Legal Decisions[1]

Income Tax

LD/66/104

Smt. Kalpana Shantilal Haria

vs.

Asst. CIT

22nd December 2017

Sanction granted by the higher Authority for issuing of a reopening notice has to be on due application of mind; It cannot be a mechanical approval without examining the proposal sent by the Assessing Officer; Reassessment initiation stayed.

A writ petition under Article 226 of the Constitution of India was preferred by the assessee challenging a notice u/s. 148 seeking to reopen the assessment for AY 2014-15. The High Court observed that, in its objection, the petitioner objected to the reasons recorded in impugned reopening notice and *inter alia* pointed out that the Joint Commissioner of Income Tax has mechanically granted the sanction without due application of mind. The Assessing Officer (AO) rejected the petitioner's objection.

The High Court noted that the prescribed form filled by the AO indicated that the notice has been issued u/s. 143(b) of the Act and the Joint Commissioner of Income Tax, while granting the sanction has recorded the word "satisfied". The petitioner contended that there was no proper sanction in view of non-application of mind by the Joint Commissioner of Income Tax. It was further contended that the AO had invoked a provision of law to sustain the impugned notice which is admittedly not in the statute and the Joint Commissioner had not yet approved it.

The High Court stated *"...there can be no dispute with regard to the application of Section 292B of the Act to sustain a notice from being declared invalid merely on the ground of mistake in the notice. However, the issue here is not with regard to the mistake / error committed by the Assessing Officer while taking a sanction from the Joint Commissioner of Income Tax but whether there was due application of mind by the Joint Commissioner of Income Tax while giving the necessary sanction for issuing the impugned notice."* The High Court further stated that *"....It is a settled principle of law that sanction granted by the higher Authority for issuing of a reopening notice has to be on due application of mind. It cannot be a mechanical approval without examining the proposal sent by the Assessing Officer."*

The High Court opined that non-pointing out the mistake/error by the Joint Commissioner of Income Tax on the part of the Assessing Officer is *prima facie* evidence of non-application of mind on the part of the sanctioning authority while granting the sanction. However, the High Court also clarified that the petition was admitted solely on the issue of *prima facie* non-application of mind by the Joint Commissioner of Income Tax while granting the sanction for issuing the impugned notice.

HC, thus, admitted the writ petition of assessee and stayed the reassessment initiation.

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LD/66/105

Epcos India Private Limited

vs.

Jt. Commissioner of Income Tax

15th December, 2017

TP adjustments set aside by the ITAT; Adjustments resulted from incorrect advice by the assessee's erstwhile attorneys on the TP-Method for benchmarking.

With respect to AY 2011-12, assessee adopted an overall entity based TNMM to determine the arm's length nature of its international transactions. TPO disagreeing with the applicability of the method for this case, considered segmental profitability as per AS-17 and prescribed a transaction-by transaction approach instead. Thereafter, TPO proposed a TP adjustment of ₹35.41 crore for certain International transactions viz. Sale of Ferrites for Resale, Sale of Ferrites for consumption, and Payment of business support services. For AY 2012-13 also, TPO found two additional transactions to not be at arm's length, viz. Payment of non-compete Fee, and Payment of lump-sum fee for technology, and accordingly proposed a combined TP adjustment of ₹68.13 crore with respect to five international transactions. DRP upheld this adjustment made by TPO, aggrieved by which the assessee preferred appeals before ITAT.

Assessee submitted that its incorrect adoption of TP Method for erstwhile AY 2011-12 was based on

[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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Legal Update

the advice offered by its erstwhile attorneys. Assessee also furnished additional evidence to support the revised approach for AY 2011-12 as well.

ITAT noted that the assessee had appointed a new law firm while the assessment proceedings were before the Tribunal for AY 2011-12. The new law firm after analysing the original TP study had advised the assessee to adopt transaction by transaction method, in place of entity level bench marking approach. ITAT accepted the plea of the assessee that it should not be penalised for the error/ mistake of erstwhile attorneys who had for the same AY incorrectly suggested TNMM, an entity-level approach for benchmarking. ITAT referred to the SC ruling in the 1998 case of *N. Balakrishnan vs. M. Krishnamurthy* wherein the delay of 883-day caused by the mishandling of the case by the petitioner's advocate was condoned holding that *"petitioner cannot be faulted due to the latches of the lawyer"*. Following the ratio laid out by the Apex Court, ITAT ruled that *"for substantial justice, the assessee should not suffer because of earlier legal advice which the assessee realises to be wrong and ready to correct"*.

Thus, ITAT remitted the matter to the file of the TPO for reassessment of only those transactions that were deemed not-at-arm's-length by the TPO. After considering the additional evidence placed by the assessee as per revised approach to benchmarking, ITAT directed the TPO to take them into consideration while deliberating on the arm's length nature of the transactions in question. TPO was also directed by the ITAT to offer hearing to the assessee in case of any fresh adjudication to be done.

LD/66/106

CIT

vs.

Rajasthan and Gujarati Charitable Foundation

13th December, 2017

Income of the Trust is required to be computed u/s. 11 on commercial principles after providing for allowance for normal depreciation from Trust's gross income, despite full expenditure allowed in the year of acquisition of assets.

The Supreme Court noted that all the assessees are charitable institutions registered u/s. 12A of the Income-tax Act and for this reason, in the AY in which the depreciation was claimed, the entire expenditure incurred for acquisition of capital assets was treated as application of income for charitable purposes u/s. 11(1)(a) of the Act. It was further noted that the view taken by the Assessing Officer in disallowing the depreciation which was claimed u/s. 32 was that once the capital expenditure was treated as application of income for charitable purposes, the assessees had virtually enjoyed a 100 per cent write off of the cost of assets and, therefore, the grant of depreciation would amount to giving double benefit to the assessee

The Supreme Court referred to *CIT vs. Institute of Banking Personnel Selection (IBPS)* [(2003) 131 Taxman 386 (Bombay)], wherein the Bombay High Court held that income of the Trust is required to be computed u/s. 11 on commercial principles after providing for allowance for normal depreciation from Trust's gross income, despite full expenditure allowed in the year of acquisition of assets.

It was noted that the legislature, realising that there was no specific provision in this behalf in the Income-tax Act, has made amendment in Section 11(6) of the Act *vide* Finance Act No. 2/2014 which became effective from the Assessment Year 2015-2016. The Supreme Court approved Delhi High Court's view that the said amendment is prospective in nature and thus, Section 11(6) cannot be applied retrospectively to AYs prior to AY 2015-16.

