Legal Decisions[1]

Income Tax

LD/66/157

The Director, Prasar Bharti
vs.
Commissioner of Income Tax
03rd April, 2018

Commission payment by Prasar Bharti to advertising agencies are liable for TDS under Section 194H; Default proceedings under Section 201(1) and 201(1A) upheld.

The assessee functions under the Ministry of Information and Broadcasting, Government of India and is engaged in the running of the TV channel called "Doordarshan". The assessee has been regularly telecasting advertisements of several consumer companies. With a view to have a better regulation of the practice of advertising and to secure the best advertising services for the advertisers, the assessee entered into an agreement with several advertising agencies.

In terms of the agreement, the advertising agency (hereinafter referred to as "the Agency") was required to make an application to the assessee to get the "accredited status" for their Agency so as to enable them to do business with the assessee of telecasting the advertisements of several consumer products manufactured by several companies on the assessee's doordarshan TV Channel. The agreement, *inter alia*, provided that the assessee would pay 15% by way of commission to the Agency. The Agency was to retain the commission/remuneration earned and not to part the same either directly or indirectly with any other person, advertiser or representative of any advertiser for whom it may be acting or has acted as an advertising agency. The agreement also provided the manner, mode and the time within which the payment was to be made by the Agency to the assessee. The failure to make the payment was to result in losing the accredited status by the Agency. The Agency was to give minimum annual business of ₹ 6 lakhs to the assessee in a financial year failing which their accredited status was liable to be withdrawn.

For AYs 2002-03 and 2003-04, the assessee paid a sum of ₹2.56 crore and ₹2.29 crore respectively towards commission to various accredited Agencies, in terms of the aforesaid agreement. The AO held that the assessee committed default for non-deduction of tax at source thereby attracting the provisions of Section 201(1) of the Act. The CIT(A) ruled in favour of Revenue, however the ITAT ruled in favour of assessee. Further the order of ITAT was reversed by High Court, aggrieved by which the assessee approached the Supreme Court.

Referring to the terms of the advertising agreements with Agencies and referring to the provision under Section 194H, Supreme Court rejected assessee's argument that relationship between the assessee and the accredited Agencies was not that of principal and agent but it was in the nature of principal-to-principal.

Supreme Court observed that the terms of the agreement indicate that both the parties intended that the amount paid by the assessee to the agencies should be paid by way of "commission" and it was for this reason, the parties used the expression "commission" in the agreement. Supreme Court further observed the transaction in question did not show that the relationship between the assessee and the accredited agencies was principal to principal rather it was principal and agent. The payment of 15% was being made by the assessee to the agencies after collecting money from them and it was for securing more advertisements for them and to earn more business from the advertisement agencies. Supreme Court observed that the definition of expression "commission" in the Explanation appended to Section 194H was an inclusive definition giving wide meaning to the expression "commission", the transaction in question did fall under the definition of expression "commission".

Ruling in favour of Revenue, Supreme Court concluded that the payment in question was in the nature of "commission" and thus the AO rightly invoked Section 201 against the assessee.

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LD/66/158

M/s Regen Powertech Private Limited
vs.
The Central Board of Direct Taxes
28th March, 2018

High Court condones 37 days delay in filing income tax return for AY 2014-15 owing to the delay in carrying out tax audit

The assessee had filed its return of income for AY 2014-15 on January 1, 2015, the due date of which was 30/11/2014, due to certain reasons beyond the control of the assessee. During the relevant AY 14-15, the assessee had transferred its Operating & Maintenance (O&M) business division on a going concern basis as a slump sale to its wholly owned subsidiary company for a consideration of ₹310 Cr. The tax auditors of the assessee, S. R. Batliboi & Associates, had certain reservations on the valuation of the aforesaid business transfer and therefore on the last moment i.e. on 29/11/2014, the tax auditors orally communicated their unwillingness to complete the audit and to issue a Tax

[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

Audit Report before the due date. Thus, the assessee was left with no other alternative, but to look for an alternative auditor, after getting written communication from S.R. Batliboi & Associates. The assessee received NoC from S. R. Batliboi on 15/12/2014 and the new auditor completed audit work and issued tax audit report on 29/12/2014 based on which the assessee uploaded its return on 01/01/2015.

The assessee in this return filed inadvertently did not claim exemption under Section 47(iv) for transfer of business to wholly owned subsidiary. However, since the original return was not filed within time, no revised return could be filed, and thus assessee made an application to CBDT for condonation of delay of 37 days. The CBDT had refused to condone the delay of 37 days in filing return of income on the ground that the assessee has not been able to establish that the work of the tax audit got delayed due to the professional misconduct on the part of the auditor and the assessee could have still taken a contrary view to tax audit report and filed its return. Aggrieved, the assessee filed Writ Petition before the High Court.

High Court noted that assessee company could not be blamed for the delay in carrying out its audit, as the same was beyond its control and due to which it could not file its Return of Income. High Court noted that by delaying the submission of the Return of Income, the assessee did not stand to benefit in any manner whatsoever. High Court remarked that when the assessee had satisfactorily explained the reasons for the delay in filing the Return of Income, the approach of the CBDT should have been justice oriented and that the delay of 37 days in filing the Return of Income should not defeat the claim of the assessee.

High Court thus ruled in favour of assessee and condoned the delay.

LD/66/159

Kalanithi Maran

vs.

Union of India

28th March, 2018

Non-executive Chairman not a principal officer so as to be prosecuted for TDS default of the company

The assessee was a Non-Executive Chairman of the Board of Directors of Spice Jet Limited. The assessee is a resident of Chennai and is neither receiving any remuneration nor any sitting fees from the company. The assessee is full time Executive Chairman of Sun TV Network Ltd., which is a public limited company, from which he draws remuneration as per the provisions of the Companies Act.

