who is obliged to pay for the services provided by the petitioner and this position does not change merely because subscribers to services of Verizon US or its US based customers 'use' the services provided by petitioner, as such customers may be the 'users' of the services provided by Verizon India but are not its recipients, for there being no privity of contract between Verizon India and the customers of Verizon US.

Further, Hon'ble High Court noted that for providing services to Verizon US, petitioner might use the services of a local telecom operator; but that does not mean that the services to Verizon US are being rendered in India. All these steps are taken by petitioner as part of its contract with Verizon US to provide services to Verizon US located outside India. In this regard, references were made to decision in case of *Paul Merchants Ltd vs. CCE, Chandigarh 2012-TIOL-1877-CESTAT-DEL* wherein it was held that service recipient is the person on whose instructions/orders the service is provided, who is obliged to make payment for same and whose need is satisfied by provision of such service and not the one who may be affected by performance of such service, thus, the destination has to be decided on the basis of place of consumption and not the place of performance of service, decision in case of *Vodafone Essar Cellular Ltd. vs. CCE, Pune-III-2013-TIOL-566-CESTAT-Mum*, holding that a customer's customer is not your customer, when a service is rendered to a third party at the behest of your customer, the service recipient is your customer and not the third party.

Accordingly, the High Court held that, it cannot be said that petitioner has provided services in India and thus, place of provision of such services, rightly remains outside Indi and hence, services provided by petitioner to Verizon US qualify as export and would not be liable to service tax.

LD/66/59

M/s. Mylan Laboratories Ltd.

ss.

Commisioner of Service Tax, Hyderabad

9TH AUGUST, 2017

Tribunal held that refund of unutilised cenvat credit by SEZ unit cannot be denied only for the reason that input services in respect of which refund is sought were received by SEZ prior to inclusion of such services in list of approved services by UAC/DGFT.

Facts:

Appellant's SEZ units paid service tax on certain input services under 'reverse charge mechanism' and claimed refund of same in terms of Notification No. 12/2013-ST dtd. 01.07.2013. Revenue denied appellant's entitlement to refund claim on the ground that the input services were received by appellant prior to inclusion of said services in the list approved by UAC (i.e. Unit Approval Committee) for SEZ. Aggrieved by impugned order denying refund claim, appellant preferred present appeal by submitting that in terms of Notification No. 12/2013-ST, the service provider has the option to claim *ab-initio* exemption on complying with the procedure prescribed. Appellant further submitted that while admittedly, the impugned services on which refund was claimed were not covered in the UAC list at the time of procurement of the same, they were subsequently covered and the delay is procedural for which substantive benefit of refund cannot be denied, because main condition relating to refund under the notification is receipt and consumption of services in the SEZ for authorised operations, thus, refund should be granted upon fulfillment of same, especially when there is no condition in the notification requiring the inclusion of the input service in the UAC list prior to procurement of the service. Appellant also relied on decision in case of *Mahindra Engineering*

Services Ltd. vs. CCE -TIOL- 2534-CESTAT-MUM, wherein under similar circumstances, refund claim was allowed to assessee.

Held:

Tribunal found that it is undisputed that appellant is SEZ unit and eligible to receive services without payment of duty or can claim the refund of the duty under various provisions and more so under Notification No. 12/2013-ST; appellant had discharged service tax liability under reverse charge mechanism for various services received by it under the category of business support services and subsequently claimed the refund on the said amount as being provided under the list of approved services by the DGFT and appellant filed refund claims within the time limit as prescribed in the said rules and the notifications. Therefore, Tribunal held that appellant being an SEZ unit is not required to pay any service tax either to service provider or under reverse charge mechanism and even if he pays the same, he is eligible for the refund of the service tax liability so discharged. It was also held that non-inclusion of services in list of approved services at the time of receipt of service cannot be a reason for rejection of refund claim as it is an avowed policy of the Government of India that SEZ unit should not be burdened with any taxes in order to make them competitive. Accordingly, Tribunal allowed present appeal by setting aside impugned order denying refund claim to appellant.

Note:

On similar issues, in *2017-TIOL-3511-CESTAT-HYD M/s Prolifics Corporation Ltd. vs. CCCE&ST* (Date of Decision 16.08.2017), wherein appellant SEZ unit filed application before DGFT authorities for approval of list of services on 16.08.2012, which was subsequently approved on 22.11.2013 in terms of meeting of UAC held on 19.07.2013, Tribunal rejected revenue's plea that since list of services was approved after period under consideration for which refund claim is filed, refund should not be granted in terms of Notification No. 12/2013-ST, and also by referring to decision of Hon'ble Mumbai Tribunal in *Trizetto India Private Ltd.*

2015-TIOL-845-CESTAT-MUM, Tribunal set aside impugned order and held appellant to be entitled to refund claim.

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LD/66/60

Shri Sanjeev K. Gaddamwar

vs.

CCE

31st July, 2017

Since shops and godowns of APMC are not used by it for commercial purpose and the same are used by farmers for marketing and auctioning their agriculture produce, Tribunal held that construction of such shops and godowns cannot be said to be in the nature of 'commercial or industrial construction'.