LD/66/107

Horace Dansereau

vs.

Asst. CIT

12th December, 2017

Income tax component borne by Indian company is taxable as salary income in the hands of assessee foreign nationals in view of Section 195A.

The petitioners were employees deputed by the Consultant, returned their income received in India and showed the tax component paid by the Kerala State Electricity Board (KSEB) as "income from other sources". The Assessing Officer added on the tax paid by KSEB, returned as "income from other sources", to the salary paid and computed the total salary paid as provided in Section 195A. Tax was determined for the said component of salary and deductions were made with respect to the tax paid by the KSEB. The balance was demanded from the assessee, the foreign nationals, who were in India by virtue of the contract.

The Kerala High Court referred to the co-ordinate bench ruling in *CIT vs. C.W. Steel*[(86) ITR 817] wherein it was held that while computing the

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total salary for determining the value of the rent free accommodation, the tax paid by the employer was also includable. HC observed that, the given issue was decided even before Section 195A was available in the statute. The High Court denied assessee's reliance on the apex court ruling in *Emil Webber vs. CIT* [200 ITR 483] as the case was not concerned with the effect of Section 195A and hence directed the income to be treated as "income from other sources". It was further stated that the aforesaid case was more on interpreting the definition of 'salary' which included perquisites. Thus, the High Court held that, the argument of assessee that Section 195A would be applicable only if the salary and tax is paid by the same person could not be accepted.

The Kerala High Court opined that the assessees were in the employment of the KSEB and as per the consultancy agreement the salary was payable by the Consultant and the income tax by the KSEB. The High Court further held that the salary of the employees deputed by the Consultant was included in the consultancy charges and the salary and income-tax were both from the KSEB, in whose project the assessees were employed.

The High Court directed the Assessing Officer to employ Section 195A and compute the amounts properly within the stipulated period and ruled in favour of Revenue.

LD/66/108

SC Johnson Products Private Limited
vs.
Assistant Commissioner of Income Tax
8th December, 2017

Delhi High Court upholds assessment u/s. 147 beyond completion of 4 years of relevant assessment year on ground that assessee had followed wrong method of accounting for amalgamation resulting in excessive depreciation claim on goodwill while computing profits u/s. 115JB.

The assessee, SC Johnson Products Private Limited, filed its return of income for the AY 2007-08 declaring an income which was assessed by AO at higher level during scrutiny. The assessee was served with a notice for reopening of completed assessment for AY 2007-08 and for AY 2008-09 after completion of 4 years from the end of the relevant AY. The Revenue contended that a wrong accounting standard with respect to amalgamation was applied by assessee resulting into concealment of the true income. It was further contended by the revenue that the assessee should have followed "pooling of interest" method and not the "Purchase" method for accounting the amalgamation. Thus, according to the Revenue, there would not have been any question of creation of goodwill.

Aggrieved, the assessee filed writ petitions before the Delhi High Court.

The Delhi High Court noted that the completed assessments for the two years, had taken into account the documents and materials and those assessments were undeniably after scrutiny, finalised u/s. 143(3). It was further noted that while framing a similar assessment, for AY 2009-10, the AO noticed that the assessee had adopted a wrong method i.e. "purchase", while calculating depreciation instead of the "pooling of assets" method in terms of a different accounting standard. The High Court held that an assessment order would become conclusive, if the rationale for re-opening was purely factual unless fresh facts having live link with the issue lead to inference of concealment of material facts. However, if the AO comes across material subsequently which pertain to a previous assessment or assessment orders (as in the present case) where it is felt that returns were "dressed up" or improper claims were made, that escaped inquiry, reassessment is warranted.

The Delhi Court relied on the apex court rulings in *'Calcutta Discount Co. Ltd.'* [(1961) 41 ITR 191] and in *Phool Chand Bajrang Lal vs. ITO* [(1993) 203 ITR 456] wherein the Apex court ruled *"... He (an Income-tax Officer) may start reassessment proceedings either because some fresh facts had come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information."*

The High Court ruled that there was no doubt that the court had facially accepted the method which the assessee indicated and at that stage, neither did the court conduct any detailed inquiry into the question of the appropriateness of the method, nor was it competent to return findings that would have been conclusive. Thus, the Delhi High Court dismissed the writ petition filed by assessee and held that it cannot *ipso facto* bar any inquiry by the AO and it upheld reassessment notices based on the materials produced for AY 2009-10.

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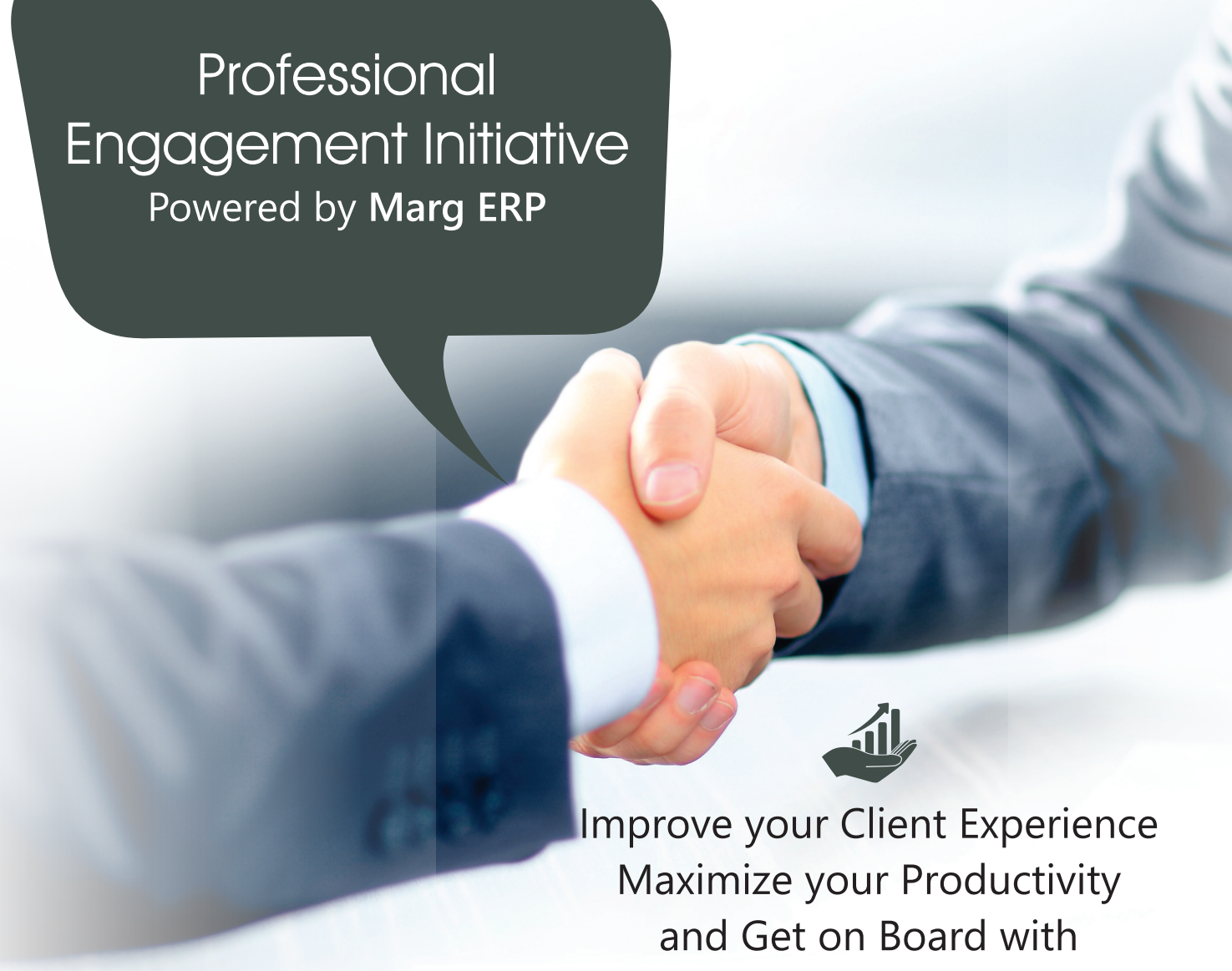