For a TDS default of Spice Jet for AY 2014-15, the AO passed an order under Section 2(35) dated 03/11/2014 treating assessee as the Principal Officer of the Company. Resultantly, the AO also held that the assessee was liable for prosecution under Section 276B of the Income Tax Act. Aggrieved, assessee filed a writ petition before Madras High Court.

With respect to the jurisdiction of the matter, High Court noted that though the relevant tax authority is at Delhi, it is clear that part of cause of action had arisen at Chennai where assessee is located. High Court observed that as per Article 226(2) of the Constitution of India, the writ petition is maintainable before a High Court within which the cause of action wholly or in part arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

High Court observed that the assessee is not involved in the day-to-day affairs of the company operating from Delhi and that he is not drawing any salary from the company and that he is not an employee of the company. Further the assessee is not connected with the management and not involved in the decision making day-to-day affairs of the company. High Court stated that merely because the petitioner is the Non-Executive Chairman, it cannot be stated that he is in charge of the day-to-day affairs, management and administration of the company.

High Court observed that under Section 2(35), AO can serve notice only to persons who are connected with the management or administration of the company to treat them as Principal Officer. Further it was also stated by the Managing Director of Spice Jet that the assessee is only a Non-Executive Director in the company, who is based at Chennai and is not involved with the day-to-day management of the company and has not made any visits to the company till date as he does not draw any salary or remuneration from the company and attends the Board Meetings only in the Non- Executive capacity, for which, he does not even get any sitting fees. As per High Court, unless the AO makes out a prima facie case against the assessee of his liability and obligation as Principal Officer in the day-to-day affairs of the company, he cannot be prosecuted under Section 278B of the Income Tax Act.

High Court thus ruled in favour of assessee and quashed the order passed under Section 2(35).

LD/66/160

Academy of Medical Sciences

vs.

Commissioner of Income Tax

17th March, 2018

Section 40(a)(ia) disallowance for TDS default on lease rent paid/payable by assessee confirmed since there was no tax payment by payee due to losses at his end

The assessee is an educational institution. The assessee credited lease rent to one company but no actual payment was made. The assessee also did not deduct tax at source for AY 2007-08 to 2009-10.

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The AO made the disallowances under Section 40(a)(ia) and treated the assessee as assessee-in-default. Before High Court, the assessee contended that proviso under Section 40(a)(ia) and Section 201(1) was curative in nature as it was with the intention of alleviating the hardship, in cases where the resident-receiver of amounts, paid tax on such receipts, even when the payer has failed to deduct tax at source.

As per the first proviso to Section 201(1) when a resident, who receives any sum from an assessee, has furnished his return of income under Section 139(1) and taken into account such sum for computing income, as also paid the tax due on the income declared by him in such return of income; then assessee would stand absolved from being treated as an assessee in default, despite the fact that the assessee had failed to deduct at source, the whole or any part of the tax in accordance with the provisions of Chapter-XVII-B. Thus when the assessee failed to deduct tax on any sum paid to receiver, he would still not be considered as an assessee in default if the receiver has paid tax on that income/sum.

As per High Court, to avail the benefit of provisos under Section 40(a)(ia) and Section 201(1), there should be payment of tax on such income also. In the present case, the resident-receiver to whom the assessee had credited the lease rent had filed its return belatedly and not paid any tax due on the income declared due to losses at its end. Thus as per High Court, there cannot be any claim raised by the assessee in default to absolve him from the consequences flowing from Section 201(1) and Section40(a)(ia) in such case.

High Court rejected the assessee's contention that the term 'paid' means an amount paid or actually incurred and thus, even if there is no actual payment due to a loss return, it has to be liberally construed on the ground that definition clause is with reference to 'income from profits and gains of business' with reference to the method of accounting.

High Court thus ruled in favour of Revenue.

LD/66/161

The Commissioner of Income Tax
vs.
Tata Ceramics Limited
8th March, 2018

Details available in the books of accounts or balance sheet or profit and loss account cannot absolve the assessee from his disclosure obligation under Section 147.

The assessee filed a return of income for disclosing a total income of ₹3.14 lakhs, which was also subjected to regular assessment. However, after four years but within six years, AO initiated re-assessment proceedings under Section 147 on grounds of escapement of income alleging non-disclosure of full and true material facts necessary for assessment. As per the AO, interest income of ₹38.35 lakhs was revealed later, which was taxed on re-assessment and was never disclosed by the assessee. However the CIT(A) found that the balance sheet had already mentioned such 'interest income' and the assessee had nothing left to be disclosed, and thus there could not be any allegation of non-disclosure of full and material facts. ITAT also upheld the CIT(A)'s order, aggrieved by which the Revenue approached the High Court.

Before High Court, assessee argued that the reason for reassessment was the decision of the Supreme Court in case of *Tuticorin Alkali Chemicals and Fertilisers Ltd.* [(1997) 227 ITR 172 (SC)] and placing reliance on Supreme Court ruling in *Simplex Concrete Piles (India) Ltd.* [(2013) 11 SCC 373], assessee stated that a subsequent decision of the Supreme Court could not lead to a re-assessment proceedings especially on the allegation of non-disclosure of full and material facts.

High Court observed that there was nothing to indicate that the AO was apprised of the fact of there being interest income in addition to that disclosed in the return. The contentions raised were only with respect to the income returned and though the very same contentions were available against the interest income that was not disclosed in the return, there is no reference made to that by the Accounts Officer of the assessee.