Facts:

In terms of work orders received from *Krishi Utpanna Bazar Samiti* i.e. APMC, appellant undertook construction of 'traders shop and godowns', which are used by farmers for marketing and auctioning of agricultural produce. The ownership of shops and godowns always remains with APMC and only maintenance charges i.e. the housekeeping charges are collected by APMC from member traders. By alleging that appellant provided 'commercial or industrial construction services', revenue demanded service tax from appellant. Aggrieved by the order of lower adjucating authorities confirming service tax demand along with interest and imposition of penalties, appellant filed present appeal.

Held:

Tribunal observed that CBEC Circular No. 157/8/2012-ST dated 27.04.2012 provided that service provided by APMC out of the market fee is not in the nature of 'outsourced service', it is not possible to hold that the licensees have outsourced the development and maintenance of agricultural market to the APMC, which could have been otherwise undertaken by them, solely in their business interest. Development and maintenance of agricultural market infrastructure undertaken by APMC in accordance with the statute, is for the benefit of all users, rather than an activity solely in the interest of licensees, hence, APMC cannot be said to be rendering 'business support service' to the licensees and 'Market fee' is not in the nature of consideration for such BSS. Said circular further clarified that services provided by the APMC are classifiable as BAS and hence covered by the exemption under Notification 14/2004-ST.

Further, tribunal noted that only farmer's charges are collected for the maintenance of the property and the said property is not registered out or sold to anybody. Reference was also made to *Circular No. 80/10/2004-ST dt. 17.9.2004* wherein it was provided that leviability of service tax would depend primarily upon whether the building or civil structure is "used, or to be used" for commerce or industry, the information about this has to be gathered from the approved plan of the building or civil construction. Such constructions which are for the use of organisations or institutions being established solely for educational, religious, charitable, health, sanitation or philanthropic purposes and not for the purposes of profit are not taxable, being non-commercial in nature. Generally, government buildings or civil constructions are used for residential, office purposes or for providing civic amenities. Thus, normally government constructions would not be taxable, however, if such constructions are for commercial purposes like local government bodies getting shops constructed for letting them out, such activity would be commercial and builders would be subjected to service tax.

Accordingly, it being apparent that the shops and godowns constructed by appellant are not used by owner i.e. APMC for commercial purposes, it was held that service tax demand against appellant would not sustain.

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LD/66/61

Dhanashree Enterprises, Jai Maharashtra Enterprises

vs.

CCE

10th July, 2017

Tribunal held that processing job done in premises of service recipient for which consideration is paid on piece rate basis cannot be regarded as provision of supply of manpower to service recipient.

Facts:

In terms of contract with service recipient, appellants were engaged in undertaking job of producing or processing in the premises of service recipient and consideration for job was charged by appellants on per piece basis. Revenue alleged that entire transaction is supply of manpower and merely

because consideration towards service is on piece rate basis, that alone would not be determinative basis of classification, thereby, demanded service tax from appellant under category of 'Manpower recruitment and supply agency services'. While rebutting the same appellant submitted that the job is on per piece of the goods irrespective of how much labour is deputed for carrying out the job, and even the payment terms are also on per piece basis and not on reimbursement of wages of salary, therefore, it is not supply of manpower recruitment or supply agency service. Appellant also relied upon *M/s. Bhagyashree Enterprises & Sonawane Indl. 2017-TIOL-1113-CESTAT-MUM, Ritesh Enterprises 2010-TIOL-539-CESTAT-BANG, Future Focus Infotech India P. Ltd. - 2010-TIOL-835-CESTAT-MAD.*

Held:

Tribunal held that in terms of agreement between appellants with services recipients, it can be seen that the appellant's job is not to depute the labour to the service recipient, and irrespective of the number of labours, the appellant has to perform the job of producing piece for the service recipient and the rate is on per piece basis and thus, wages/salary or emolument paid to the labour is not relevant to the service recipient. Accordingly, considering decision of this Tribunal in the case of *M/s. Bhagyashree Enterprises & Sonawane Indl. (supra)*, Tribunal set aside impugned service tax demand under category of 'Manpower Supply Services'.

Transfer Pricing

LD/66/62
Corning Sas-India Ltd.
Vs.
Dy. Director of Income Tax
18th September 2017

ITAT's order wherein ITAT did not undertake exercise of testing correctness of the inclusion and exclusion of comparables set aside by HC; HC noted that ITAT did not give any conclusive finding on selection of comparables

Corning SAS-India Branch Office ('assessee') is a branch office of the French company Corning S.A., a

leading manufacturer of high grade ophthalmic and non-ophthalmic glass products, ophthalmic blanks for eye glasses and optical fibre, etc. Assessee's business operations can be divided into three business segments, viz., (i) distribution segment; (ii) agency segment; and (iii) market support segment.

During AY 2008-09, assessee entered into various international transactions. Assessee considered the transactions of import of rough ophthalmic blanks and provision of agency services as being as closely linked and part of one segment, namely, distribution segment and benchmarked the same applying TNMM. Assessee undertook separate benchmarking analysis for transaction related to provision of market support services by applying TNMM. For this purpose, the Assessee selected 12 comparable companies with weighted average operating profit margin of 8.86% in the TP study.

