Legal Decisions[1]

Income Tax

LD/66/171

Kaushalya Devi

vs.

Commissioner of Income Tax

20th April, 2018

Liquidated damages paid by the assessee for cancelling earlier agreement to sell immovable property are allowed as deduction, as expenditure in connection with transfer under Section 48.

The assessee in her return of income for the AY 1994-95 declared long-term capital gains from the sale of immovable property. The property was sold by a tripartite agreement to sell dated 4th November, 1993 amongst the purchaser who had paid ₹45 lakhs to the tenant to vacate the property and transfer possession, and ₹55 lakhs to the assessee for transfer of title and ownership rights in the property. Earlier on 10/04/1989, the assessee had entered into an agreement to sell the same property to one Anil Sharma for ₹15 lakhs and had also received ₹7.5 lakhs as advance. Subsequently, as per the agreement to sell, and mutual agreement, the assessee had paid ₹25 lakhs on 16/12/1993 to Anil Sharma for foregoing his right and claim under the agreement dated April 10/04/1989. Further, ₹7.5 lakhs which was received as advance by the assessee was also refunded by the final purchaser to Anil Sharma and had reduced it from payment of ₹55 lakhs to be paid to the assessee. Thus, the assessee had treated the payment of ₹25 lakhs to Anil Kumar Sharma as expenditure incurred wholly and exclusively in connection with transfer under Section 48 (i).

The Assessing Officer invoked Section 51 to tax ₹7.5 lakhs received from Anil Kumar Sharma and reduced it from the cost of acquisition. Further, the Assessing Officer held that ₹25 lakhs paid as liquidated damages cannot be allowed as a deduction for computation of capital gains since it was not incurred wholly and exclusively in connection with the transfer of the property to the purchaser. ITAT deleted the taxability of 7.5 lakhs noting that the advance received was not forfeited and the assessee had paid ₹25 lakhs to Anil Sharma, however, the ITAT held that payment of ₹25 lakhs to Anil Sharma was towards personal liability of the assessee and was not attached to the capital asset sold. Thus, ITAT also disallowed the deduction of 25 lakhs from capital gains income. Aggrieved, the assessee preferred an appeal before the Delhi High Court.

Further, High Court held that the expression "expenditure" used in Section 48(i) should be given the same meaning as used in Section 37, except that expenditure may be also capital in nature and which may also cover the amount of loss, which has gone out of the assessee's pocket. High Court further held that the words "wholly and exclusively" used in Section 48 are also found in Section 37 and relate to the nature and character of the expenditure, which in the case of Section 48 must have connection i.e. proximate and perceptible nexus and link with the transfer resulting in income by way of capital gain.

High Court held that the word "connection" in Section 48(i) reflects that there should be a causal connect and the expenditure incurred to be allowed as a deduction must be united or in the state of being united with the transfer resulting in income by way of capital gains on which tax has to be paid. High Court noted that the purchaser was aware of the agreement to sell with Anil Sharma and had directly paid ₹7.5 lakhs by way of cheque to him and the assessee had placed on record the relevant agreements. Thus, there was a close nexus and connect between the payment of ₹25 lakhs and the transfer of the property to the purchaser resulting in income by way of capital gains and there was proximate link and the expenditure incurred was in furtherance and to effectuate the transfer/sale of the property and was not remote and unconnected. Therefore, High Court allowed the deduction of ₹25 lakhs under Section 48(i).

Additionally, High Court clarified that this decision should not be interpreted to mean that wherever an assessee has paid an amount under an earlier agreement-to-sell in terms of the settlement or even a court decree, the said amount would be treated as expenditure wholly or exclusively in connection with the transfer, the subject matter of capital gains. The nature and character of the agreement, timing of the earlier agreement and payment claimed as expenditure and the date of transfer resulting in capital gains, are relevant

[1] *Contributed by CA. Sahil Garud, CA. Mandar Telang, Indirect Taxes Committee, Disciplinary Directorate and ICAI's Editorial Board Secretariat. Readers are invited to send their comments on the selection of cases and their utility at eboard@icai.in. For full judgment, write to eboard@icai.in*

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aspects, which should be taken into consideration. For example, an agreement-to-sell rescinded or cancelled and payment made long before the date on which immovable property was transferred resulting in capital gains, may not be expenditure incurred wholly and exclusively in connection with such transfer. Link and connection with the transfer of a capital asset and the expenditure must be inextricable and should be established.

High Court thus ruled in favour of assessee.

LD/66/172

Covanta Samalpatti Operating Private Limited

vs.

Asst. Commissioner of Income Tax, Chennai

04th April, 2018

Benefit of Section 80IA denied to assessee who was not the owner of the power plant but was only maintaining it.

The assessee claimed deduction under Section 80IA which was denied by the Assessing Officer since the assessee's undertaking had not been set up for generation or for generation and distribution of power. Based on the terms and conditions of the agreement entered into between the assessee and one Samalpatti Power Corporation Private Limited (SPCL), it was noted that the assessee is only a contractor and the power plant for generation and distribution of electricity is owned by the SPCL. The CIT(A) and ITAT affirmed the order of Assessing Officer. ITAT had noted that main purpose of providing deduction under Section 80IA of the said Act was to encourage investment in certain specific industries and to augment the industrialisation of the country. It was further noted that the assessee made an investment of less than ₹10 lakhs, but claimed deduction of more than ₹67 lakhs.

High Court noted that a 'generating company' can only refer to the SPCL and not the assessee, since the Assessing Officer, the CIT(A) and the ITAT, after considering the scope of the agreement entered into between the appellant and the SPCL, clearly held that the assessee is not the owner of the power plant and that it does only maintenance work, for which, it is given a fee. Even assuming that the assessee contributed technical knowhow for the purpose of generating electricity, assessee did so on behalf of the owner of the plant namely the SPCL.