The assessee raised a contention that the interest income returned was so returned only on a misconception of law. The deduction claimed of the interest income returned, from the computation of total income was rejected in the regular assessment. The interest income was determined as taxable income. This inference/reasoning applied to the further interest income available in the books of accounts but not disclosed in the return. If the said income had been pointed out to the A.O. then the inference would have been the same in regular assessment. Thus, Explanation-I to Section 147 squarely applied.

Non-disclosure of further income received as interest, available in the profit and loss account but not disclosed in the return, was a non-disclosure of material fact. High Court stated that assessee could not have claimed that the AO ought to have employed due diligence and found out further interest income from bank deposits, which were not returned, but available in the books of accounts.

High Court rejected assessee's another contention that the reassessment was made based on Supreme Court ruling in *Tuticorin Alkalies & Fertilizers Ltd.* Based on chronology of events, High Court observed that this Supreme Court decision was not the cause for the impugned reopening of assessment. Only in assessment order, the AO had relied on this decision of the Supreme Court, to further sustain the re-assessment of undisclosed income to tax. After the regular assessment, the AO saw from the P&L account that there was further income

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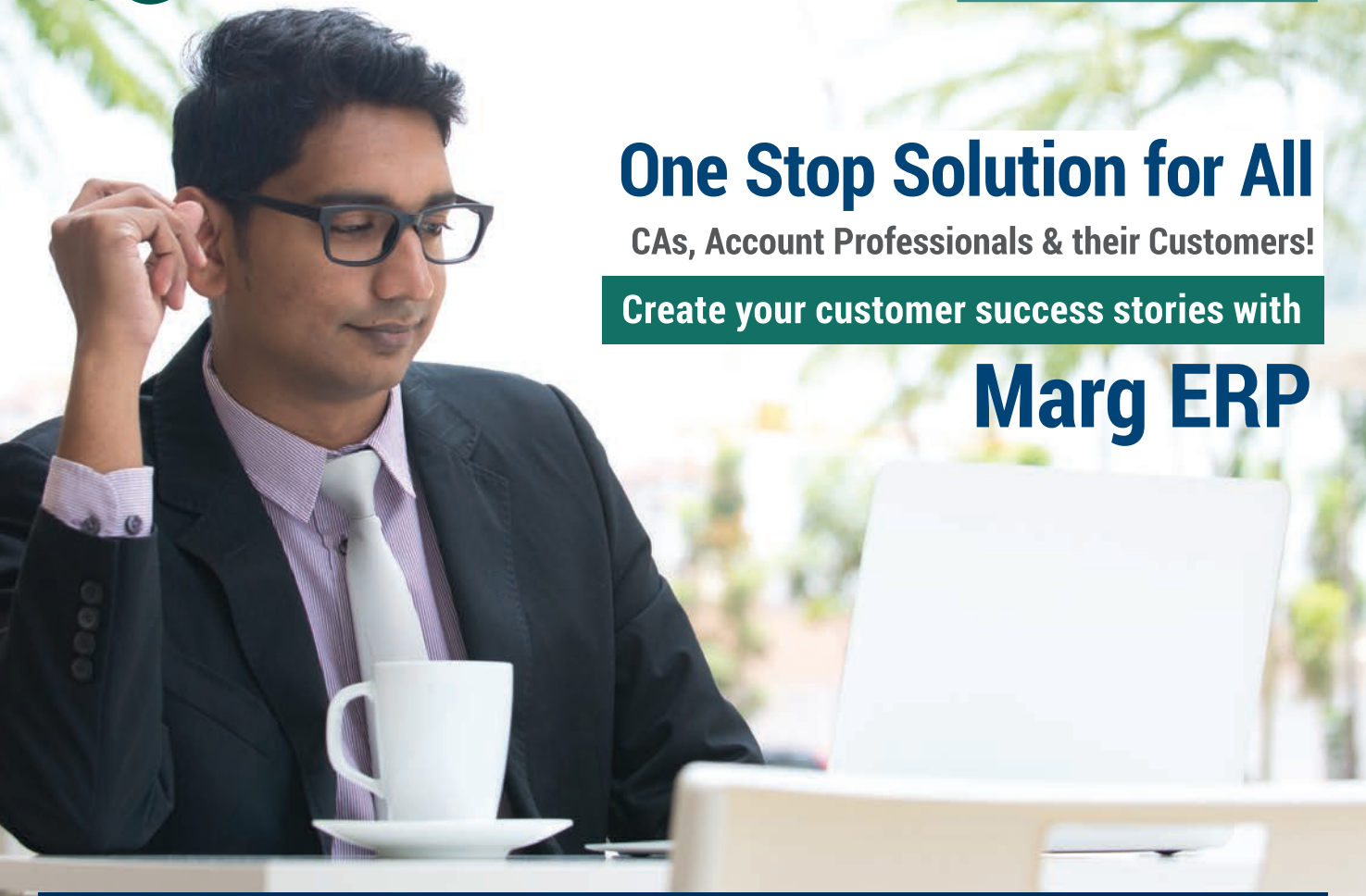

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by way of interest from deposits, which had not been disclosed in the returns filed by the assessee, which was the sole reason for re-opening of assessment.

High Court thus ruled in favour of Revenue.

LD/66/162

The Commissioner of Income Tax
vs.
Cochin Shipyard Limited
1st March, 2018

Set-off of unabsorbed depreciation is allowable against other heads of income also for AY 1997-98, however, carried forward unabsorbed depreciation can be set off only against 'business income' of AY 1998-99.