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Legal Update

LD/66/109

CIT

vs.

Chaphalkar Brothers Pune

7th December, 2017

Entertainment tax subsidy received by multiplexes under the respective subsidy schemes of the states of Maharashtra and West Bengal are capital in nature and not revenue receipt.

The Supreme Court noted that judicial test stated by Viscount Simon in *Pontypridd and Rhondda Joint Water Board vs. Ostime* was applied in *Sahney Steel's* case and co-ordinate bench had stated therein that, since funds were made available to the assessee to assist it in carrying on its trade and business, there could be little doubt that the object "of various assistances under the subsidy scheme was to enable the assessee to run the business more profitably. The Supreme Court further referred the ruling of *Sahney Steel* and observed that the notification issued by the Andhra Pradesh Government was concerned with certain facilities and incentives which were to be given to all new industrial undertakings which commenced production on or after 1-1-1969 with investment capital not exceeding ₹5 crore. In that case, it was observed that as no financial assistance was granted to the assessee for setting up of the industry, the idea of the subsidy scheme was to provide a helping hand for five years in order to enable the industry to be viable and competent.

The Supreme Court observed assessee's reliance on Jammu and Kashmir High Court ruling in *Shri Balaji Alloys* wherein the High Court had found that concessions were issued in order to achieve the twin objects of acceleration of industrial development in the State of Jammu and Kashmir and generation of employment in the said State. The Apex Court upheld the High Court's observation that the subsidy took a particular form and the fact that it was granted only after commencement of production would make no difference.

The Supreme Court referred to the West Bengal Finance Act, 2003 and observed that since the subsidy scheme in the West Bengal case was similar to the scheme in the Maharashtra case, being to encourage development of Multiplex Theatre Complexes which were capital intensive in nature and that the amount of entertainment tax collected was to be retained by the new Multiplex Theatre Complexes for a period not exceeding four years, the Supreme Court opined that West Bengal cases must follow the judgement that was just delivered in the Maharashtra case.

Thus, the Supreme Court dismissed Revenue's appeal.

LD/66/110

CIT

vs.

Dr. Arvind S. Phake

20th November, 2017

Exemption u/s. 54EC-Date of contract is relevant provided the terms of the contract indicate passing off or transferring of complete control over the property in favour of the developer.

The dispute before the Appellate Tribunal was in respect of part disallowance of exemption claimed by the assessee u/s. 54EC of the Income-tax Act, 1961, while computing the Long Term Capital Gain on the sale of immovable property. The investment of ₹50,00,000/- was made in the Bonds of NHAI on 28th March, 2008 and ₹50,00,000/- in the Bonds of REC Ltd. on 22nd August, 2008. The Assessing Officer held that the investment made in the bonds of REC Ltd. was beyond the period provided in the said provision in as much as the investment made on 22nd August, 2008 was not within six months from the date of the transfer of assets. The Tribunal observed that on the date of execution of the development agreement, full consideration was admittedly not paid, and therefore, the contention of the department that the transfer was effected on 13th September, 2007 could not be accepted. Therefore, taking the date of transfer as 1st March, 2008 on which day the possession was delivered, it was held that investment made on 22nd March, 2008 was well within the time specified u/s. 54EC.

Aggrieved, the Revenue preferred an appeal before the Bombay High Court.

The Bombay High Court noted that it was bound by the Division Bench ruling in the case of *Chaturbhuj Dwarkadas Kapadia vs. CIT* [(2003) 260 ITR 491 (Bom)], wherein the division Bench held that the date of contract is relevant provided the terms of the contract indicate passing off or transferring of complete control over the property in favour of the developer. It was further noted that the

Division Bench laid down the test for determining the date which should be taken into account for determining the relevant accounting year in which the liability accrues.

The High Court observed that in the present case on the date of execution of the development agreement, the entire consideration was not received by the assessee. The physical possession of the property subject matter of development agreement was parted with by the assessee on 1st March, 2008. It was held that on that day, complete control over the property was passed on to the developer. After having perused the various clauses in the agreement and the aforesaid factual aspects, the Tribunal has taken 1st March, 2008 as the date of transfer.

Thus, following the Division bench ruling in *Chaturbhuj Dwarkadas Kapadia* (*supra*), the High Court dismissed Revenue's appeal and opined that no fault could be found with the impugned judgement of the Tribunal when it was held that the investment made by the assessee on 22nd August, 2008 was within the period specified u/s. 54EC.

Transfer Pricing

LD/66/111

Lehman Bros. Securities Pvt. Ltd.

vs.

Dy. Commissioner of Income Tax

12th December, 2017

Owing to Collapse of Lehman Brothers group worldwide, assessee could not make effective representations before the lower authorities; Assessee given another opportunity to present its case and to justify its adoption of Revenue-split method by placing reliance on Rule 10AB (Other Method for determination of ALP); Matter remitted to AO/TPO for a de-novo assessment proceeding.