During the course of the assessment proceedings, the Assessee revised the aforementioned set of comparables and restricted it to the following 8 comparables with an average operating profit ('OP') margin of 7.48%. TPO segregated the agency services from the distribution segment and clubbed them with the marketing support services for the purposes of the benchmarking analysis applying TNMM. TPO determined the income from the agency services by allocating common expenses aggregating to ₹2.08 crore relating to the distribution sales and imputed sales to earn agency commission in the ratio of 52.25% and 47.75%. TPO then picked up 10 comparables with average margin of 22.12% and proposed a TP-adjustment of ₹1.32 crore.

In appeal, DRP upheld TPO's reasoning segregation of international transactions under the Distribution segment and Agency segment and aggregating the latter with the transaction under the Marketing Support segment; and also about allocation of common expenses to the Agency segment on the basis of sales/revenue under the said segment vis-à-vis the Distribution segment and not in the ratio of their gross margins. DRP also directed exclusion of 2 comparables working out the revised average margin at 23.21%, thus, recommending a further enhancement of TP-adjustment to ₹1.40 crore.

In appeal before ITAT, the Assessee did not press the challenge to aggregation of the agency segment with the marketing support segment in view of a similar order for AY 2003-04 having attained finality. Likewise, the Assessee did not challenge the allocation of the common expenses under the agency segment on the basis of sales/revenue earned under the said scheme vis-à-vis distribution scheme and not in the ratio of their respective gross margin. However, the Assessee contended that the TPO had erred in selecting 3 of the comparables, that is, Apitco Ltd. ('Apitco'), Choksi Laboratories Ltd. ('Choksi') and Wapcos (India) Ltd. ('Wapcos') for the combined benchmarking of international transaction under the agency and marketing support segments.

ITAT gave no conclusive finding on the issue of selection of comparables ground by observing that adjudication of the said issue would be futile. ITAT directed the TPO to undertake a fresh TP study analysis to benchmark the international transactions.

Aggrieved, assessee filed an appeal before Delhi HC.

Before HC assessee submitted that ITAT ought not to have remanded the matter to the TPO for undertaking TP study afresh. Assessee argued that merely because assessee's computation of operating margin as a tested party was to be reworked by the TPO based on ITAT's findings with respect to expense allocation, it could not preclude ITAT from examining whether the selection of comparables was correct.

Revenue, on the other hand submitted that the exercise of determining which of the comparables had to be chosen could not be undertaken piecemeal and therefore ITAT order did not call for any interference.

HC observed that there was no occasion for the ITAT to direct the TPO to undertake a fresh TP study analysis to benchmark assessee's international transactions. The issue before the ITAT was whether three comparables viz., Apitco, Choksi and Wapcos were rightly included and the Assessee's three comparables viz., Educational Consultants (India) Limited, ITDC and In House Productions Ltd. were rightly excluded. This required an FAR analysis to be undertaken vis-à-vis these comparables.

HC observed that the direction to the TPO to allocate the expenses on the basis of gross margin in the agency segment and not in the ratio of sales for the purpose of computing ALP of the international transactions, had nothing to do with the above issue concerning selection of comparables. Rule 10B (2)

read with Rule 10B (3) required the issue concerning selection of comparables to be undertaken with reference to inter alia the functions performed/ taken into account, assets ought to be employed and the risks assumed by the tested party and the comparable. HC also clarified that a specific characteristic of the property transferred or services provided in both the controlled and uncontrolled transactions has to be taken into consideration.

HC remarked that ITAT should have undertaken such exercise regarding the correctness of the inclusion and exclusion of comparables. HC thus set aside ITAT remand order and restored the appeal to ITAT for disposal on merits, and in particular, the issue concerning validity of the inclusion by DRP of the three comparables, Apitco, Choksi and Wapcos and the exclusion of thee comparables Educational Consultants (India) Limited, India Tourism Development Corporation Limited and In House Productions Ltd., as suggested by the Assessee.

LD/66/63
JCB India Ltd.
vs.
Dy. Commissioner of Income Tax and Anr
07th September 2017

AO is required to pass draft assessment order after receipt of TPO's order; Requirement of passing draft assessment order is not inapplicable where exercise had been undertaken by TPO on remand by ITAT.

The assessee is a wholly owned subsidiary of JCB, U.K. and is engaged in the business of manufacture of earth-moving/construction equipment.

For AY 2006-07, assessee filed its tax return declaring income of ₹214.44 crore After making a reference to the TPO, AO passed the final assessment order enhancing the returned income to ₹255.45 crore. In appeal, ITAT set aside the matter back to DRP for fresh consideration. In pursuance of DRP's directions, TPO recommended an adjustment of ₹38.95 crore. Thus, AO passed the final

assessment order as per recommendations made by the TPO. Thus, total income was determined at ₹253.39 crore. Subsequently, ITAT set aside the issue of ALP-determination back to AO for fresh adjudication.

For AY 2007-08, assessee filed its tax return declaring income of ₹341.45 crore which stood enhanced to ₹426.63 crore by AO's final assessment order. Similar orders like AY 2006-07 were passed and the ITAT finally set aside the issue of ALP-determination back to AO for fresh adjudication. Similarly, same round of litigations took place for AY 2008-09, where assessee had filed its tax return declaring income of ₹604.98 crore which stood enhanced to ₹731.93 crore in AO's final assessment order.