The issue revolves around the setting-off of unabsorbed depreciation against income other than the profits and gains arising out of business or profession; here, interest income from deposits in banks. For AYs 1997-98 and 1998-99, assessee claimed setting-off of unabsorbed depreciation first against the profits and gains arising out of the business, and then against income from other sources, i.e., interest income from bank deposits. In revision assessment proceedings under Section 263, CIT was of the view that the set-off could not be claimed in view of the amendment to Section 32 vide Finance (No.) Act, 1996. The CIT declined the benefit of set-off of unabsorbed depreciation allowance as against the income from other sources. ITAT ruled in favour of assessee, aggrieved by which the Revenue filed an appeal before Kerala High Court.

High Court observed that the amendment to Section 32 was effective from FY 96-97 and that there could be no dispute that the assessee could set-off unabsorbed depreciation, first against the profits and gains arising from business or profession and then against the income from other sources. Since the amendment was effective from 01.04.1997, the assessee was entitled to set off against the income from other sources also.

From the amendment in Finance Bill 1996, High Court observed that it was evident that the claim of set-off as against the income from other sources was available for that year, and for the subsequent 8 years, it could be claimed only as against profits and gains arising from business or profession. The amendment of April 1, 1997 enabled any unabsorbed depreciation carried over from the previous years to be first adjusted against the profits and gains from business or profession, then against income from other sources (for that year alone) and any amounts remaining still, to be adjusted against the profits and gains arising from the business or profession for a further period of 8 years. Further, since there was a variance in the budget speech and actual provisions contained in Finance bill, High Court opined that whatever be the intention expressed in the Budget Speech, the law passed by the Parliament alone was relevant and external aid needs to be resorted to only if there was any ambiguity in the provision incorporated. Thus, for the AY 1997-98, the claim for set-off of unabsorbed depreciation was allowable against the income from other sources.

High Court thus held that for the AY 1997-98, unabsorbed depreciation could be set-off against the income from any head, and for AY 1998-99, any unabsorbed depreciation could be set-off only against the business income.

Transfer Pricing

LD/66/163

Honda Motor Co. Limited, Japan
vs.
Asst. Director of Income Tax, Noida
14th March, 2018

Reassessment notice cannot be sustained based on allegation of a Permanent Establishment once arms length procedure has been already followed.

A survey conducted on the premises of the Indian subsidiary revealed that assessees have income chargeable to tax in India and the same had escaped assessment. As per the Revenue, survey clearly indicated that profits were required to be attributed to the assessee's PE in India in terms of the functions performed, risks assumed and assets deployed by the permanent establishment. As per the assessees, the transactions in respect of which it was alleged that there has been an escapement of income were already considered by the Transfer Pricing Officer (TPO) and found to be at arm's length basis, and thus re-assessment was not warranted.

In its writ petition before Allahabad High Court, the High Court noted that assessee had business connection in India and therefore was liable to be taxed in India. High Court noted that TPO of the Indian subsidiary had already examined the transactions and found the same to be meeting the arm's length principle. However, ruling in favour of Revenue, High Court held that once the AO is satisfied that a permanent establishment of the assessee exists in India and business is being conducted from this permanent establishment, the attribution of profits is a necessary consequence. The order of TPO will not come in the way for the reason that the TPO's order is in relation to the transactions between a subsidiary company and the assessee. Once a permanent establishment is established, the assessee becomes liable to be taxed in India on so much of its business profits as is attributable to the permanent establishment in India. The order of the TPO is in relation with the subsidiary company and not in relation with the permanent establishment of the assessee, and thus the order of the TPO was not binding at the stage of issuance of notice.

Aggrieved, assessee filed an appeal before Supreme Court.

Supreme Court referred coordinate bench ruling in

Assistant Director of Income Tax-I, New Delhi vs. M/s. E-Funds IT Solution Inc., [Civil Appeal NO.6082 of 2015] wherein it had held that once arm's length principle has been satisfied, there can be no further profit attributable to a person even if it has a Permanent Establishment in India. In the instant case, Supreme Court observed that since the impugned notice for the reassessment is based only on the allegation that the appellant(s) has permanent establishment in India, the notice cannot be sustained once arm's length price procedure has been followed.

Supreme Court thus ruled in favour of assessee.

LD/66/164

Prin. Commissioner of Income Tax

vs.

International Metro Civil Contractors

07th March, 2018

TPO's disallowance of overheads allocated by partners of the Joint Venture, to the Joint Venture, quashed; No comparables were identified by TPO to justify that the overhead allocation was excessive.

During the course of the transfer pricing proceedings, TPO noted that there was an agreement between the assessee and the 5 Joint Ventures (JV partners). This agreement *inter-alia* permitted the JV partners to allocate its head office overhead expenses to the assessee to the extent of 8.5% of the turnover of the assessee. The TPO disallowed the same on the ground that other expenses incurred by the JV partners have been debited in the books of the assessee on being separately computed. Therefore, there was no need to allocate overhead office expenses of JV partners on an adhoc basis to the assessee to the extent of 8.5% of the assessee's turnover.

The assessment order was completed on the basis of the transfer pricing adjustment made in TPO's order by disallowing the above expenditure resulting in addition of ₹19.45 lakhs.

CIT(A) held that the TPO had not brought anything on record to indicate that debiting of overhead expenses were excessive and that details of overhead expenses were supported by the auditor's certificate of the JV partners and along with the detailed working.

ITAT upheld the CIT(A)'s conclusion. ITAT had noted that assessee had furnished certificate from JVs' auditors confirming overhead charging rate and its apportionment to the assessee's operations. Aggrieved, Revenue filed an appeal before Bombay High Court.