High Court noted that the Assessing Officer had done a thorough factual exercise to consider the correctness of the said submission and found that M/s. Covanta USA owns 70% of the shares in the SPCL and that M/s. Covanta USA also owns 100% of the shares in the assessee through its Mauritius subsidiary. Taking into consideration the submissions made by the assessee, the Assessing Officer went through the records of the SPCL and also the shareholding pattern, profit and loss account, balance sheet and computation of income, etc., and found the version of the assessee that the owner of the power plant had no technical expertise, is factually incorrect.

High Court concluded that the order of CIT(A) and ITAT was perfectly legal and valid and that there was no perversity in the finding rendered by all these Authorities. High Court, thus declined, re-appreciating the factual position and ruled the matter in favour of the Revenue.

LD/66/173

Vedanta Limited

vs.

Principal Commissioner of Income Tax, Delhi

19th March, 2018

Assessee does not have option not to claim depreciation; Additional depreciation under Section 32(1)(iia) is mandatory; Assessee's contention that additional depreciation is not at par with normal depreciation with respect to its claim, rejected by the High Court.

The assessee claimed depreciation amounting to ₹503.24 crore apart from additional depreciation of ₹538.66 crore in the revised return. During the course of assessment proceedings, the assessee withdrew the claim of additional depreciation amounting to ₹538.66 crore. Resultantly, the original deduction claim under Section 80IB from ₹2042.81 crore shot up to ₹2579.07 crore. The Assessing Officer allowed the claim of additional depreciation by relying on Explanation 5 to Section 32 (ii).

ITAT ruled in favour of the Revenue, aggrieved by which the assessee preferred an appeal before the High Court.

The assessee argued additional depreciation under Section 32(l)(iia) of the Act is in the nature of an incentive and cannot therefore, be treated at par with normal depreciation (on account of wear and tear and obsolescence) and as mandatory and not optional in nature. Further, Explanation 5 was inserted below Section 32(l)(i) and (ii) of the Act and thus applies to normal depreciation only. He further argued that Section 32 (iia) of the Act was inserted

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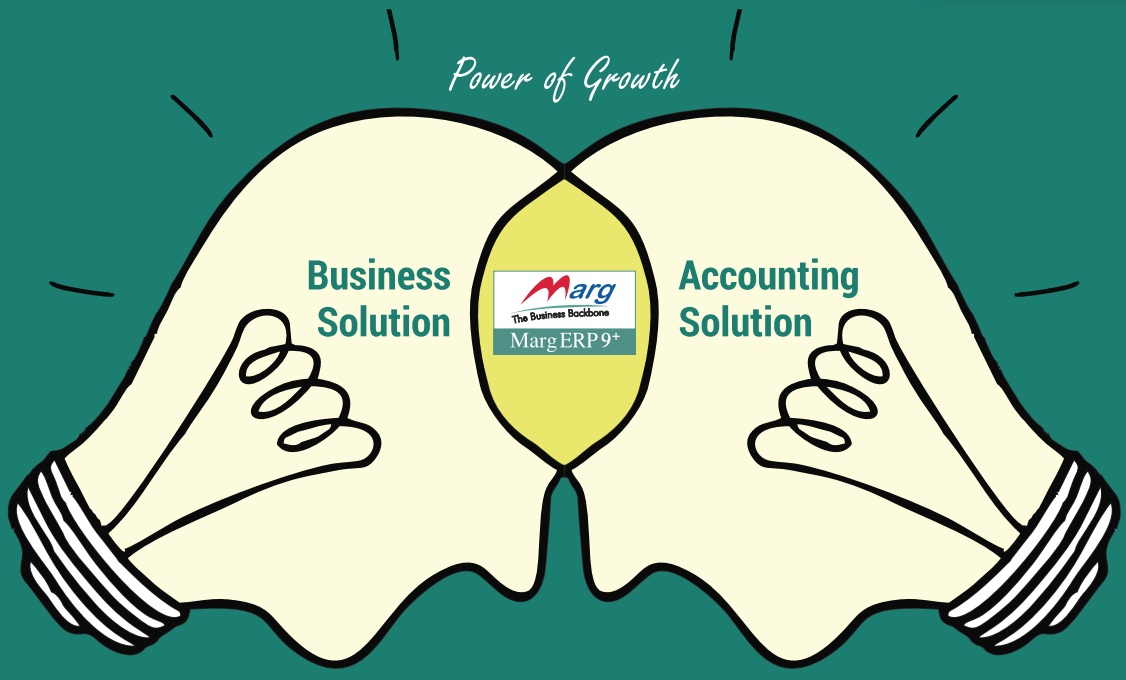

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w.e.f. 01.04.2003. On the other hand, Explanation 5 was inserted w.e.f. 01.04.2002. The expression "this sub-Section" in Explanation 5 thus only refers to Section 32(l)(i) and 32(l)(ii) of the Act. Assessee also argued that Section 32(l)(iia) is in the nature of an incentive providing for accelerated depreciation and hence, cannot be imposed upon the assessee.

The concerned explanation to Section 32 states that "for the removal of doubts, it is hereby declared that the provisions of this sub-Section shall apply whether or not the assessee has claimed the deduction in respect of depreciation in computing his total income".

High Court noted that assessee's claim for Section 80IB deduction would be increased when it sought to withdraw the additional depreciation claim. However, HC remarked that a single circumstance should not influence this court to ignore the plain intendment of the statute, since Parliament clearly stated that the provisions of "this sub-Section" would apply, "whether or not the assessee has claimed the deduction in respect of depreciation in computing his total income".

High Court thus held that no question of law arose and therefore ruled in favour of Revenue.

LD/66/174

Commissioner of Income Tax

vs.

Sri Vasavi Gold & Bullion Private Limited

20th February, 2018

Loss incurred from derivatives trading allowed to be set off against other business income.