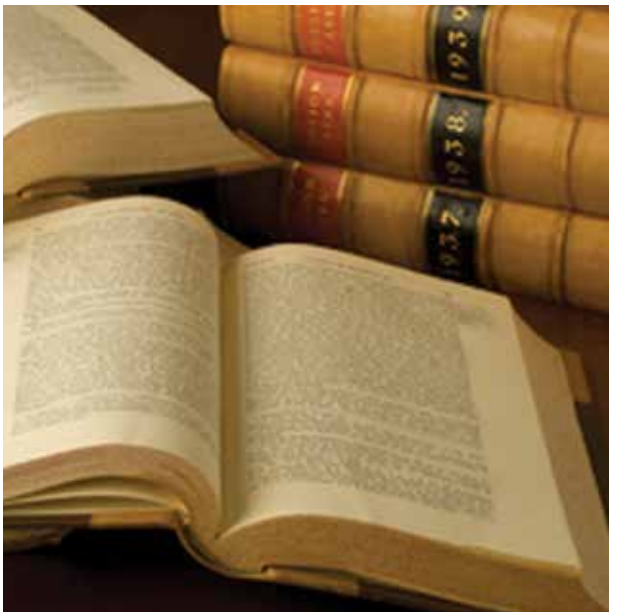
For all 3 AYs, the AO sought TPO's comments on the issue of TP adjustment. In March, 2016, TPO issued a notice to assessee to present its case. Submissions were made by assessee stating that the proceedings were barred by limitation in light of Section 92CA(3A) read with Section 153(2A). However, TPO proceeded and passed separate orders for each AY determining a TP adjustment; and on 31/03/2016, AO passed the final assessment order enhancing the returned income on the basis of TP-adjustment recommended by TPO.

Aggrieved, assessee filed an appeal before Delhi HC.

Before HC, assessee argued that the AO could not have straightway issued the final assessment order without issuing a draft assessment order u/s. 144 C of the Act. As per Revenue since this was a second round of appeals before the TPO pursuant to ITAT's remand, it was not mandatory on the part of the AO to pass a draft assessment order. Revenue lastly submitted that the requirement of passing a draft assessment order u/s. 144C was only in the first instance and not after the remand by the ITAT.

HC observed that Section 144C(1) is unambiguous and it requires AO to pass a draft assessment order after receipt of TPO's report. HC stated that There is nothing in the wording of Section 144C (1) which would indicate that this requirement of passing a draft assessment order does not arise where the exercise had been undertaken by the TPO on remand to it, of the said issue, by the ITAT.

Relying on HC ruling in Citi Financial Consumer Finance India Pvt. Ltd. [ITA No. 275/2015], HC



observed that that the final assessment order of the AO stood vitiated not on account of mere irregularity but since it was an incurable illegality and that section 292B of the Act would not protect such an order. HC further observed that Sec. 292B could not save an order not passed in accordance with the provisions of the Act. It was further stated that "the issue involved is not about a mistake in the said order but the power of the AO to pass the order."

HC observed it was mandatory for the AO to have passed a draft assessment order u/s 144C prior to issuing the final assessment order. Relying on rulings in *Turner International India Pvt. Ltd. vs. Deputy Commissioner of Income Tax* [W.P. (C) No. 4260/2015] and *Commissioner of Income Tax, Vadodara-2 vs. C-Sam (India) Pvt. Ltd* [Gujarat HC Tax Appeal No. 542 of 2017], HC held that compliance with Section 144C was of 'great importance and mandatory', negating the plea that non-compliance with the terms of Section 144C was merely an 'irregularity'.

HC thus concluded that the impugned final assessment order were without jurisdiction on account of the failure by the AO, to first pass a draft assessment order and thereafter, subject to the objections filed before the DRP and the orders of the DRP, to pass the final assessment order.

HC thus ruled in favour of assessee and set aside orders of TPO dated 30/03/2016 issued pursuant to ITAT's remand.

Insolvency and Bankruptcy Code

M/s. Innoventive Industries Ltd.
vs.
ICICI Bank & Anr.

Supreme Court of India
31-08-2017

Section 238 of the Insolvency and Bankruptcy Code, 2016 read with Section 4 of the Maharashtra Relief Undertaking (Special Provisions) Act, 1958 read with Article 254 of the Constitution of India – Provision of this Code to override other Laws - Once an insolvency professional is appointed to manage the company, the erstwhile directors who are no longer in the management, obviously cannot maintain an appeal on behalf of the company - The Insolvency and Bankruptcy Code, 2016 is an Act to consolidate and amend the laws relating to reorganisation and insolvency resolution, inter alia, of corporate persons – The Insolvency and Bankruptcy Code is a Parliamentary law that is an exhaustive code on the subject matter of insolvency in relation to corporate entities - On reading of Section 238 of the code it is clear that the later non-obstante clause of the Parliamentary enactment will also prevail over the limited non-obstante clause contained in Section 4 of the Maharashtra Act and therefore, the Maharashtra Act cannot stand in the way of the corporate insolvency resolution process under the Code -There would be repugnancy between the provisions of the two enactments

In its order dated 17th January 2017 the NCLT held that the Insolvency and Bankruptcy Code, 2016 (Code) would prevail against the Maharashtra Relief Undertaking (Special Provisions) Act, 1958 (Maharashtra Act) in view of the non-obstante clause in Section 238 of the Code. It, has further, held that the Parliamentary statute would prevail over the State statute and this being so; it is obvious that the corporate debtor had defaulted in making payments, as per the evidence placed by the financial creditors. Hence, the application was admitted and a moratorium was declared. The second application with a different plea filed by the Corporate Debtor was rejected by the NCLT vide its order dated 23rd January 2017 on the ground that it was filed belatedly and thus, not maintainable.