The assessee, Lehman Brothers Securities Pvt. Ltd., is an entity which was part of Lehman Brothers group and had offered financing and advisory salutations to its clients in India in the field of Investment Banking.

The assessee followed a Revenue-split method to compute ALP of revenue earned by assessee's

Investment Banking transactions with AEs as prescribed by the group's Global Transfer Pricing Policy. Assessee's share in the global revenue was claimed to have been computed at 0.56% of the total Investment Banking Division (amounting to ₹28.88 Cr) revenue on the basis of compensation, head count and revenue allocation. TPO rejected the revenue-split method noting that assessee could not explain the basis of the same properly and applied the TNMM at entity level. TPO could not identify comparables from the investment banking segment, it arrived at a 21.18% arm's length margin from a set of ten ITES/BPO companies which resulted in a TP-adjustment of ₹ 33 crore. CIT(A) confirmed the TP-adjustment, aggrieved by which, the assessee filed an appeal before ITAT.

The assessee submitted that the method had been consistently and uniformly applied since 1999-00 by Lehman Brother Group worldwide across all its entities. Further, assessee submitted that its business model was unique being investment banking, there was no comparable available, and that the revenue-split method fell under the classification of "Other method of determination of ALP" as per Rule 10AB.

Assessee linked its inability to make effective representation of its position before the authorities due to the extraordinary event of worldwide collapse of the Lehman Brothers. Assessee elaborated that the event led to the group's liquidation in 2009 and also caused many employees to leave the organisation, thus making the collation of information desired by the authorities very difficult.

ITAT observed that assessee could not make effective representations before the lower authorities due to extraordinary situation faced by the assessee owing to collapse of Lehman Brothers group worldwide leading to liquidation in 2009.

ITAT also noted that concerned assessment year was assessee's first year of operations as it had claimed certain extraordinary expenses such as fees paid for increase in share capital, rental paid for premises lying vacant due to non-appointment of employees, signup bonuses being given to employees on joining the assessee and recruitment cost incurred in the initial phase of appointment of the new employees as assessee's base was being setup in India. ITAT held that, in the interest of justice, the matter should be remanded to the file of AO/TPO for fresh assessment to allow the assessee an opportunity for effective representation. ITAT stressed that the assessment should be one wherein all the issues which arise or may arise in assessment are kept open and TPO/AO will be free to adjudicate. ITAT, further, placed the onus on the assessee to bring on record evidences and explanations to support its position.

LD/66/112

Dy. Commissioner of Income Tax

vs.

Kalyani Hayes Lemmerz Ltd.

11th December, 2017

Price paid by assessee to its AE was the same as the one which was decided/entered with that AE when it used to be an independent entity for assessee; Transaction-Price held to be considered as an uncontrolled transaction.

The assessee was engaged in the manufacture of wheel Rims for light, medium and heavy commercial vehicles. The assessee was jointly promoted by Kalyani Group and Lemmerz Werke Gmbh with 75%: 25% equity. The assessee had acquired Wheel Rim division of Bharat Forge Ltd. and had commenced manufacture of wheel rims from 04.06.1996. Hayes Corporation, USA acquired Lemmerz Were Gmbh on 30/06/1997 and subsequently in August 1998, increased its holding in the assessee company from 25% to 85% by acquiring additional equity.

Assessee entered into international transactions with its AE regarding Export of Finished Goods (Truck and Trailer Wheel Rims), Import of Moulds and Dies, Payment of Royalty for Technical Know-How.

The assessee had paid royalty of ₹33.29 lakh to its AE - Hayes Lammerz Werke GmbH ('Hayes'). To justify its royalty payment, assessee relied on its approval from the Reserve Bank of India ('RBI') and Secretariat of Industrial Assistance ('SIA'). TPO rejected this reliance on RBI or SIA holding that they were not transfer pricing authorities. For AY 2005-06, TPO meted out the same treatment for ₹64.02 lakh payment of royalty to Hayes. TPO observed that no royalty was paid between June 2002 to December 2004, no other group entities entered into similar agreements for the remaining period of the assessment year (between 01/01/2015 and 31/03/2015), and on lack of information about the life cycle of technology and how royalty charge recovers technology value.

CIT(A) ruled in favour of assessee, aggrieved by which , the Revenue filed appeals before ITAT Pune.

ITAT noted that the royalty payments were based on a foreign collaboration Technology License agreement which was signed between two independent parties Bharat Forge Ltd. and Lammerz Were GmbH on 25/06/1992, and the same was approved by RBI on 01/07/1992. Bharat Forge Ltd. had paid royalty as per the agreement until 03/06/1996, after which it was taken over by assessee, who continued to honour the agreement until it expired on 17/06/2002.

ITAT remarked that where payment of royalty was pursuant to such an agreement between independent entities and not associated enterprises, and where the concern became associated enterprise in a later period and where the price paid to associated enterprises was the same as entered when it was an independent entity, then the same has to be considered as uncontrolled transaction. ITAT perused the agreement and registered that the RBI-approved rate of payment of royalty varied from 2.5% to 4.5% depending on the number of units. ITAT also observed that royalty payment by the assessee in all the preceding years from assessment years 1997-98 to 2002-03 have been allowed and that Revenue had failed to bring on record any evidence to show that there was any change in facts. ITAT also referred to Bombay HC judgement for SGS India wherein RBI/SIA-approved rate of royalty was held to constitute CUP data.

Additionally, ITAT opined that TPO was not empowered to ask assessee for information on AE's cost of technology development, how AE intended to recover the same and AE's royalty transactions with other group entities and that the duty of the TPO was limited to determining the arm's length price of transaction in accordance with the provisions of the Act. ITAT accepted reliance on subsequent years i.e. AY 2006-07 to AY 2013-14's orders wherein payments of royalty following the same agreement was accepted to be at arm's length. ITAT noted that Revenue had failed to bring on record any difference in factual aspects *vis-à-vis* payment of royalty in instant assessment year when compared to the subsequent years.

ITAT thus ruled in favour of assessee.

Legal Update

Service Tax

LD/66/113

Front Line Builders and Developers
vs.
Commissioner of Central Excise, Customs and Service Tax
4th December, 2017

Total value of taxable service not challenged, only different interpretation on classification of services; it cannot tantamount to substantial mis-declaration, VCES cannot be disregarded.