High Court observed that the issue was a question

of fact and that the Revenue had failed to show that the finding of fact were perverse in any manner. Thus, High Court held that no substantial question of law arose, and dismissed this ground of the Revenue.

With respect to the issue of whether the Tribunal was justified in giving relief for AY 2006-07 relying on findings of AY 2002-03 to 2005-06 not considering the fact that absence of inquiry in earlier years by AO would not preclude AO to investigate the matter in following years, High Court observed that reliance upon the earlier assessment orders was only in support of the fact that in identical factual situation, the TPO did not vary the ALP in respect of the allocation of overhead office expenses to the expenditure of the respective JV partners allocated to the assessee with a cap of 8.5% of its turnover. The moot point remained that there was no justification for enhancement of the ALP by disallowing allocation of overhead office expenses of the JV partners to assessee.

Thus, High Court held that there was no substantial question of law and thus ruled in favour of assessee.

International Taxation

LD/66/165

SeaBird Exploration FZ LLC

Vessels engaged in seismic surveys on the high seas, in connection with the exploration of mineral oil/natural resources, constitutes fixed place PE under the India-UAE tax treaty

Background and Facts of the case

The Applicant (a UAE tax resident) is engaged in the business of rendering geophysical services to the oil and gas exploration industry. Its core business activity involves 4C-3D seismic data acquisition and processing, which are aimed at increasing the exploration success of its oil and gas clients and maximising their production.

In India, it is providing these services to ONGC and other oil companies. It is in this connection that it had entered into a contract with ONGC for 4C-3D seismic data acquisition, processing and interpretation in Mumbai High Field. Its activities are therefore intrinsically connected with oil and mineral exploration, and which ultimately go to assist in oil and mineral extraction, and the same are carried out through its survey and seismic vessels. As per para B of Appendix A of Annexure II of the Agreement it may offer any number of 4C-3D vessels equipped for undertaking the survey and other utility vessels for the purpose of evaluation. The subsequent paras C to I give details of the various other equipments and instruments provided with the vessels for the purpose of the surveys, such as Gun control system, seismic nodes, recording instruments, DGPS etc.

As far as question that is whether the consideration received by the Applicant from ONGC can be categorised as Fees for Technical Services or Royalty respectively, the Revenue accepted that consideration cannot be considered as Fees for Technical Services or Royalty. Hence, only question to be answered is whether the Applicant could be said to have a PE in India, and if so, whether its income would be taxable in India.

Issue/questions

Whether on the facts and in law, can the Applicant be considered as having a Permanent Establishment ('PE') in India under Article 5 of the Tax Treaty in respect of its contract with ONGC? And if the answer to question is not in the affirmative, can it be said that the Applicant is not taxable in India on income earned from its contract with ONGC.

Held

AAR ruled that applicant (a UAE tax resident) constitutes a fixed place PE in India under Article 5(1) of India-UAE DTAA in the form of its vessels engaged in seismic surveys on the High seas in connection with the exploration of mineral oil/natural resources under its agreement with ONGC.

AAR held that vessels used by applicant have passed all 3 tests for constituting PE under Article 5(1) namely that there was permanence of duration to the extent that is required by the business, there was a fixed place which are the vessels in the High Seas in a definite and composite geographical area and from which its business of survey in connection with exploration is carried out and lastly this place was at the disposal of applicant.

AAR rejected the applicant's contention that it cannot be considered as having a PE since it is covered by the specific clause under Article 5(2)(i). Article 5(2)(i) covers the furnishing of services including consultancy services by an enterprise of a Contracting State through employees or other personnel in the other Contracting State, provided that such activities continue for the same project or connected project for a period or periods aggregating more than 9 months within any twelve-month period whereas applicant's period of operation was only 113 days.

AAR opined that services of seismic surveys are conducted on the High seas through the seismic vessels. They are not carried on mainly by employees/personnel but primarily by the vessels and equipments mounted thereon and deployed in the ocean. Such are not the services contemplated under para 5(2)(i) of the India UAE DTAA.

AAR illustrated examples from India-USA, India-Netherlands, India-UK, India-Japan DTAAs wherein specific mention of certain time period has been made in respect of an installation or structure used for the exploration or exploitation of natural resources for constituting a PE, particularly refers to India-Singapore DTAA

which specifically provides that PE would be constituted if an enterprise provides services or facilities in that contracting state for a period of more than 183 days in any fiscal year in connection with the exploration, exploitation or extraction of mineral oils.

Absent any mention with regard to activities in connection with exploration or connected activities in Article 5 (2) of India-UAE DTAA, AAR held that there is no scope for getting into the debate of interplay between paras 1 and 2 of Article 5 of the India UAE DTAA, or to resolve any conflict therein since the services rendered by the Applicant are not covered by any of the sub-paras of para 2 of Article 5 or any other para.

AAP further ruled that income arising from PE shall be subject to tax as business income since the activities of the Applicant are in connection with exploration of mineral oils, the special provisions of Section 44BB apply, and the income of the Applicant would be computed as laid out therein.

LD/66/166

Godaddy.com LLC

vs.

ACIT

Delhi ITAT

Fees received for domain name registration are taxable as royalty under Section 9(1)(vi) of the Income Tax Act

The assessee, GoDaddy.com LLC, is a limited liability company located in the United States. It is engaged in the business of accredited domain name registrar authorised by Internet Corporation for Assigned Names and Numbers (ICANN). During the financial year 2012-13, the assessee declared income from web hosting services/on demand sale as income from royalty. However, the AO assessed it as fees for technical services (FTS). The assessee also had income from domain registration fees that were claimed to be not taxable in India. The AO taxed such income as royalty. Aggrieved, the assessee appealed before the Tribunal.