On appeal, the NCLAT upheld the order passed by the NCLT, however, held that the Code and the Maharashtra Act operate in different fields and, therefore, are not repugnant to each other and therefore, the appellant cannot derive any advantage from the Maharashtra Act to stall the insolvency resolution process under Section 7 of the Code.

The appellant/Corporate Debtor filed this appeal against the order of NCLAT which had upheld the order passed by the NCLT before the Supreme Court.

On maintainability of the appeal, the Apex Court held:

Once an insolvency professional is appointed to manage the company, the erstwhile directors who are no longer in the management, obviously cannot maintain an appeal on behalf of the company. In the present case, the company is the sole appellant. This being the case, the present appeal is obviously not maintainable.

However, we are not inclined to dismiss the appeal on this score alone. Because this is the very first application that has been moved under the Code, we thought it necessary to deliver a detailed judgement so that all Courts and Tribunals may take notice of a paradigm shift in the law.

Entrenched managements are no longer allowed to continue in management if they cannot pay their debts.

After going through the Statement of Objects & reasons and various relevant provisions of the Code the Supreme Court held as follows:

The Insolvency and Bankruptcy Code, 2016 has been passed after great deliberation and pursuant to various committee reports. One of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. The Code gets triggered the moment default is of

rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor.

The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

On the other hand, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.

The rest of the insolvency resolution process is also very important. The entire process is to be completed within a period of 180 days from the date of admission of the application under Section 12 and can only be extended beyond 180 days for a further period of not exceeding 90 days if the committee of creditors by a voting of 75% of voting shares so decides. It can be seen that time is of essence in seeing whether the corporate body can be put back on its feet, so as to stave off liquidation.

As soon as the application is admitted, a moratorium in terms of Section 14 of the Code is to be declared by the adjudicating authority and a public announcement is made stating, inter alia, the last date for submission of claims and the details of the interim resolution professional who shall be vested with the management of the corporate debtor and be responsible for receiving claims. Under Section 17, the erstwhile management of the corporate debtor is vested in an interim resolution professional who is a trained person registered under Chapter IV of the Code. This interim resolution professional is now to manage the operations of the corporate debtor as a going concern under the directions of a committee of creditors appointed under Section 21 of the Act. Decisions by this committee are to be taken by a vote of not less than 75% of the voting share of the financial creditors. Under Section 28, a resolution professional, who is none other than an interim resolution professional who is appointed to carry out the resolution process, is then given wide powers to raise finances, create security interests, etc. subject to prior approval of the committee of creditors.

Under Section 30, any person who is interested in putting the corporate body back on its feet may submit a resolution plan to the resolution professional, which is prepared on the basis of an information memorandum. This plan must provide for payment of insolvency resolution process costs, management of the affairs of the corporate debtor after approval of the plan, and implementation and supervision of the plan. It is only when such plan is approved by a vote of not less than 75% of the voting share of the financial creditors and the adjudicating authority is satisfied that the plan, as approved, meets the statutory requirements mentioned in Section 30, that it ultimately approves such plan, which is then binding on the corporate debtor as well as its employees, members, creditors, guarantors and other stakeholders. Importantly, and this is a major departure from previous legislation on the subject, the moment the adjudicating authority approves the resolution plan, the moratorium order passed by the authority under Section 14 shall cease to have effect. The scheme of the Code, therefore, is to make an attempt, by divesting the erstwhile management of its powers and vesting it in a professional agency, to continue the business of the corporate body as a going concern until a resolution plan is drawn up, in which event the management is handed over under the plan so that the corporate body is able to pay back its debts and get back on its feet. All this is to be done within a period of 6 months with a maximum extension of another 90 days or else the chopper comes down and the liquidation process begins.

In answer to the application made under Section 7 of the Code, the appellant only raised the plea of suspension of its debt under the Maharashtra Act, which, therefore, was that no debt was due in

law. The adjudicating authority correctly referred to the non-obstante clause in Section 238 and arrived at a conclusion that a notification under the Maharashtra Act would not stand in the way of the corporate insolvency resolution process under the Code.

The Supreme Court observes its various judgments and yields the following proposition:

i. Repugnancy under Article 254 arises only if both the Parliamentary (or existing law) and the State law are referable to List III in the 7th Schedule to the Constitution of India.

ii. In order to determine whether the Parliamentary (or existing law) is referable to the Concurrent List and whether the State law is also referable to the Concurrent List, the doctrine of pith and substance must be applied in order to find out as to where in pith and substance the competing statutes as a whole fall. It is only if both fall, as a whole, within the Concurrent List, that repugnancy can be applied to determine as to whether one particular statute or part thereof has to give way to the other.

iii. The question is what is the subject matter of the statutes in question and not as to which entry in List III the competing statutes are traceable, as the entries in List III are only fields of legislation; also, the language of Article 254 speaks of repugnancy not merely of a statute as a whole but also "any provision" thereof.