The assessee had claimed a loss of ₹60.66 lakhs in open market trading, during relevant AY. Assessee was carrying on commodity trading through HRIM Comtrade. The Assessing Officer rejected assessee's claim to set off the said loss against the normal business income, on the ground that the assessee failed to prove that transactions were done through a recognised stock exchange and was not supported by proper time stamped contract notes and that the transaction did not qualify as an eligible transaction under Section 43(5).

Alternatively, the Assessing Officer also held that even if the transaction has to be treated as eligible speculative transaction, the assessee will not be entitled for the claim, in view of Explanation to Section 73, as per which, company had to be treated as in the speculative business to the extent of which the income was derived from speculative transaction. The CIT(A) and ITAT ruled in favour of assessee, aggrieved by which the Revenue preferred an appeal before Madras High Court.

High Court analysed provisions of Section 73 and 43(5). Section 43(5) deals with 'speculative transaction' and any income derived from the same will be computed under the head "income from profits and gains of business or profession". Proviso (d) to Section 43(5) gives exemption to an eligible transaction in respect of trading in derivatives carried out in a recognised exchange.

High Court noted that the assessee's main business is in retail gold jewellery, and for a short period of time, the assessee was also trading in derivatives through recognised Multi Commodity Stock Exchange and suffered loss. High Court further referred to ITAT's finding that these transactions were carried out electronically on screen based systems and through approved stock broker and that the same is supported by Time Stamped Contract Note, issued by the stock broker indicating the unique identification number and PAN number in the contract note. High Court observed that the assessee's transaction is not a speculative transaction but it only comes under provios (d) to Section 43(5) thereby it is only a non-speculative transaction and thus, exempt from tax.

Further, High Court perused provisions of Section 73 of the Income Tax Act which deals with "losses in speculation business". Explanation to Section 73 categorically states that in the case of a company, business of purchase and sale of shares is deemed to be speculative business. High Court remarked that since derivative transactions being separate from trading in shares, provisions of Explanation to Section 73 will not be applicable to such transactions. High Court concluded that the loss incurred by the assessee in derivative transactions through recognised stock exchange has to be set off against other business income as per the provisions.

Thus, High Court held that the transaction carried out by the assessee is a non speculative transaction and thus it does not attract Section 43(5) and likewise the assessee was trading in derivatives and not in shares, so the loss suffered by the assessee in trading in derivatives is excluded from the ambit of Explanation to Section 73.

High Court thus ruled in favour of assessee.

LD/66/175

Commissioner of Income Tax
vs.
Millennium Estates Private Limited
30th January, 2018

Income from sale of flat for a builder accrues when possession of flat is given and not when allotment letter issued by the builder.

The assessee carries on business as a contractor and developer. During the scrutiny proceedings for the subject Assessment Year, the Assessing Officer found that an amount of ₹2.43 crores was shown under the head current liabilities i.e. as advances received from it buyers. Assessing Officer observed that an aggregate amount of 2.14 crores was received by the assessee from one Siddhi Vinayak Securities and from Manomay Estates Pvt. Ltd. on 14th and 15th March, 2007 but further consideration was received in the next year on 1st April, 2007 when the possession of flats was given. Thus, income was booked by assessee in the next year. The Assessing Officer added the amounts received as income accruing in AY 2007-08. The CIT(A) ruled in favour of Revenue, however, ITAT ruled in favour of assessee. ITAT held that since the sale of the flats took place only on April 1, 2007, the accrual of income would take place in AY 2008-09 only and till that time, the amount of ₹2.14 crores was only in the nature of advances. ITAT had also noted that in the next AY assessee had offered the income of ₹2.14 crores on the sale of the flats which was accepted by Revenue.

Before High Court, Revenue contended that the sale of the flats under consideration had taken place on 14th and 15th March, 2007 when they were allotted under allotment letters.

High Court noted that the possession of the flats was given on receipt of total consideration only on 1st April 2007. High Court stated that the relevant Clause of the allotment letter which is been relied upon by the Revenue does not in any manner indicate that the possession was given on 14th/15th March, 2007; that clause only stated that the electricity and other charges in respect of the flat being sold to two buyers would be borne by the buyers after the possession of the two flats are handed over to buyers. As per High Court, it did not even remotely suggest

that the responsibilities for the payment of charges in respect of the said flat were on the buyer from the date of the allotment. High Court further noted that no statement of the buyers or other evidence, even circumstantial in nature, was brought on record to indicate that the facts are different from what has been recorded in the possession letter dated 1st April, 2007. High Court concluded that the order of ITAT was correct.

Separately, High Court also noted that the concerned amount of 2.14 crores was offered to tax by the assessee in the next Assessment Year. High Court therefore remarked, "It is not the case of the Revenue that there are circumstances to indicate that by bringing the said transactions to tax in the next Assessment Year instead of this, there is likely to be a loss to the Revenue".

High Court held that no substantial question of law arose, and thus ruled the matter in favour of the assessee.

Transfer pricing

LD/66/176

The Commissioner of Income Tax
vs.
Petro Araldite Pvt. Ltd.
26th April, 2018

ITAT's invocation of Rule 10B(1)(e)(iii) for allowing capacity utilisation adjustment to the assessee upheld by High Court.

During AY 2005-06, the assessee entered into international transaction on account of export of finished goods to AEs, import of raw materials from AEs and payment of management charges to AE. The assessee aggregated all the international transactions for benchmarking and adopted Transactional Net Margin Method (TNMM) as the most appropriate method. The TPO recomputed assessee's margin to 8.63%. CIT deleted the transfer pricing addition.

ITAT also upheld assessee's claim for adjustment on account of capacity utilisation on the grounds that difference in capacity utilisation materially affects the profit margin. ITAT invoked Rule 10B(1)(e)(iii) of the Income Tax Rules for arriving at the profit margin of comparable uncontrolled transactions to enable the ALP determination of the assessee's transactions with AE. ITAT noted that less utilisation of capacity, would result in allocation of fixed costs over a smaller number of final products, thus reducing the profit margin. ITAT held that difference in capacity utilisation would materially affect the profit margin and if there was a difference in the level of capacity utilisation of the assessee and the level of capacity utilisation of the comparable, then adjustment would be required to be made to the profit margin of the comparable on account of difference in capacity utilisation in terms of Rule 10B(1)(e)(iii) of the Rules.