The assessee being non-resident in the United States had not claimed benefit under the provisions of India-United States tax treaty. Thus, taxability was to be decided under the provisions of Indian Income-tax Act, 1961. The assessee explained that domain name registration is the process of registering a domain name that identifies one or more IP address with a name that is easier to remember and use in URLs to identify particular web pages. The assessee pointed out that for providing a domain registration service, none of the assessee's employees visited India and all services were provided from outside India. Further, the assessee does not have any fixed business presence in India in the form of any branch/liaison office and the business operations are undertaken from outside India. Hence, it was claimed that the receipt in respect of domain name registration was not in the nature of royalty under Explanation 2 of Section 9(1)(vi) of the Indian Income-tax Act.

Issue

Whether fees received for domain name registration are taxable as royalty under Section 9(1)(vi) of the Income Tax Act.

Held

Tribunal analysed Explanation 2 to Section 9(1)(vi) which defines the term royalty to mean, inter alia, consideration for the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trademark or similar property; the use of any patent, invention, model, design, secret formula or process or trademark or similar property and also the consideration for rendering of any services in connection with the activities referred above. The Tribunal noted Revenue's contention that the domain name is an intangible asset that is similar to the trademark. Since the assessee is rendering services in connection with such domain name registration, it was claimed that the charges received would fall within the definition of royalty u/s. 9(1)(vi).

The Tribunal relied on the Indian Supreme Court's decision in the case of *Satyam Infoway Ltd.* wherein it was held that internet domain names are subject to the legal norms applicable to other intellectual properties, such as trademarks. The Tribunal observed that in that case, the Apex Court had held that the domain name is a valuable commercial right and it has all the characteristics of a trademark and, accordingly, it was held that the domain names are subject to legal norms applicable to trademark. The Tribunal also referred to the Bombay High Court's decision in the case of *Rediff Communications Ltd.* wherein it was held that domain names are of importance and can be a valuable corporate asset and such a domain name is more than an Internet address and is entitled to protection equal to a trademark. The Tribunal also discussed the Delhi High Court ruling in the case of *Tata Sons Limited* wherein it was held that domain names are entitled to protection as a trademark because they are more than an address. Thus, relying on these decisions, the Tribunal held that, *"the rendering of services for domain registration is rendering of services in connection with the use of an intangible property which is similar to trademark."* Thus, the Tribunal held that the charges received by the taxpayer for services rendered in respect of domain name were taxable as royalty within the meaning of clause (vi) read with clause (iii) of Explanation 2 to Section 9(1) of the Indian Income-tax Act.

Legal Update

Service Tax

LD/66/167

Sundaram Finance Ltd.

vs.

CCE&ST, LTU

16th November, 2017

When the assessee NBFC extended loans to its clients and sold the assets receivables to bank/trust for discounted price and simultaneously entered into an arrangement with such bank/trust for collecting the EMIs from clients as per EMI schedule and remitting the same to bank/trust, for which assessee received some fees, Tribunal held that such arrangements being on principal to principal basis cannot be regarded as 'business auxiliary services'

Facts:

The appellant, a non-banking financial company, is engaged in business of extending loans to various clients for purchase of vehicles etc., which are paid back on regular EMI basis. The appellant-assessee entered into an agreement with another person viz. "Trust/Special Purpose Vehicle (SPV)" to whom they have sold the receivables towards these loans extended to various clients. On sale of such future receivables, appellant received a discounted consideration when compared to actual receivables, which included interest. Simultaneously, they have entered into an agreement with the Trust/SPV which mandates the appellant-assessee to collect all these receivables on the fixed periodicity from the loan clients and deposit the same in return of the said consideration received on sale of receivables. For such operation of receiving EMI payments and remitting the same to SPV/Trust, the appellant-assessee is paid a consideration in percentage terms. This amount is named as "Securitisation Service Fee". The appellant also entered into similar agreement with ICICI Bank.

Revenue took a view that the activities of the Appellant are clearly incidental or auxiliary to the support service relating to billing, collection, recovery of cheque, remittance of amount and will be taxed under the head business auxiliary services. As regards transactions with ICICI Bank, the Revenue also contended that, the appellant are in fact service providers of services which are incidental or auxiliary to bill collection by depositing the cheques of the obligors with the ICICI bank as per the predetermined obligation for which they are showing very nominal amount as fee towards collection and deposit of receivables from the obligors into bank account and showing a substantial amount as profit on sale of receivables. This is nothing but a device arranged by the appellant-assessee to avoid tax liability.

Held:

Hon'ble Tribunal noted that the contractual arrangement between the appellant assessee and the Trust/SPV is on principal to principal basis and the obligation to collect the cheque and deposit as per the schedule of agreement is nothing but an obligation in pursuance of the main agreement of upfront sale of future receivables which would be recouped on regular basis later. Similarly, as regards transaction with ICICI Bank, Hon'ble Tribunal held that appellant assessee cannot be called as 'collection agent' of bank for providing business auxiliary services, as such collection agents are generally dealing an amount or instrument which is due to an institution from a third party for which the agent acts as a middleman. Tribunal noted that, in the present case, it clear that instrument or amount is intended and remitted to the appellant by way of cheque. The said amount has to be transmitted to ICICI bank as per the agreed schedule towards servicing of already obtained consideration by the appellant. Hence there is no tripartite arrangement. The role of the appellant is mainly with reference to discharging the obligation of servicing the amount already received. All these conditions are put by ICICI bank with reference to various loans extended to different identified obligors. This by itself does not make the appellant as a collection agent of the amount from the identified obligors to be paid to the ICICI bank. Tribunal also noted that even in case of non-collection of such amounts from obligors, the appellant has to discharge the amount due to ICICI bank, from their resources. This will only indicate that the transaction is a financial arrangement on principal to principal basis between the appellant and ICICI bank. The conditionalities of such transaction between the two principals will not determine and make one of the contracting party an agent of the other. Tribunal also held that the conditions of transactions and schedule of payment will not influence the nature of activity as agreed

upon between two contracting parties, hence there is no element of business auxiliary services in arrangement between appellant and the bank. Accordingly, Tribunal held that the cheque and other bills collected by the appellant are on their own account which are further passed on in terms of agreement with ICICI bank.