iv. Since there is a presumption in favour of the validity of statutes generally, the onus of showing that a statute is repugnant to another has to be on the party attacking its validity. It must not be forgotten that that every effort should be made to reconcile the competing statutes and construe them both so as to avoid repugnancy – care should be taken to see whether the two do not really operate in different fields qua different subject matters.

v. Repugnancy must exist in fact and not depend upon a mere possibility.

vi. Repugnancy may be direct in the sense that there is inconsistency in the actual terms of the competing statutes and there is, therefore, a direct conflict between two or more provisions of the competing statutes. In this sense, the inconsistency must be clear and direct and be of such a nature as to bring the two Acts or parts thereof into direct collision with each other, reaching a situation where it is impossible to obey the one without disobeying the other. This happens when two enactments produce different legal results when applied to the same facts.

vii. Though there may be no direct conflict, a State law may be inoperative because the Parliamentary law is intended to be a complete, exhaustive or exclusive code. In such a case, the State law is inconsistent and repugnant, even though obedience to both laws is possible, because so long as the State law is referable to the same subject matter as the Parliamentary law to any extent, it must give way. One test of seeing whether the subject matter of the Parliamentary law is encroached upon is to find out whether the Parliamentary statute has adopted a plan or scheme which will be hindered and/or obstructed by giving effect to the State law. It can then be said that the State law trenches upon the Parliamentary statute. Negatively put, where Parliamentary legislation does not purport to be exhaustive or unqualified, but itself permits or recognises other laws restricting or qualifying the general provisions made in it, there can be said to be no repugnancy.

viii. A conflict may arise when Parliamentary law and State law seek to exercise their powers over the same subject matter. This need not be in the form of a direct conflict, where one says "do" and the other says "don't". Laws under this head are repugnant even if the rule of conduct prescribed by both laws is identical. The test that has been applied in such cases is based on the principle on which the rule of implied repeal rests, namely, that if the subject matter of the State legislation or part thereof is identical with that of the Parliamentary legislation, so that they cannot both stand together, then the State legislation will be said to be repugnant to the Parliamentary legislation. However, if the State legislation or part thereof deals not with the matters which formed the subject matter of Parliamentary legislation but with other and distinct matters though of a cognate and allied nature, there is no repugnancy.

ix. Repugnant legislation by the State is void only to the extent of the repugnancy. In other words, only that portion of the State's statute which is found to be repugnant is to be declared void.

x. The only exception to the above is when it is

found that a State legislation is repugnant to Parliamentary legislation or an existing law if the case falls within Article 254(2), and Presidential assent is received for State legislation, in which case State legislation prevails over Parliamentary legislation or an existing law within that State. Here again, the State law must give way to any subsequent Parliamentary law which adds to, amends, varies or repeals the law made by the legislature of the State, by virtue of the operation of Article 254(2) proviso.

After going through the Maharashtra Act, the Apex Court held that there is no doubt that this Maharashtra Act is referable to Entry 23, List III in the 7th Schedule to the Constitution. On the other hand, the Insolvency and Bankruptcy Code, 2016 is an Act to consolidate and amend the laws relating to reorganisation and insolvency resolution, inter alia, of corporate persons.

There can be no doubt, therefore, that the Code is a Parliamentary law that is an exhaustive code on the subject matter of insolvency in relation to corporate entities, and is made under Entry 9, List III in the 7th Schedule which reads as, "9. Bankruptcy and insolvency".

On reading its provisions, the moment initiation of the corporate insolvency resolution process takes place, a moratorium is announced by the adjudicating authority vide Sections 13 and 14 of the Code, by which institution of suits and pending proceedings etc. cannot be proceeded with. This continues until the approval of a resolution plan under Section 31 of the said Code. In the interim, an interim resolution professional is appointed under Section 16 to manage the affairs of corporate debtors under Section 17.

It is clear, therefore, that the earlier State law is repugnant to the later Parliamentary enactment as under the said State law, the State Government may take over the management of the relief undertaking, after which a temporary moratorium in much the same manner as that contained in Sections 13 and 14 of the Code takes place under Section 4 of the Maharashtra Act. There is no doubt that by giving effect to the State law, the aforesaid plan or scheme which may be adopted under the Parliamentary statute will directly be hindered and/or obstructed to that extent in that the management of the relief undertaking, which, if taken over by the State Government, would directly impede or come in the way of the taking over of the management of the corporate body by the interim resolution professional. Also, the moratorium imposed under Section 4 of the Maharashtra Act would directly clash with the moratorium to be issued under Sections 13 and 14 of the Code. It will be noticed that whereas the moratorium imposed under the Maharashtra Act is discretionary and may relate to one or more of the matters contained in Section 4(1), the moratorium imposed under the Code relates to all matters listed in Section 14 and follows as a matter of course. In the present case it is clear, therefore, that unless the Maharashtra Act is out of the way, the Parliamentary enactment will be hindered and obstructed in such a manner that it will not be possible to go ahead with the insolvency resolution process outlined in the Code. Further, the *non-obstante* clause contained in Section 4 of the Maharashtra Act cannot possibly be held to apply to the Central enactment, inasmuch as a matter of constitutional law, the later Central enactment being repugnant to the earlier State enactment by virtue of Article 254 (1), would operate to render the Maharashtra Act void vis-à-vis action taken under the later Central enactment.