Frontline Builders and Developers ('the Assessee') is engaged in the business of construction of residential and commercial complexes. It filed a declaration under the Service Tax Voluntary Compliance Encouragement Scheme (VCES). In the VCES filed, the Assessee declared service tax liability for the period April 2011 to December 2012 and paid service tax accordingly. On the total value of taxable services declared in the VCES, the Assessee claimed abatement of 75% as per Notification No. 26/2012-ST (in respect of cost of land) and paid balance dues under category of construction of complex services (CCS).

The Revenue on the other hand contended that said activity has been declared as 'works contract' service (WCS) under returns filed by the Assessee before VAT Department. The Revenue demanded for extra service tax along with interest and penalties by alleging that in the declaration made by the Assessee, he had failed to declare his service tax liability properly and that there was a substantial mis-declaration of service tax dues. Accordingly, citing substantial mis-declaration against assessee, Revenue sought to deny the benefit of abatement to them and re-classify the service under WCS.

Before the CESTAT, the Assessee contended that, definition of WCS under Finance Act, 1994 as well as respective State Government Act is different and the services rendered by assessee is rightly classifiable under CCS as consideration also includes cost of undivided share of land transferred after construction of apartments.

CESTAT noted that there is no difference found by the Revenue in the total consideration declaration made by the Assessee; the adjudicating authority has only taken a different view on classification of assessee's service. Then CESTAT stated that "*VCES was framed by the Government with the intention of encouraging voluntary compliance and payment of service tax. The declarations made under such scheme were to be accepted, by and large*".

On the power of reopening the declarations, CESTAT noted that the power was given to the jurisdictional Commissioners to reopen such declarations only in cases where they were found to be substantially mis-declared. CESTAT opined that in the present case, Revenue merely noticed that same services were declared to be WCS for the purposes of VAT assessment. Further, Revenue has not made out a case of substantial mis-declaration in this case absent any contract or document which indicates that assessee has not made full declaration of service tax liability for the disputed period. As Revenue has only taken a different interpretation on classification of services, it cannot tantamount to substantial mis-declaration, and thus, VCES cannot be disregarded.

LD/66/114

CCE
vs.
Maharashtra Industrial Development Corporation
23rd August, 2017

Service fees/service charges collected by Industrial Development Corporation (IDC) from plot holders, for providing amenities in industrial estates such as roads, water supply, street lighting, drainage etc., are in the nature of compulsory levy imposed by IDC while performing its statutory functions, hence are not chargeable to service tax.

Facts:

Revenue alleged that service charges/service fees collected by respondent MIDC from the plot owners/plot allottees for providing them various facilities including maintenance, management and repairs of facilities in the MIDC's Industrial area, are liable to service tax under category of 'maintenance, management and repair services' and confirmed service tax demand on respondent. During appellate proceedings, Tribunal allowed appeal filed by respondent and set aside impugned demand, aggrieved by which, revenue preferred present appeal.

Held:

Hon'ble HC noted that preamble to Maharashtra Industrial Development Act, 1961 (MID Act) shows that said Act has been enacted for establishment of MIDC for securing orderly establishments of industrial areas and industrial establishments of industries in state of Maharashtra and for assisting generally in the organisation thereof; that Section 14 of MID Act, which provides that function of

MIDC is not only to develop industrial areas but to establish and manage industrial estates. Further, it was observed that in *Ramtanu Cooperative Housing Limited and Anr. vs. State of Maharashtra and Ors. AIR 1970 SC 1771*, Hon'ble Supreme Court held that the functions and powers of Industrial Development Corporation indicate that the corporation is acting as wing of state government in establishing industrial estates and developing industrial areas, acquiring property for those purposes, constructing buildings, allotting buildings, factory sheds to industrialists or industrial undertakings. Therefore, HC held that the role of MIDC is not limited only to establishing industrial estates and allotting the plots or buildings or factory sheds to industrial undertakings, but the functions and obligations of MIDC is also to manage and maintain said industrial estates established by it, therefore, it is statutory obligation of MIDC to provide and maintain amenities in its industrial estates such as roads, water supply, street lighting, drainage etc. Accordingly, HC held that service fees/service charges collected by MIDC are in the nature of compulsory levy, which is used by MIDC in discharging its statutory obligations and thus, not chargeable to service tax. Thus, HC dismissed revenue's appeal holding that no substantial question of law arose.

LD/66/115

IILM Undergraduate Business School

vs.

CCE

1st November, 2017

Tribunal held that the course conducted by Indian educational institution for which degree is awarded by foreign university and such degree is recognised in India, no service tax demand would sustain under category 'commercial training and coaching services' and such course fees would be exempt.

Facts:

The assessee is conducting recognised educational course for which degree is awarded by a foreign university in UK. Revenue entertained a view that as the course conducted by appellant is not recognised by any statutory authority in India, consideration received by appellant assessee from students for conducting said course is chargeable to service tax

under category of 'commercial training and coaching services'. While rebutting department's contention, appellant submitted that the said foreign university is accredited member of Association of Common Wealth Universities (ACWU) and the Association of Indian Universities (AIU) recognised accreditation by ACWU for foreign universities courses; also vide press release dated 22.04.2003, Ministry of Human Resource Development, Govt. of India (MHRD) clarified that AIU is mainly concerned with recognition of degrees, diplomas awarded by accredited universities in India and abroad for the purpose of admission to higher courses at Indian Universities. Appellant further submitted that said degree by foreign university was also recognised by Indira Gandhi National Open University (IGNOU).

The adjudicating authority recorded a finding that course conducted by appellant is not recognised as degree by AICTE or any other Indian university or deemed university; that if the course is not recognised by a university or an authority created under any law for grant of diploma or certificate then the course will not be excluded from the scope of taxable service. AA held that the recognition of course conducted by IGNOU for the purpose of granting admission to PG course would not amount that degree is conferred by or under the approval of IGNOU. As regards recognition by AIU, AA took a view that though AIU is a coordinating agency and plays an important role for sharing and furnishing cooperation in the field of education, it is not a statutory body empowered to approve course for grant of degree/diploma recognised by law for the time being in force. Further, revenue also relied upon decision of the Hon'ble Madras HC in *Academy of Marytime Education and Training Trust 2014-TIOL-1327-HC-MAD-ST*.