High Court observed that Revenue was not disputing that capacity utilisation of a comparables manufacturing unit would impact the net profit margin of the comparable. In assessee's case, considering that comparables capacity utilisation materially affected the profit margin, High Court opined that "the invocation of Rule 10B (1) (e)(iii) of the Rules, cannot be found fault with". High Court stated that this was a self-evident position that all aspects/differences between the international transactions and the comparable uncontrolled transactions materially affecting the net profit margin had to be taken into account so as to have the fair comparison while determining the arm's length price (ALP) of the tested party's transaction.

Ruling in favour of assessee, High Court held that this concerned question does not give rise to any substantial question of law as Rule 10B (1)(e)(iii) of the Rule is self evident.

Separately, the Revenue contented whether the Tribunal was correct in holding that the profit margin of the comparable should be applied only to the value of the international transactions entered into AEs to determine the ALP and not at entity level. However, the Revenue had accepted that the issue was covered against it by jurisdictional High Court in assessee's own case for AY 2008-09. Thus, High Court dismissed Revenue's appeal on this ground too.

LD/66/177

Comm Vault Systems (India) Private Limited
vs.
Dy. Commissioner of Income Tax
11th April, 2018

Re-characterisation of assessee's distribution transaction as a service transaction rejected by ITAT.

The assessee is engaged in the business of software development services and distribution of parent company's products. Assessee had entered into an agreement dated April 1, 2010 with its AE to

distribute the product of the AE in India i.e. Simpana Software, a scalable unified data and information management software designed to replace several products. The products were supplied to the assessee free of cost and sales were made by the assessee to domestic parties. Therefore, the assessee did not treat the same as an international transaction.

TPO noted that even though the cost price to the assessee is 'nil', the product has a price and that the sales are made on behalf of the AE and that the assessee company should be compensated by way of a suitable mark-up. Thus, he was of the opinion that the arrangement is nothing but in the nature of service agreement requiring a mark-up. TPO thus proposed an adjustment of ₹1.54 crores. DRP upheld the said adjustment. Aggrieved, assessee went before Hyderabad ITAT.

Assessee submitted that the agreement between the assessee and its AE was distribution agreement, but the TPO characterised it as a service agreement and had held that a mark-up on the operational cost should be made to determine the ALP. Assessee contended that since it had not made any payment to the AE during the subject year, the provisions of Section 92 should not be applied. Assessee relied upon sub-Section 3 of Section 92 to argue that where no income was chargeable to tax or it increased the loss, then the TP proceedings are not applicable.

ITAT noted that the assessee had received the goods from its AE free of cost and the assessee had not made any payment whatsoever to the AE during the relevant AY or in the subsequent AYs till AY 2013-14. Based on the copy of the agreement between the assessee and its AE, ITAT observed that it was clearly spelt out that the assessee was a distributor and was not required to make the payments to the AE for the goods supplied to it till the assessee made profit from the transactions. Further, from Form 3CEB also, ITAT observed that the assessee had reported as to why no TP analysis was undertaken for the distribution activity and had relied upon the provisions of Section 92(3) of the Act.

ITAT noted that in assessee's case there was no difference between the form and substance of the transaction of distribution to re-characterise the transaction as a service agreement. The AE was

entitled to a specified percentage of the distributor's sales revenue less operating costs/expenses of the distributor. However, ITAT noted that since the assessee had no revenue left after reducing the operating cost/expenses, the AE was not paid any percentage. The revenue generated by selling the goods is retained by the assessee. ITAT noted that the TPO has instead computed the mark up on the operating cost of the assessee to determine the ALP and brought the notional income to tax which is not justified.

Regarding applicability of the provisions of Section 92, ITAT observed that sub-Section (3) lays down that where the assessee declared better and more favourable results as per its books of account, then by reason of TP adjustment, the income chargeable to tax shall not be decreased or the loss shall not be increased. If the provisions of Section 92(3) would apply, then the provisions of sub-Sections (1) and (2A) of Section 92 would not be attracted. ITAT noted that since it has already held that the transaction is a distribution transaction and not service agreement, then the TP analysis has to be done afresh and then it has to be seen if the provisions of Section 92(3) would apply.

ITAT therefore directed the Assessing Officer/ TPO to conduct fresh TP analysis by treating the assessee's transaction as a distribution agreement and by determining the most appropriate method afresh and after allowing the necessary adjustments. If the loss declared by the assessee is increased by such TP study, then no TP adjustment can be made as provided in Section 92(3) of the Act.

ITAT thus ruled in favour of the assessee.

LD/66/178

Bombardier Transportation India Private Limited

vs.

Dy. Commissioner of Income Tax

09th April, 2018

Question regarding appropriateness of one or other method under Section 92C cannot be considered as a question of law.

The assessee had approached the High Court against the decision of the ITAT on the ground involving use of the 'most appropriate method'. The assessee urged that Comparable Uncontrolled Price(CUP) was the most appropriate method for ALP determination and is justified given that the rates at which it supplies the articles in question i.e.; the finished railway wagons coincide with the rate at which they are supplied to the Delhi Metro i.e.; the ultimate purchaser.

High Court observed that question as to the appropriateness or otherwise of one or other method under Section 92C read with Rule 10B(1) of the Income Tax Rules, 1962 cannot *per se* be a question of law as it involves a fact analysis that is done by the revenue authorities at the first instance and settled by the ITAT. Unless the facts show glaring distortion in the adoption of one or the other method, a question of law cannot be said to arise.