On reading of section 238 of the code, it is clear that the later *non-obstante* clause of the Parliamentary enactment will also prevail over the limited *non-obstante* clause contained in Section 4 of the Maharashtra Act. For these reasons, we are of the view that the Maharashtra Act cannot stand in the way of the corporate insolvency resolution process under the Code.

The appellant argued that the notification under the Maharashtra Act only kept in temporary abeyance the debt which would become due the moment the notification under the said Act ceases to have effect.

The Supreme Court however held that the notification under the Maharashtra Act continues for one year at a time and can go upto 15 years. Given the fact that the timeframe within which the company is either to be put back on its feet or is to go into liquidation is only 6 months, it is obvious that the period of one year or more of suspension of liability would completely unsettle the scheme of the Code and the object with which it was enacted, namely, to bring defaulter companies back to the commercial fold or otherwise face liquidation. If the moratorium imposed by the Maharashtra Act were to continue from one year upto 15 years, the whole scheme and object of the Code would be set at naught.

The appellant then argued that since the suspension of the debt took place from July, 2015 onwards, the appellant had a vested right which could not be interfered with by the Code.

The Supreme Court however held that it is precisely for this reason that the non-obstante clause, in the widest terms possible, is contained in Section 238 of the Code, so that any right of the corporate debtor under any other law cannot come in the way of the Code. For all these reasons, we are of the view that the Tribunal was correct in appreciating that there would be repugnancy between the provisions of the two enactments. The judgment of the Appellate Tribunal is not correct on this score because repugnancy does exist in fact.

As regards to the rejection of second application the Tribunal as well as the Appellate Tribunal it was held by the Apex Court that the Tribunal and the Appellate Tribunal were right in not going into this contention for the very good reason that the period of 14 days within which the application is to be decided was long over by the time the second application was made before the Tribunal. Also, the second application clearly appears to be an after-thought for the reason that the corporate debtor was fully aware of the fact that the MRA had failed and could easily have pointed out these facts in the first application itself. However, for reasons best known to it, the appellant chose to take up only a law point before the Tribunal. The law point before the Tribunal was argued on 22nd and 23rd December, 2016, presumably with little success. It is only as an after-thought that the second application was then filed to add an additional string to a bow which appeared to the appellants to have already been broken.

The obligation of the corporate debtor was, therefore, unconditional and did not depend upon infusing of funds by the creditors into the appellant company. Also, the argument taken for the first time before us that no debt was in fact due under the MRA as it has not fallen due (owing to the default of the secured creditor) is not something that can be countenanced at this stage of the proceedings. In this view of the matter, we are of the considered view that the Tribunal and the Appellate Tribunal were right in admitting the application filed by the financial creditor ICICI Bank Ltd.

Case Review: Order dated 17th January, 2017 and Order dated 23rd January, 2017 passed by NCLT, Mumbai Bench, Mumbai in *ICICI Bank Ltd. vs. M/s. Innoventive Industries Lt*d. (C.P. No. 1/I&BP/NCLT/MB/MAH/2016) and order dated 15th May 2017 passed by the NCLAT in *M/s. Innoventive Industries Ltd. vs. ICICI Bank Ltd.* (reported in IIIPI Update 4, Part 2, June 2017), *Upheld*.

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Lokhandwala Kataria Construction Pvt. Ltd.
vs.
Nisus Finance & Investment Manager LLP
Supreme Court of India
24-07-2017

Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 – Withdrawal of Application - In view of Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the National Company Law Appellate Tribunal (NCLAT) could not utilise the inherent power recognised by Rule 11 of the National Company Law Appellate Tribunal Rules, 2016

An appeal was filed by the appellant/Corporate Debtor against the order passed by the Adjudicating Authority (NCLT, Mumbai Bench) whereby the application under section 7 of the Insolvency and Bankruptcy Code, 2016 (the Code) has been admitted. The parties have settled the dispute and part amount has already been paid. The NCLAT held that such settlement cannot be ground to interfere with the impugned order in absence of any other infirmity. The NCLAT further held that Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 has not been adopted for the purpose of the Code and only Rules 20 and 26 have been adopted in absence of any specific inherent power and where there is no merit, the question of exercising inherent power does not arise.

On appeal, the Supreme Court held that:
In view of Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the National Company Law Appellate Tribunal (NCLAT) could not utilise the inherent power recognised by Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 to allow a compromise before it by the parties after admission of the matter.

Case Review: Order dated 13th July 2017 passed by the NCLAT in *Lokhandwala Kataria Construction Pvt. Ltd. vs. Nisus Finance & Investment Manager LLP.* in CP (AT) (Insolvency) No. 95 of 2017, *upheld*.