Held:

Hon'ble Tribunal noted that the education system in India is coordinated by several agencies; while the university system falls within jurisdiction of UGC, professional institutions are coordinated by different bodies like AITE, MCI, ICMR, ICAR etc. Another coordinating agency is AIU and all the universities and equivalent institutions are members of AIU. Further, MHRD has clarified that AIU is entrusted with recognition of degrees or diplomas awarded by accredited universities in India and abroad for the purpose of admission to post graduate course by said university. Tribunal referred to its own decision in case of *M/s ITM International Pvt. Ltd. 2017-TIOL-3635-CESTAT-DEL* wherein it was found that MHRD vide Notification dated 13.03.1995 stated that GoI has decided that those foreign qualifications which are recognised or equated by the AIU are treated as recognised for the purpose of employment services under central government and no separate orders for recognition of such foreign qualifications is needed to be issued and accordingly, it was held that courses offered by appellants resulting in issue of certificate by foreign university which is treated as equivalent to degree or diploma issued by Universities in India, would be falling outside scope 'commercial training and coaching services'.

Further, Tribunal distinguished from decision in *Academy of Maritime Education and Training Trust (Supra)* on a finding that in present case, dispute pertains to educational activity which is not claimed for exclusion under vocational training; the exclusion is claimed on the basis that degree awarded on completion of course is recognised degree. Therefore, impugned demand was set aside by holding that course conducted by appellant for which degree is awarded by foreign university would get covered under exclusion category specified for educational services and not liable to service tax under 'commercial training and coaching services'.

LD/66/116

Mrudula Pradeep Mehta

vs.

Commissioner of Service Tax I, Mumbai

7th December, 2017

Late fees under Rule 7C are not attracted if service tax returns are filed manually within stipulated due date and subsequently filed electronically.

Facts:

The assessee filed service tax returns manually (instead of electronically) within prescribed due date for filing returns and later on filed the same electronically. Revenue alleged that there was delay in filing ST-3 returns and thus, imposed late fees on appellant in terms of Rule 7C of Service Tax Rules, 1994.

Held:

Hon'ble Tribunal held that said Rule 7C prescribes late fees only for delay in filing return; however said rule is silent on penalty if the service tax

returns are filed manually in time although not filed electronically. Accordingly, as appellant had filed manual returns within prescribed time, Tribunal set aside impugned OIA deleting the demand for late fees.

LD/66/117

Ruchi Infrastructure Limited

vs.

CCE, Indore

7th November, 2017

Tribunal held that when premises owned by one of the parties to the joint venture is made available for conducting activity of joint venture, there cannot be said to be a renting of immovable property so as to attract service tax.

Facts:

Appellant owned various premises which can be used for warehousing facility. They entered into joint venture agreement with warehousing corporation wherein appellants provided their premises for storing goods brought by the depositors, which are warehoused and maintained by warehousing corporation. Revenue demanded service tax from appellant by alleging that amount of consideration received by appellant from warehousing corporation is liable to be taxed as premises of the appellant were rented out to warehousing corporation to be used for business or commerce.

Held:

Hon'ble Tribunal noted that the agreement itself states the intent of the joint venture agreement of partnership between appellant and state warehouse corporation, wherein responsibilities are identified for each parties and it provided that the consideration to be accrued to both the parties specifically to be identified out of common total income, warehousing corporation undertakes certain activities over and above the storage fee (which is sharable). Further, reliance was placed on decision of Hon'ble Supreme Court in case of *Gujarat State Fertilizers and Chemicals Ltd. & Anr. - 2016 - TIOL-198-SC-ST* and the decision of the Tribunal

in *Mormugao Port Trust 2016-TIOL-2843-CESTAT-MUM*, holding that joint venture agreements are not liable to service tax. Accordingly, Tribunal held that the agreement between the appellant and warehousing corporation is more in the nature of joint venture than a simple rent agreement for usage of immovable property and thereby allowed present appeals by setting aside impugned service tax demand.

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LD/66/118

Andhra Pradesh State Road Transportation Company
vs.
CCCE&ST
24th October, 2017

Tribunal held that services of providing buses (primarily used for passenger transportation in state) on hire to private customers for marriage functions, pilgrim places etc. by state transport corporation, would neither be covered under Section 66D(o) nor under entry (23) of Notification No. 25/2012-ST and thus, liable to service tax because as a result of such hiring, the buses loose characteristic of 'stage carriage' and would be regarded as 'contract carriage or special permit carriage'.

Facts:

Appellants are engaged in operation of buses in the State of Andhra Pradesh for public transport and also provided buses for marriage functions, pilgrimage places etc. to private persons on commercial consideration. Revenue alleged that appellants are providing 'rent-a-cab services' and confirmed service tax demand along with imposition of penalties for period 'June 2007 to September 2015'. Appellant submitted that the buses operated by State Transport Undertaking are "stage carriage" vehicles which are mainly used for passenger transportation and spare buses as well as normal buses, which are "stage carriages" are used for giving on hire to various customers and the possession and control of the vehicles is not transferred to customers but always remains with appellants, therefore, demand under category of 'rent-a-cab service' is not sustainable. Further, it was submitted that buses operated by them are "stage carriage vehicles" and are used for purposes like marriage functions, pilgrimage, by obtaining a special permit under Section 88(8) of Motor Vehicles Act, according to which special permit can be granted to stage carriage vehicles as well as contract carriage vehicles.

W.e.f. 01.07.2012, in terms of Section 66D(o) of Finance Act, 1994 services of passenger transportation by a Stage Carriage are not chargeable to service tax and in terms of Sr. No. (23) of Mega Exemption Notification No. 25/2012-ST dated 20.06.2012, transportation of passengers by a contract carriage for the transportation excluding tourism, conducted tour or hire were exempted from service tax. Accordingly, appellant submitted that while giving exemption to non-air-conditioned contract carriage, it has been specifically provided that such exemption would not apply for "tourism, conducted tour, charter or hire"; but since no such exclusion is provided in Section 66D(o) in respect of 'stage carriages', when 'stage carriage' vehicles are used for transportation of passengers even for purpose of tourism, conducted tour, charter or hire, no service tax can be demanded. Thus, issues before Tribunal in present appeal are as to (i) whether for period up-to 01.07.2012, hire charges collected by appellant would attract levy of service tax under rent-a-cab service and (ii) whether same activities would be chargeable to service tax from 01.07.2012 in light of Section 66D(o)?

Held:

Tribunal held that after amendment in definition of 'motorcab' u/s. 65(20) in 2007, the term "cab" would cover buses also. Relying on decision of Hon'ble HC in case of *C&CE vs. Sachin Malhotra 2015 (37) S.T.R. 684 (Uttarakhand)* holding that unless controlling of vehicle is made over to hirer and he is given possession for howsoever short period to deal with the vehicle, there would be no renting in present case, Tribunal held that for period up-to 30.06.2012, hire charges collected by appellant for giving buses on hire for marriage, pilgrim functions would not be chargeable to service tax under 'rent-a-cab service'.