High Court observed that in the present case, the CUP method was rejected as an appropriate method, having regard to the fact that it unduly restricted the choices of the Revenue. The TNMM was considered to be a more appropriate method where greater choice was available. The assessee's contention in this respect that the supplies made to the Metro Rail alone ought to be considered is equally unpersuasive. The most appropriate method or the transactional similarity does not dictate that two entities alike in all particulars can only be considered for comparative purposes. High Court noted that it is the functional similarity which is to be taken into account.

High Court thus denied admitting grounds of appeal related to appropriateness of method; however, it admitted the appeal on other questions of law.

Service Tax

LD/66/179

Power Mak Industries

vs.

CCEC&ST

1st February, 2018

Tribunal held that when the hire agreement for supply of Diesel Generators only sets out terms and conditions of hire and do not put any shackles on the hirer for full enjoyment of DG sets by hirer and the effective possession and control of DG sets rests with hirer, such transaction would be regarded as 'deemed sale' attracting sales tax/ VAT and not as transaction of supply of tangible goods so as to attract service tax.

Facts:

Appellants entered into Hire Agreement with parties for supply of Diesel Generators on hire basis subject to conditions as laid down in "Hire Agreement". It appeared to the department

that essential components to constitute these transactions as sale, namely, (i) an agreement to transfer title, (ii) supported consideration and (iii) actual transfer of title in goods were absent and all through agreement period, equipment was in the possession and control of the owner. It also appeared that insurance, maintenance, repairs and damages charges pertaining to diesel generators were also borne by the appellant owner. Department therefore took the view that the appellant rendered services of 'supply of tangible goods' to the hires and is liable to pay service tax on consideration received from hirers.

Appellant contended that appellants are engaged in letting out of DG sets on lease basis to various hirers for their use during subsistence of contract and they do not have any control over DG sets and entire control of possession of DG sets vests with the hirers. Therefore, appellant submitted that the transaction with hirers is only of 'transfer of right to use any goods involving transfer of both possession and control of the goods to the users' which is 'deemed sale of goods' and is leviable to sales tax/ VAT.

Held:

Hon'ble Tribunal noted that there cannot be "one-size-fix-all" method to determine whether a transaction is supply of tangible is "deemed sale" or "service". On the other hand, each transaction having its own unique entities and conditions, will have to be critically examined and subject to various tests laid down by the Courts, in particular the tests laid down by the Hon'ble Supreme Court in the landmark judgement of *Bharat Sanchar Nigam Limited vs. Union of India [2006(2)STR 161 (SC)]*.

After referring to various clauses in the agreement between appellant and hirers, Tribunal, *inter alia*, noted that there is definitely a consensus between lessor and the lessee as to identity of the goods. The hirers very much have legal right to use the goods. In fact, the agreements clearly lay down that lessee shall render/operate DG sets for his exclusive use and the lessor has transferred the right to use the DG set. Further, it is undisputed that as long as goods are with hirer, appellant does not have any legal right to use the goods themselves and the appellant has transferred right only to one hirer at a time.

As regards department's contention regarding appellant providing DG technicians to hirers and not permitting hirers to run DG sets in absence

of technicians, Tribunal noted that appellant has adequately clarified that DG technicians are provided as some of the hirers do not know how to technically operate the DG sets and such condition relates to the tolerance level of the equipments and deviation from it will result in break-down of the equipment, accordingly, they prescribed a list of "Do's" and "Don'ts" by the hirers. Even if the DG technicians are provided by the appellant, the manner of operation of DG sets is only as per the instructions and requirements of the hirers and not on the directions of the appellants. Further, Tribunal categorically noted that the hirers pay hire charges and not service charges and also, hirers pay deposit to the appellant, which is the practice only in cases of leasing contracts which are deemed sale transactions and not in case of service transactions.

Therefore, Tribunal held that the impugned transaction involving supply of DG sets on hire basis to various hirers is nothing but supply of tangible goods with transfer of both possession and control of the goods to the users of the goods and this is the case of supply of tangible goods for use, with legal right of possession and effective control vesting with the hirer, required to be treated as "deemed sale of goods", hence cannot be considered as "supply of tangible goods for use of service", for the purpose of charging service tax.

LD/66/180

AVC MC Cormick Ing Pvt. Ltd.

vs.

CCE&C

13th December 2017

Tribunal held that merely because a technical know how is recognised under international treaties to which India is signatory, in absence of municipal legislation enacting such treaty, it cannot be presumed that such knowhow is recognised under Indian law and service tax liability cannot be fastened on recipient of the knowhow under 'intellectual property services'.

Facts:

Appellant, a 100% EOU engaged in manufacture and export of spices, received technical knowhow and assistance from a foreign company and paid royalty for the same. Revenue took a view that appellant received intellectual property services in India and thereby rendering themselves liable to pay service tax under reverse charge basis.

Held:

As regards department's contention that such technical knowhow is recognised under international treaties to which India is a signatory and hence it is leviable to tax in India, Tribunal noted that as per Article 253 of the Constitution of India, for implementing any treaty agreement or convention with any country or any decision made at international conference etc., there should be a municipal legislation enacted for giving effect to such international agreement or treaties. Further, it was also found that the impugned notice does not clearly state the nature of knowhow which the appellant has availed from his foreign company. Therefore, it being settled position of law, as laid down in various judicial pronouncement that the intellectual property, proposed to be chargeable to service tax, has to be recognised as per Indian law, Tribunal set aside impugned demand and allowed present appeal.

LD/66/181

M/s Reliance Securities Ltd.

vs.

CST

13th December 2017

Once an agent discharges service tax on entire amount collected from customers, and then shares part of such amount with principal, no service tax can be demanded again on such sharing of fees under category of 'business auxiliary services' as it would amount to double taxation.