Disciplinary Case

Shri yyy
vs.
CA. zzz

Facts of the case:

A Complaint in Form I dated 19.12.2007 was received from *Shri yyy* (hereinafter referred to as the "Complainant"), *Ex Managing Director of XXXX Ltd* (hereinafter referred to as the "Company") against *CA. zzz of M/s XYZ & Co.*, Chartered Accountants (hereinafter referred to as the "Respondent" and the "Respondent firm"). The charges alleged in the Complaint are as under:

- One of the partners of Respondent Firm was the Director/Chairman of the Complainant Company since its incorporation, whereas the Respondent- Firm was the statutory auditor of the Complainant Company since its incorporation. Despite being partner in the Respondent firm, the Respondent signed the Complainant Company's Balance Sheets, Profit & Loss A/c for various years, Directors' Report, Bank loan agreements etc. and after resignation on 26th February, 2001 signed loan renewal agreement with a Bank on 27th April, 2001.
- The Respondent received his due share of fees charged from the Complainant Company as a partner in the Respondent firm in addition to his professional income. The Respondent is running many other business establishments and is also a Director/partner in many Companies.
- Since incorporation of the Complainant Company till the resignation of the Respondent firm as a statutory auditor, all the auditor's report, Tax audit report, etc were prepared and duly signed by the partners of the Respondent firm whereas the Respondent, being other partner of the Respondent firm had substantial interest as a Director and shareholder of the Complainant Company. The Respondent had full knowledge of the day to day affairs and dealings of the Complainant Company and thus, signed vital documents for and on behalf of the Complainant Company.
- A land at Bahadurgarh was sold on Power of attorney on 23rd June, 1996 vide Board's Resolution passed under the Chairmanship of the Respondent. The same land figured in all the future financial statements of the Company till the new statutory auditor brought it to the attention of the Board of Directors in 2003-2004 and corrected the same.
- Certain Plots though sold during 2001-2002 but the same was not reflected in the financial statements for the Financial Year 2001-2002. The fact was known when a new firm was appointed as statutory auditor after the resignation of the Respondent firm on 22nd March, 2003 and got rectified in 2003-2004.

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

The Committee noted that the Company under question was in liquidation. Further, the Complainant and the Respondent in this matter were the Directors of the Company and the dispute between them has led to this complaint. However, the Committee restricted its enquiry to professional and/or other misconduct of the Respondent in his professional capacity.

The Committee noted that it is an admitted fact that the Respondent was the Director of the Company as well as the partner of the firm which was doing the Statutory Audit of the Company. Moreover, the Committee noted that the Complaint under question has been filed against the firm and the firm has disclosed the name of the Respondent as the member answerable to the charges alleged in the Complaint. The Committee has further noted that the Respondent-firm was consisting of two partners including the Respondent and his brother and the Respondent-firm being

well aware of the provisions to the Act disclosed the Respondent as the member answerable for the firm. The Committee referred to Section 226(3) of the Companies Act, 1956 and Clause (4) of Part I of the Second Schedule to the Chartered Accountants Act and observed that, firstly, members who are Directors in a Company and are also Partners of the firm which intends to be appointed as Auditor of a Company are not permitted to be appointed as its Statutory Auditors. Secondly, where a partner or relative of the member is a Director in the Company who has substantial interest i.e. more than 20% shareholding jointly is not permitted to be appointed as the Auditors of the Company.

The Committee observed that in the present matter the Respondent was the Director as well as the Partner of the firm who was carrying the audit over the years of the Company even though the other partner auditing the accounts of the Company for all the years under question. The Committee, in the first place, found that the Respondent firm was not entitled for appointment as an Auditor of the Company. Secondly, the Respondent along with his family was holding 21.85% shares in the Company.

The Committee observed that the independence of mind is a fundamental concept of audit and/or expression of opinion on the financial statements in any form and, therefore, must always be maintained. Although no Balance Sheet which was signed by the Respondent in the capacity of the Director is brought on record yet he being the Chairman/ Director was able to influence the decision making of the Company which was having bearing on the independence of the Auditors as he was the partner of the auditee-firm. Also he has been declared/ identified as the partner responsible by the firm. The concept of Independence was completely overlooked by the Respondent as he continued to be the Director and also one of the partners of the firm which was carrying the Statutory Audit of the Company. The committee held that the said conduct of the Respondent is unbecoming of a Chartered Accountant and against the provisions of the Companies Act, 1956 and the Chartered Accountants Act.

The Committee noted that, as regard the charge that the Respondent was engaged in other business besides holding the Certificate of Practice (COP), the Respondent was the Promoter Director and Chairman of the Company as well as was holding COP and partner in M/s XYZ Co, Chartered Accountants. The committee while referring to the provisions of Regulation 190A read with Clause (11) of Part I of First Schedule of the Act observed that the Respondent was signatory to the MoA, was Chairman of the Company and has signed various Board Resolutions etc. the same shows that the Respondent was not just the Director Simplicitor instead he was involved in day to day affairs of the Company which is not permitted for Members without the specific approval of the Council which constitutes professional misconduct falling within the meaning of Clause (11) of Part I of First Schedule to the Act.

The committee noted that, as regards the charge that the Respondent sold the assets of the Company and the same was not reflected in the financial statements of the Company, sales were not incorporated in the Books of accounts of the Company, inasmuch as, the years which were under question the Financial Statements itself were signed by the Complainant himself. Therefore, in the absence of any documentary evidence, the Committee did not find any merit in this charge as the role of the Respondent in any such activity could not be established. In view of the above, the Committee held the Respondent Guilty of Professional Misconduct falling within the meaning of Clause 11of Part I of the First Schedule, Clause (4) 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 one year.

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 concurred with the findings of the Committee and dismissed the appeal.

The Respondent further preferred writ petition before the Hon'ble High Court of Delhi. The High Court, after considering the fact that the misconduct took place *qua* a company in which substantial control vested in the family of the Respondent and the Respondent was in practice since last 45 years, reduced the period of sentence from one year to six months. ■