LD/66/168

CCE&ST

vs.

Analog Devices India Pvt Ltd.

13th November, 2017

Tribunal held that though the marketing support services are rendered to foreign holding company, in respect of buyers in India, since the benefit has accrued to such foreign company, the place of provision of service would be outside India and thus, such transactions would not be liable to service tax

Facts:

The respondent assessee is a subsidiary of Analog Devices Holding BV, Netherlands, which in turn is subsidiary of Analog Devices International. Respondent provided services of consulting engineers and marketing services, to its holding companies located abroad. Treating the same as export of services, respondent filed refund claim for unutilised cenvat credit in terms of Rule 5 of Cenvat Credit Rules, 2004, which was partly rejected by lower adjudicating authority and on appeal, allowed by first appellate authority. Aggrieved by the same, revenue filed present appeal alleging that services provided by respondent assessee are 'intermediary services', thereby, the place of provision cannot be regarded as outside India and conditions laid down in Rule 6A of Service Tax Rules, 1994 would not get fulfilled i.e. such services provided by assessee would not be regarded as 'export of services'.

Held:

Tribunal noted that the foreign holding company of the respondent assessee is located in Ireland i.e. outside India and is the sole recipient of services rendered by them and the respondent locate potential customers for the products of foreign company. Further, Tribunal observed that though the services are provided with respect to buyers in India, the benefit of the same accrued to the company located abroad and respondent assessee does not render any service to Indian customers and benefit is derived by foreign recipient only. Accordingly, Tribunal upheld order of first appellate authority that services rendered by respondent assessee are not intermediary services but correctly regarded as 'export of services' u/r 6A of STR, 1994 and dismissed revenue's appeal.

LD/66/169

Mumbai Police

vs.

CST

23rd March, 2018

The activity of deploying additional police force on payment basis to maintain public security and peace, being sovereign function, the police department, an agency of state government, cannot be regarded as "person" engaged in business of running security services.

Facts:

Appellant are providing security to banks, individuals, security for cricket matches, Mumbai port trust, Mazagaon dock, Tata Power, FCI and for other functions. Revenue contended that charges recovered by appellant for providing such security would be chargeable to service tax under category of 'security agency service'. While rebutting the same, appellant submitted that alleged service tax demand would not sustain for they being performing sovereign functions, as held in case of *Dy. Commissioner of Police, Jodhpur 2017 (48) STR 275 (Tri-Delhi)*.

Held:

While deciding the present case, Hon'ble Mumbai Tribunal observed that in *Dy. Commissioner of Police, Jodhpur (supra)*, as relied upon by appellant, the Hon'ble Delhi Tribunal, *inter alia*, noted that the term "business" connotes that it is an activity undertaken with the intent of earning profit, whereas the charges recovered by police are in the nature of cost recovery for the additional police force deployed on request for maintaining security and law and order. Further, as submitted by the police department that the deployment of additional police force at the request of banks and other institutions or other events has been done only for maintenance of law and in the absence of which, there could arise major security issues in relation to person or property. It was accordingly held that such activities undertaken by the police, for which charges have been recovered, cannot be held to be in the nature of business activity.

Further, Hon'ble Tribunal in *Dy. Commissioner of Police, Jodhpur (supra)*, also held that the fees/charges collected for deploying additional police force can be regarded as part of statutory functions, by observing that the police department has the mandatory duty to maintain public peace and order, which is in the nature of sovereign function and no charges are recoverable from the citizens for the same; though the police department has recovered fees for deploying additional police personnel on request, however, the statutory functions of the police of the State Govt. make it explicit

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that such activity, even at request of the other person, is to be carried out only for the purpose of public security or for the maintenance of public peace or order and the charge for deployment of such additional force is also prescribed by the statutory notification issued by the State Govt, thereby confirming that the activity of deploying police personnel on payment basis is to be considered as part of statutory function of the State Govt. and the fees recovered are to be considered as statutory. Consequently, the police department, which is an agency of the State Govt., cannot be considered to be a "person" engaged in the business of running security services. Thus, Tribunal set aside impugned demand by holding that present case is squarely covered by decision of *Dy. Commissioner of Police, Jodhpur (supra).*

Note:

In *M/s UP Police vs. CCE&ST*, similar decision has been given by Hon'ble Allahabad Tribunal that service tax demand on police department under category of 'security agency services' would not sustain for providing security is a statutory function.

Excise

LD/66/170

Commissioner of Central Excise
vs.
Advance Steel Tubes Limited
06th March, 2018

Assessee's accounting for duty paid under protest as expenditure in balance sheet does not give rise to presumption that same had been passed onto the buyer, and thus refund of excise duty cannot be restricted on grounds of unjust enrichment.