Facts:

Appellant, M/s Reliance Securities Ltd. (RSL) is stock broking company and provide its customers access to trade in equity derivatives, mutual funds and IPOs. The customer desirous to do trading has to register with the appellant's affiliate M/s Reliance Money Infrastructure Limited (RMIL) who provides the state of art online trading platform vide its web portal to trade in securities. For the purpose of trading the investor is provided with pre-paid cards also known as limit cards of various denominations and the fee charged for such cards from the investor is income to the appellant and M/s RMIL. The Appellant has entered into agreement with M/s RMIL outlining the role of each of them in providing consolidate service to the investor. By virtue of agreement M/s RMIL was entrusted with the sole responsibility of collection of card fee

including service tax for such consolidated service to the customer. It was agreed between the appellant and M/s RMIL that 95% of the total card fee would be disbursed to the appellant by M/s RMIL and the remaining 5% would be retained by M/s RMIL for providing services to the clients. Department issued show cause notice contending that the appellant is engaged in providing infrastructure services, namely its internet based trading platform to the clients of M/s RMIL and such service are classifiable under taxable service category of "Business Support Service".

Appellant submitted that they are providing stock broking services to investors and no service is provided to RMIL. It also submitted that appellant is providing stock broking and related services to the investors and has entered into a facility agreement with RMIL for recovery/collection of the entire consideration for stock broking service provided to the investor and thereafter discharge the service tax liability on behalf of appellant and the balance amount attributable was to be given to the appellant by RMIL who acts in the capacity of agents only for the purpose of collection of card fees and discharging tax liability on behalf of appellant. Appellant also submitted that same transaction cannot be taxed twice and it would be a case of revenue neutrality as whatever service tax is charged is available as credit.

Held:

Hon'ble Tribunal noted that the agreement specifically recognises the clients to that of M/s RMIL to which the services are provided by the appellant. In sharing of such fee, M/s RMIL is effectively discharging service tax on full amount of card fee. M/s RMIL has retained only 5% amount as its share and the remaining 95% has been forwarded to the appellant. This clearly shows that M/s RMIL has acted as agent of appellant for provision of financial services. The discharge of service tax liability has been made by M/s RMIL as it has collected fee as agent of the appellant and paid applicable service tax before remitting the 95% amount to the appellant. Further, Tribunal noted that the amount of 95% has

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been received by the appellant from M/s RMIL and not from the clients. Thus, Tribunal held that the sharing of fee cannot be interpreted as rendering of services by appellant to the clients of M/s RMIL and the amount thus shared in between the appellant and M/s RMIL cannot be taxed as it has already suffered taxes at the time of receipt by M/s RMIL. Accordingly, it being settled position of law that once the service tax on entire value has been discharged, there cannot double taxation, Tribunal dropped impugned demand in present case.

Excise

LD/66/182

Jubilant Life Sciences Ltd.

vs.

The Commissioner of Central Excise

16th April, 2018

CESTAT order rejecting refund claim under Section 11B of Central Excise Act, set aside by High Court; HC remarked that there was no independent application of mind by CESTAT and CESTAT only endorsed legal findings by the Adjudicating Body/Authority.

The assessee manufactures organic chemicals falling under Chapter 29 of First Schedule to Central Excise Tariff Act, 1985 (CETA). The assessee also also manufactures Rectified Spirit and Extra Neutral Alcohol. The assessee uses molasses as input in manufacture of Rectified Spirit, on payment of excise duty at specific rate on per tonne basis. The spirit so manufactured is either captively consumed in the manufacture of Extra Neutral Alcohol or sold as such in the domestic market. The Extra Neutral Alcohol too is either captively consumed in the manufacture of dutiable goods or sold as such in the domestic market. Extra Neutral Alcohol is exempted from payment of excise duty.

The assessee followed the procedure laid down under the erstwhile Rule 6(3)(a) of the CENVAT Credit Rules, 2004, as per which a manufacturer engaged in the manufacture of goods falling under Chapter Heading 2207 of the Central Excise Tariff Act, 1985 was required to pay an amount equivalent to the CENVAT credit attributable to inputs used in the manufacture of exempted final products. Bearing in mind the nature of the operation and the manufacturing process, the assessee stated that it was not feasible to maintain separate accounts for receipt, consumption and inventory of molasses for manufacture of dutiable and exempted goods. The assessee had therefore reversed CENVAT credit equivalent to duty paid on molasses used in manufacture of exempted goods. Pursuant to amendment to Rule 6(3) by way of Notification dated 01/03/2008 the assessee submitted that during the course of internal audit, it realised that from April, 2008 to September, 2009, it had paid/reversed higher amount of CENVAT credit for molasses and therefore, claimed refund seeking re-credit of excess reversal.

However, the Adjudicating Authority held that if the assessee had opted to pay an amount equivalent to the CENVAT attributable to input, it should have intimated the fact to the jurisdictional authority. It further held that the claim for re-credit was incorrect and inadmissible as it was an afterthought, and by switching the option between Rule 6(3)(i) and Rule 6(3)(ii) in the middle of the financial year, it was seeking to derive benefit. CESTAT ruled in favour of Revenue aggrieved by which the assessee approached the High Court.

High Court noted that the assessee had already filed before the Commissioner (Appeals) a declaration from the management certifying that option under Rule 6(3)(ii) has not been exercised. However, that submission was not considered in the impugned order and no specific findings have been rendered in respect of the same.

The CESTAT had entirely agreed with the Commissioner and had only endorsed its reliance on Explanation-1 to Rule 6(3). There was no independent application of mind and CESTAT was expected, as the last fact finding authority, to render a specific finding.

High Court remarked that *"We do not think that the case could have been disposed of even if the revenue involved was not substantial, by a mere endorsement of the Appellate Authority's finding, particularly on the interpretation of the Rule prevailing at the relevant time. The Tribunal is not expected to endorse legal findings by the Adjudicating Body/Authority and that of the First Appellate Authority."*

Ruling in favour of assessee, High Court quashed the CESTAT order and directed a fresh decision on merit. High Court stated that the Tribunal must render its independent conclusion on the issues involved and should not be influenced by its earlier findings and it is not expected to merely endorse what the Appellate Authority has done in the instant case.