As regards demand pertaining to period after 01.07.2012, by observing various provisions of Motor Vehicles Act, 1988, Hon'ble Tribunal opined that for a vehicle having 'stage carriage' permit like buses owned by appellant, to operate for private persons/marriage parties under contract, such buses will then necessarily be required to obtain a contract carriage permit or a special permit; once such a contract carriage permit or special permit is obtained, the bus will then no longer have the

character of stage carriage but will instead acquire the color of contract carriage or special permit carriage. Therefore, Tribunal held that buses of appellants, having become "contract carriage or special permit carriage" even if for temporary permit to provide them on hire for marriage/pilgrims etc., they cannot be considered as stage carriage for that short period and hence, cannot then be claimed to be covered under negative list as a stage carriage for transportation of passengers, or under entry (23) of mega exemption notification as said entry does not cover contract carriage on hire. Accordingly, Tribunal upheld service tax demand for period after 01.07.2012; however, penalties were set aside as the issue involved is one of interpretation and the question of taxability on the services was mired in confusion and litigation.

LD/66/119
Ticketpro India Pvt. Ltd.
vs.
CST, Bangalore
8th September, 2017

Once original authority has set aside penalty by invoking Section 80, revisionary authority cannot impose penalty.

Facts:

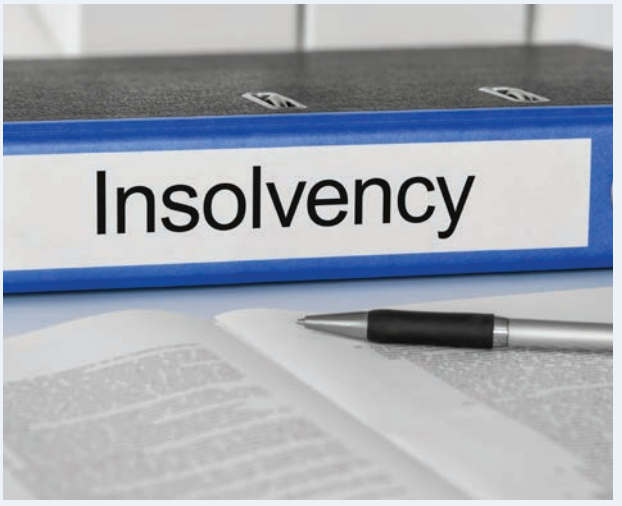
In the order-in-original, the adjudicating authority refrained from imposing penalties u/s. 76, 77 and 78 by extending benefit of Section 80. Thereafter, by exercising power of revisionary authority, department imposed penalty u/s. 78 upon appellant modifying order of original authority.

Held:

Tribunal allowed present appeal by holding that in light of decision of Hon'ble Karnataka HC in *Motor World [2012 (27) STR 225 (Kar.)]*, holding that when the assessing authority in its discretion has held that no penalty is liable, by resorting to Section 80 of the Act, then the Revisionary Authority cannot invoke his jurisdiction under Section 80 for imposing penalty.

Legal Update

Insolvency and Bankruptcy Code



M/s. Ksheeraabad Constructions Pvt. Ltd.
vs.
M/s. Vijay Nirman Company Pvt. Ltd.
National Company Law Appellate Tribunal (NCLAT)
20-11-2017

Sections 9 and 238 of the Insolvency and Bankruptcy Code, 2016 read with Sections 34 & 36 of the Arbitration and Conciliation Act, 1996 - Application for Initiation of Corporate Insolvency Resolution Process (CIRP) by the Respondent - The provision under the 'I&B Code' with regard to finality of an Arbitral Award for initiation of Corporate Insolvency Resolution Process will prevail the provisions of the Arbitration and Conciliation Act, 1996. No person can take advantage of pendency of a case under Section 34 of the Arbitration and Conciliation Act, 1996 to stall 'Corporate Insolvency Resolution Process' under Section 9 of the I&B Code.

The question which arose for consideration before the NCLAT is:

"Whether pendency of a case before a Court under Section 34 of the Arbitration and Conciliation Act, 1996 can be termed to be 'dispute in existence' for the purpose of sub-Section (6) of Section 5 of the I&B Code."

The Appellate Tribunal held as follows:

It is true that under Section 36 of the Arbitration and Conciliation Act, 1996, an Arbitral Award is executable as a decree. It can be enforced only after the time for filing the application under Section 34 has expired and/or, if no application is made or such application having been made has been rejected. Therefore, for the purpose of Arbitration and Conciliation Act, 1996, an Arbitral Award reaches its finality after expiry of enforcement time or if the application under Section 34 is filed and rejected. However, for the purpose of I&B Code no reliance can be placed on Section 34 of the Arbitration and Conciliation Act, 1996, for the reasons stated below.

The I&B Code, being a complete code will prevail over all other Acts including Arbitration and Conciliation Act, 1996. As per Section 238, provision of I&B Code is to override other laws, including Arbitration and Conciliation Act, 1996. Therefore, the provision under the I&B Code with regard to finality of an Arbitral Award for initiation of Corporate Insolvency Resolution Process will prevail over the provisions of the Arbitration and Conciliation Act, 1996.

For the purpose of Section 9 of the I&B Code, the application to be preferred under Form-5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as "Rules, 2016") as per which, the order passed by Arbitral panel/Arbitral Tribunal has been treated to be one of the documents/records and evidence of default, as apparent from Part V of Form 5.

The aforesaid provisions made in Form 5 if read with sub-Section (6) of Section 5 and Section 9 of the I&B Code make it clear that while pendency of the suit or Arbitral Proceeding has been termed to be an 'existence of dispute', an order of a Court, Tribunal or Arbitral Panel adjudicating on the default (commonly known as Award), has been treated to be a record of Operational Debt.

In view of the aforesaid provisions of law and mandate of I&B Code, we hold that no person can take advantage of pendency of a case under Section 34 of the Arbitration and Conciliation Act, 1996 to stall Corporate Insolvency Resolution Process under Section 9 of the I&B Code.

Case Review: Order dated 29th August, 2017 passed by the NCLT, Hyderabad Bench in Company Petition (IB) No. 100/9/HDB/2017), upheld.