The assessee is engaged in the manufacturing of M. S. Tubes & Pipes (Black & Galvanised) classifiable under chapter subheading No. 7306.90 of Central Excise Act, 1985 and was availing Cenvat Credit Rules, 2001. On visit to assessee's factory, Revenue found variation in the finished goods vis-à-vis balance shown in RG-1. The stock of finished products viz. Zinc Ash was also found short. The stock of H. R. coils viz. inputs was found excess as compared to the stock register. Consequent to investigation, the assessee debited an amount of ₹15 lakhs and another sum of ₹3.75 lakhs under protest on account of the said discrepancies.

2 show cause notices were issued. The first notice adjudicated and a demand of ₹2,84,389/- was confirmed. A penalty of ₹1,00,000/- was also imposed. This amount was appropriated out of the sum of ₹15 lakhs deposited by the party under protest. The penalty of ₹1 lakh was deposited by the party by way of a challan separately. The appeal against adjudication order was dismissed by CESTAT, which was accepted by Revenue (Commissioner).

With respect to the second notice, a demand of ₹32.38 lakhs (approx.) was raised, and the matter was referred to Settlement Commission, who settled the additional duty liability of ₹5.55 lakhs (approx.), which was also appropriated from the amount which was deposited by the assessee under protest. Immunity from payment of penalty and interest was also granted by the Settlement Commission.

Since the matters relating to discrepancies were settled by the Settlement Commission for a total sum of ₹8.40 lakhs, the assessee filed a refund claim for ₹10.34 lakhs. The refund claim was rejected by the Adjudicating Authority by holding that the assessee had accounted for the duty paid under protest as expenditure in the balance sheet and costing of the products were finalised by taking into account the cost of raw materials along with manufacturing and other expenses and hence, the presumption was that the same has been passed on to the buyer in the form of incurred/enhanced costing for current and further supplies of the party's products.

Being aggrieved thereby, assessee approached the CESTAT.

There was a difference of opinion between the 2 CESTAT Members, due to which the matter was referred to the third member. The third member held that this was not the case of the unjust enrichment because the duty was not paid at the time of clearance of goods, but subsequently during the course of investigation for the past period. The goods had already been cleared earlier. The third member also emphasised that the confirmed duty was adjusted from the pre-deposit made at the time of investigation by treating it as a sanctioned refund. Insofar as the sum of ₹8.40 lakhs was concerned, it was held that the same had been taken without considering the cost structure of the goods and despite that, the Revenue was invoking the bar of unjust enrichment to the balance amount for which refund had been claimed, which was not tenable.

Aggrieved by this order, Revenue approached the High Court. High Court affirmed the order of the third member and thus ruled in favour of the assessee.

Disciplinary Case

Summary of a disciplinary case, in the matter of:

ABC vs. CA. XYZ

Facts of the case

A Complaint in Form I dated 15th June, 2009 was received from ABC, Ex-Secretary to M/s XXX Co-operative Housing Society Ltd. (hereinafter referred to as the "Complainant"), against CA. XYZ (hereinafter referred to as the "Respondent"). The charges alleged in the Complaint are as under:

- The Respondent has cheated different Banks and private financers by taking loan against one flat in the Co-operative Housing Society Ltd. (hereinafter referred to as the "Society").
- The said loans were taken by the Respondent on the basis of bogus share certificates and by forging the signatures without the permission of the Society.

The matter was enquired into by the Board of Discipline and it, *inter-alia*, gave its findings as under:

- The Board, from the documents on record and oral submissions made by the Complainant, noted that the Respondent availed loans from different banks on the security of the same flat.
- The Board further noted that no NOC had been taken from the Complainant being the Ex- Secretary of the Society by the bank(s). The bank(s) had sanctioned loan to the Respondent based on the illegal NOC and documents with forged signatures provided by the Respondent.
- The Board also noted that there is a letter dated XXXX by Dena Bank addressed to the Senior Inspector of Police, XXXX Police Station, Mumbai that the bank on receipt of application along with details submitted with the application like the Share Certificate standing transferred to the name of the Respondent, the agreement of sale between the seller and the Respondent dated 23rd July, 1990 and also the visit report by the then Manager with a condition that Mr. KLM would deposit the original title deeds of the said flat with the bank, sanctioned the loan. When the said loan account was not operated regularly then the Officer visited the mortgaged flat and was shocked to learn that Satara Co-operative Bank Ltd. had put up their lock on the said flat with a notice.
- The Board also noted that several cases had been filed by the Complainant on behalf of the Society against the Respondent and his wife in various Courts which are still pending.
- The Board also took into account the fact that in spite of the service of the notice of hearing, the Respondent neither appeared before the Board nor submitted his Written Statement.

Thus, the Board observed that the conduct of the Respondent of forging the documents of the flat and availing of loans from various banks on the basis of the forged documents is unbecoming of a Chartered Accountant. A Chartered Accountant, as a professional, is expected to maintain high standards of integrity, not only at the professional level, but also at the personal level. The said act of the Respondent gives a wrong message to the Society at large and thus rightful action needs to be taken to set the right precedents. Accordingly, the Board held the Respondent guilty of 'Other Misconduct' falling within the meaning of Clause (2) of Part IV of First Schedule to the Chartered Accountants Act, 1949. Thereafter, Board afforded an opportunity of hearing to the Respondent to which Respondent neither appeared personally nor submitted any written representation. The Board took a serious view of the said fact and also noted that the Respondent is not traceable at the address available in the Institute's records. The Board further noted that the conduct of Respondent denotes his scant respect for the Rules and Regulations of the Institute and accordingly ordered that the name of the Respondent be removed from the Register of Members for a period of 3 (three) months which shall run concurrently with the punishment awarded to him in another case. ■