LD/66/183

M/s Nyati Hotels and Resorts Pvt. Ltd.

vs.

CCE

13th April, 2018

Time limit prescribed u/s 35(1) of Finance Act, 1994 for filing of appeal is not applicable for payment of mandatory pre-deposit u/s 35F. Tribunal held that appeal is admissible if filed within stipulated time limit although pre-deposit was paid late.

Facts:

The appellant had filed an appeal before first appellate authority within time limit stipulated under Section 35(1) of Finance Act, 1994. However, pre-deposit in terms of Section 35F was paid after filing such appeal. First appellate authority dismissed the appeal on the ground that time limit prescribed under Section 35(1), for filing of appeal, is also applicable for payment of pre-deposit payable in terms of Section 35F so as to enable the first appellate authority to entertain that appeal. Aggrieved by the same, appellant filed present appeal.

Held:

Hon'ble Tribunal noted that both the Section 35(1) and Section 35F are independent of each other and have got no overriding effect on the other. Section 35(1) is in respect of type of appeal which can be

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filed before first appellate authority and it does not deal with entertaining appeal by first appellate authority, whereas Section 35F in turn deals only with entertaining the appeal subject to condition of pre-deposit seven and a half percent. It nowhere prescribes time limit for making pre-deposit, thus, provisions of Section 35F cannot be read in context of Section 35(1) as it had got no application. Tribunal held that non-payment of pre-deposit is curable defect. Further, Tribunal noted that the question of entertaining appeal comes at the time of filing appeal which has to be filed within stipulated time. Therefore, it was held that once the appeal is filed within stipulated time limit, same cannot be dismissed on the ground of late payment of pre-deposit amount. Accordingly, Tribunal remanded the case back to first appellate authority and directed to hear the same on merits.

LD/66/184

Spykar Lifestyles Private Ltd.

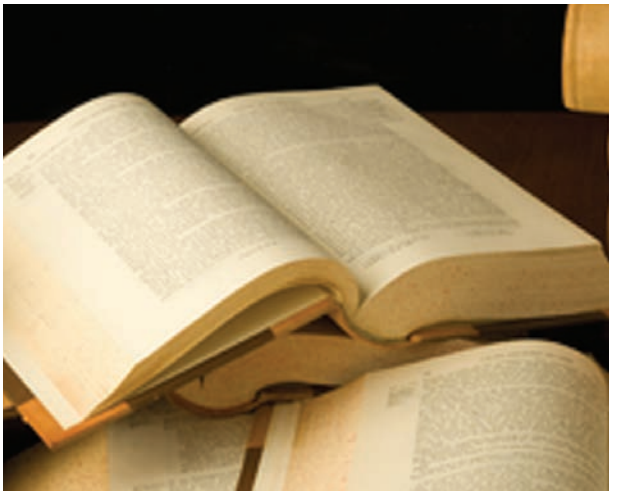
vs.

The Commissioner of Central Excise, Thane

11th April, 2018

Interest under Rule 6(3A)(e) of CENVAT Credit Rules, 2004 (CCR) on late reversal of CENVAT credit attributable to traded goods in terms of Rule 6(3)(A)

The assessee manufactures readymade garments in respect of their own manufactured goods as well as trading goods. The assessee is availing Cenvat credit in respect of common inputs service, which is used for both types of clearances. As per the Revenue, in respect of traded goods being exempted service, assessee is require to pay an amount equal to the Cenvat credit attributable to the traded goods in terms of Rule 6 (3A) of Cenvat Credit Rules, 2004. The appellant have reversed the amount as required under Rule 6(3A) of Cenvat Credit Rules, 2004, which was confirmed by the Adjudicating Authority. However, the assessee has not discharged the payment of interest on the late reversal of amount of ₹81.75 lakhs under Rule 6(3A), which was demanded in the impugned order.



Assessee argued that availment of credit was not erroneous and that, Rule 14 of CCR applies only where there is a short payment of duty whereas in the present case there was no question of short payment of duty, hence interest under Section 11AB of Central Excise Act, 1944 (Act) was not chargeable. In absence of invokability of Section 11A or Rule 14, provision of Rule 6(3A)(e) of CCR, cannot be invoked being a delegated legislation.

CESTAT analysed Rule 6(3A)(e) of Cenvat Credit Rules, 2004 and observed that the interest is in respect of the amount payable under the provision of Rule 6(3A), which is explicit provision and therefore in terms of said Rule, interest is legally chargeable. CESTAT stated that interest is not chargeable under Rule 14 and Section 11AA, however for specific purpose for payment of an amount under Rule 6(3a), the charging provision of interest was created as per the Rule 6(3a)(e). Therefore, there is no reason why this provision cannot be invoked. CESTAT further stated that if assessee's submission is accepted that interest is not chargeable, then provision of Rule 6(3A)(e) shall stand redundant, which is not the intention of the legislation.

CESTAT rejected assessee submission on non-chargeability of interest for a longer period. As per CESTAT, once the amount is admittedly reversed, interest shall be chargeable as piggy back of the principal amount, therefore assessee cannot get relief on limitation.

CESTAT thus dismissed Revenue's appeal.

LD/66/185

Dinshaws Dairy Foods Ltd.

vs.

CCE

27th March, 2018

When the charges for hiring of specialised refrigerated vans used for transportation of goods were payable on kilometer basis and not on

destination or quantity of goods transported and also, no consignment note was issued by vehicle owners, Tribunal held that such services cannot be regarded as services of goods transport agency.