Disciplinary Case

Shri ABC vs. CA. XYZ

Facts of the case:

A Complaint in Form I dated 22nd October, 2010 was received from Serious Fraud Investigation Office, Ministry of Corporate Affairs, New Delhi (hereinafter referred to as the "Complainant"), against CA. XYZ (hereinafter referred to as the "Respondent"). The charges alleged in the Complaint are as under:

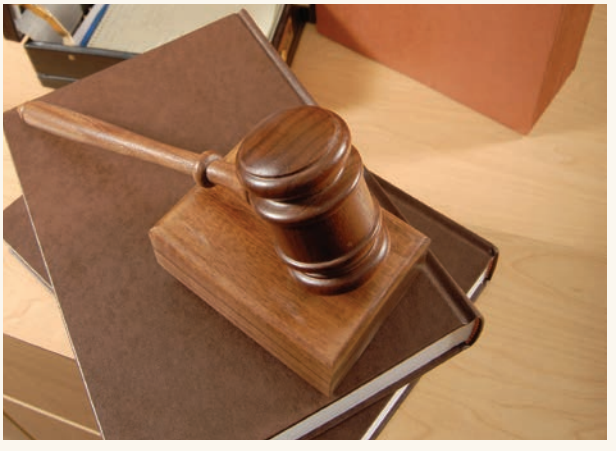
- An investigation into the affairs of M/s. XXX Limited (hereinafter referred to as "Company") was conducted under Section 235 of the Companies Act, 1956. During the investigation of the said Company, it was revealed that the Balance Sheet and the Audited Accounts of the Company from 2002-2003 to 2005-2006 under the heading unsecured loan, had shown a sum of ₹53.44 lakh as prior period adjustment from one Shri SSS during all these years. For the period ending on 31.03.2004, the Respondent, being the auditor had stated that the Company had not accepted any deposits from the public. During the process of investigation, Inspector had recorded the statement of Shri SSS on 14.07.2009 during which he was asked whether he had given any unsecured loan to the Company during the period 2002-2003 to 2005-2006. He stated on oath in his recorded statement that he never gave any loan to any Company of the XXX Group including this Company during the period 2002-2003 to 2005-2006 which is mentioned in the Balance Sheet of M/s. XXX Limited.

Legal Update

- The Respondent was appointed as statutory auditor of the Company for the year 2005-2006. He was examined under oath and asked to produce the copies of working papers, trial balance, certificate of confirmation obtained from the management with respect to loan and advance, sundry debtors, sundry creditors and verification of fixed assets of the relevant Company which he failed to produce. He has, however, certified that all records given to him show a true and fair view of the state of the affairs of the Company. On further examination, he stated that all the working papers have been lost while shifting his residence.

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

- The Committee noted that in the instant case the Complainant has raised allegations against the Respondent stating that the Balance Sheet and the Audited Accounts of the Company from 2002-2003 to 2005-2006 under the heading unsecured loan, had shown a sum of ₹53.44 lakh as prior period adjustment from one Shri SSS during all these years whereas Shri SSS stated on oath in his recorded statement that he never gave any loan to any Company of the XXX Group including this Company during the said period. Further, it has been alleged that he has certified that all records given to him show a true and fair view of the state of affairs of the Company but when examined on oath and asked to produce the copies of working papers, trial balance, certificate of confirmation obtained from the management with respect to loan and advance, sundry debtors, sundry creditors and verification of fixed assets of the relevant Company, he failed to produce the same.



- The Committee noted that the charge in the instant case is with respect to the Company named M/s. XXX Limited for the F.Y. 2005-2006 for which the Respondent was the statutory auditor. As regards the first charge, the Committee noted that the audited accounts of the Company for the year ended 2004-05 and 2005-06 show an amount of ₹53.44 lakh as prior period adjustment from Shri SSS. As brought out by the Complainant, Shri SSS on oath in his recorded statement has stated that that he never gave any loan to any of the Companies of the XXX Group including this Company during the period 2002-2003 to 2005-2006. The Committee further noted that the said Shri SSS was being summoned to appear before the Committee for deposition as witness and he was present as well at the time of the hearing. The said witness deposed before the Committee that the matter related to the instant case is old and pertains to the year 1996 and it so happened that he has sold some land to the XXX group and during the course of such sale some commission had remained due from the said group which was never paid to him. He has never given any loan to any of the Companies of the said group ever.
- The Committee noted that the audited accounts of the Company for the year ended 2004-05 and 2005-06 show an amount of ₹53.44 lakh as prior period adjustment from Shri SSS. The said amount is mentioned as an item of prior period adjustment amounts to ₹53.44 lacs which constitutes 58.02% of the total unsecured funds and 55.03% of the total liabilities of the Company for the said year which itself speaks of its materiality with respect to the Financial Statement in question. The Respondent being the statutory auditor of the Company for the said year was statutorily required to determine and consider the materiality of the said item for the purpose of audit and reporting. The Respondent not only failed to comment upon the same but also failed to examine evidence supporting the amount disclosed in the Financial Statements. The Committee noted that although he has

given a qualified audit report to the extent that details regarding confirmation of balances of creditors, debtors, unsecured loans, loans and advances were not provided by the management but the same did not suffice the need of precise expression as regard the true and fair view of the financials in light of the circumstances prevalent whereby the details and confirmation of balances for an amount constituting 58.02% of the total unsecured funds and 55.03% of the total liabilities of the Company nomenclatured as prior period adjustment from Shri SSS could not be provided by the management. In light of the same, the Committee is of the considered view that the Respondent being the auditor has not only failed to exercise due diligence and also failed to gather sufficient information to warrant an expression of opinion and also failed to invite attention to any material departure from the generally accepted procedure of audit applicable to the circumstances.

The Committee opined that the Respondent is Guilty of Professional Misconduct falling within the meaning of Clauses (7), (8) and (9) of Part I of the Second Schedule to the Chartered Accountants Act, 1949 [as amended by the Chartered Accountants (Amendment) Act, 2006]. Thereafter, Committee afforded an opportunity of hearing to the Respondent and noted at the time of hearing that the Respondent has given a qualified audit report to the extent that details regarding confirmation of balances of creditors, debtors, unsecured loans, loans and advances were not provided by the management but the same did not suffice the need of precise expression as regard the true and fair view of the financials were concerned in light of the circumstances prevalent whereby the details and confirmation of balances for an amount constituting 58.02% of the total unsecured funds and 55.03% of the total liabilities of the Company nomenclatured as 'Prior Period Adjustment' from Shri SSS could not be provided by the management.

The Committee, keeping the material on record, is of the view that since the balance was continuing from the previous year and the Respondent had relied on the previous year's audit reports, the professional misconduct on the part of the Respondent does not qualify for a severe sentence and ends of justice shall be met if minimum punishment is awarded to the Respondent. Accordingly, the Committee ordered for reprimand of the Respondent. ■