Facts:

Appellant, manufacturer of ice-cream, are clearing their goods to distributors/dealers all over the country by specialised refrigerated vans. They entered into agreement with the owners of such van to hire their Vehicles on hire charges at a fixed rate based on kilometer basis. The Vehicles were under the disposal of the appellant and were transporting goods as per Appellant's instructions. Revenue demanded service tax from appellant under category of 'goods transport agency' on reverse charge basis in respect of transportation charges paid to vehicle owners. While rebutting the same appellant submitted that vehicles were hired on per kilometer basis and the vehicles were under its control and disposal and also, no consignment note was prepared but bills were raised by the vehicle owners on the basis of monthly kilometers travelled by the van. Therefore, the activity cannot be termed as of Goods Transport Agency but of 'transfer of right to use' and treated as deemed sale within Article 366(29A) of the constitution.

Department contented that as the details of monthly invoices contain the vehicle number, date of transportation, destination of consignment and the actual kilometers which have been travelled, such invoices has got all the basic details as required by consignment note and mere assertion that consignment note is not given cannot be accepted without examination.

Held:

Tribunal noted and held that when vehicles are hired on monthly basis and charges are not based upon destination but on kilometer basis, it cannot be said that services involved are of Goods Transport Agency. Tribunal noted that in such case no consignment note is issued as vehicles run on direction of appellant and the charges are fixed not on the basis of destination or quantity of goods or any other basis but solely on kilometers vehicles have run in a month. Obviously, no consignment note is issued as service is not of consignment to be taken to any particular destination. Also, Tribunal noted that ratio laid down in *South Eastern Coalfields Limited vs. CCE, Raipur 2017 (47) STR 93(Tri-Del)* is squarely applicable to appellant's case. Therefore, it was held that services provided by appellant would not fall under category of 'Goods Transport Agency' and impugned demand was set aside.

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Disciplinary Case

Summary of a disciplinary case, in the matter of:

CBI vs. CA. XYZ

Facts of the case

A Complaint in Form I dated 26th November, 2008 was received from Central Bureau of Investigation (hereinafter referred to as the "CBI/Complainant"), against CA. XYZ (hereinafter referred to as the "Respondent"). The charges alleged in the Complaint are as under:

- The Respondent arranged for finances to various parties from various banks. He prepared false, fabricated and forged property documents and submitted to CCC Bank (hereinafter referred to as Bank) as collateral securities for the Credit facilities applied by M/s. AAA, M/s III, M/s OOO on the basis of which the following facility were sanctioned by the Bank to:
  - M/s. AAA, CC ₹220 Lakhs, OD against BD ₹75 Lakhs,
  - M/s III, CC ₹210 Lakhs, OD against BD ₹75 Lakhs,
  - M/s OOO CC ₹200 Lakhs.
- The Respondent fraudulently influenced the Valuers and Advocates of the Bank to give an inflated value report on the collateral security offered by the three firms to Bank.
- In respect of property documents offered as collateral security for limits sanctioned to M/s. AAA, the Respondent collected Xerox copies of Agriculture land documents belonging to Shri VRD and family members, and got the same forged and fabricated and made it look genuine in the sole name of Shri VRD and mortgaged the same to CBI. The said property is actually an agricultural land which cannot be sold or mortgaged as per Section 32M of Bombay Tenancy Agricultural Tenancy Act, 1949.
- In respect of property documents offered as collateral security for the loan availed by M/s. OOO which is a bungalow purportedly belonging to Shri AVP, the Respondent got false and fabricated documents prepared in the name of Shri AKS who was nonexistent. There is direct evidence against the Respondent in the form of his thumb impressions and his own handwritings appearing on the forged

documents as a purchaser, as though property was purchased by Shri AKS from Shri SNJ. The Government Examiner of Questioned Documents (GEQD) has confirmed the forgery done by the Respondent on the said documents.

- The proceeds of the aforesaid three borrowal loan account have partly gone into the account of Respondent's firm.

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

- The Board considered the opinion of Government Examiner of the Questioned Documents dated 25th November, 2004, which states that the signatures had been forged by the Respondent which in itself is sufficient evidence to establish the active involvement of Respondent in forging the documents.
- The Board noted that the Complainant has brought on record statements of various witnesses of property valuers showing that the Respondent was involved in the forgery and manipulation of property documents and thus ensured the grant of credit facilities to several borrowers. The Board further took note of the statement of an employee of the Respondent's firm to the effect that the Respondent is involved in fabricating financial statements of the various concerns for obtaining required loans/credit facilities from banks; indulged in giving loans to clients/people by creating false and fabricated documents which would be submitted to the banks by him; prepared forged collateral documents as securities and took 22 to 25% of loan sanctioned amount from the clients or parties as commission.
- The Board also took notice of various documents brought on record by the Complainant such as letter dated 09/06/2004, Bank Account opening forms with X and Z Banks which proves that current account in the name of M/s. ADI, was operated by the Respondent as proprietor of the said firm.
- The Board further noted that there is one more Information case filed by the CBI in case of forgery committed by the Respondent in respect of some other clients with another bank. Further, the CBI has also filed Charge Sheet against the Respondent for his forgery activities and which is still under trial and such acts of the Respondent has brought disrepute to the profession of Chartered Accountancy. Moreover, the Board also noted from the documents filed by CBI that the Respondent is habitually indulging into such activities of forging documents for various clients and submitting the same to various banks.
- The Board also took account the fact that neither the Respondent appeared during the course of inquiry nor submitted his Written Statement in his defence despite service of notice.

Thus, the Board in the light of the material available on record opined that the Respondent is habitually indulged into the activities of forging documents on behalf of his clients and submitting the same to the banks. Accordingly, the Board held that the Respondent is guilty of "Other Misconduct" falling within the meaning of Clause (2) of Part IV of the First Schedule to the Chartered Accountants Act, 1949. Thereafter, the Board afforded an opportunity of hearing to the Respondent *and after considering all the material on record, ordered that the name of the Respondent be removed from the Register of Members for a period of* 3 (three) months and further imposed a fine of ₹25,000/-. ■