Legal Decisions[1]

Income Tax

LD/66/186

Mahabir Industries

vs.

Principal Commissioner of Income Tax

18th May, 2018

'Initial year' under Section 80IC refers to the year in which substantial expansion has been completed and the period for which deduction is availed earlier by an assessee under Section 80-IA and Section 80-IB will not be reckoned for the purpose of availing benefit of deduction under Section 80-IC.

The assessee manufactures polythene for which it is having its factory in Shimla, Himachal Pradesh. The assessee claimed exemption under Section 80-IA for the AY 1998-99, 1999-2000 which was allowed to the assessee. From AY 2000-01 to 2005-06, the assessee claimed deduction under Section 80- IB. Section 80IC was introduced from 01.04.2004 as per which deduction was provided to new manufacturing units and to the existing units who have had substantial expansion, and situated in the State of Sikkim, Himachal Pradesh and Uttaranchal and North-Eastern States. For AY 2006-07 and 2007-08, the assessee claimed the deduction under Section 80-IC as it completed substantial expansion, by investing in new plant and machinery of value more than 50% of the value of plant and machinery already installed as on 1st April, 2005, to the manufacturing unit situated at Baddi, Himachal Pradesh. The same deduction was allowed by the Assessing Officer.

The Assessing Officer rejected the deduction claimed for AY 2008-09 and 2009-10 on the ground that this was 11th and 12th year of deduction and as per Section 80-IC(6), total deductions under Section 80-IC and Section 80- IB cannot exceed a total period of ten years. The CIT(A) and ITAT upheld the order of Assessing Officer. High Court held that ten years period shall be counted from the AY 1998-99 when the assessee had claimed deduction for the first time under Section 80-IA and, therefore, deductions for the AY 2008-09 and 2009-10 would not be allowed.

Supreme Court observed that the High Court had taken a categorical view that the moment 'substantial expansion' is completed as per Section 80-IC(8)(ix), the statutory definition of 'initial assessment year' {Section 80- IC(8)(v)} comes into play. As a consequence, Section 80-IC(3)(ii) would entitle the unit to hundred per cent deduction for five years commencing with completion of 'substantial expansion' followed by twenty-five per cent deduction for next five years i.e.; subject to maximum of ten years. Thus, the High Court accepted that when the substantial expansion is done in a particular Assessment Year and that is made during the period mentioned in sub-Section (2) of Section 80-IC, not only benefit admissible under Section 80-IC shall get triggered, the year in which such substantial expansion is completed is to be treated as 'initial assessment year'.

Supreme Court held that total period of ten years, thus, is to be counted in the following three circumstances: (a) when the deduction has been given under Section 80-IC for a period of ten years, no further deduction is admissible, (b) When the deduction is given under second proviso to Section 80-IB(4) (this provision pertains to certain industrial undertakings in North-Eastern Region); (c) When the deduction is claimed under Section 10C. It is again a special provision in respect of certain industrial undertakings in North-Eastern Region

Supreme Court noted that the assessee had not got deduction under Section 80-IC for a period of ten years as he started claiming deduction under this provision w.e.f. AY 2006-07.

Supreme Court observed that the purport behind the three types of deductions specified in Section 80-IA, Section 80-IB and Section 80-IC is, thus, different. Section 80-IC stipulates the period for which hundred per cent deduction is to be given and then deduction at reduced rates is to be given. If the assessee had earlier availed deduction under Section 80-IA and Section 80-IB, that would be of no concern inasmuch as on carrying out substantial expansion, which was carried out and completed in the Assessment Year 2006-07, the assessee became entitled to deduction under Section 80-IC from the initial year.

The term 'initial year' is referable to the year in which substantial expansion has been completed, which legal position is stated by the High Court itself and even accepted by the Department as it has not challenged that part of the judgement. The

[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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inclusion of period for the deduction is availed under Section 80-IA and Section 80-IB, for the purpose of counting ten years, is provided in sub-section (6) of Section 80-IC and it is limited to those industrial undertakings or enterprises which are set-up in the North-Eastern Region.

Supreme Court thus ruled in favour of assessee and reversed the order of High Court.

LD/66/187

Conventional Fastners

vs.

Commissioner of Income Tax

16th May, 2018

Section 80-IC deduction denied on interest earned on fixed deposit with bank for AY 2009-10 as it is not 'derived from' eligible business.

The assessee manufactures electric meters. During AY 2009-10 assessee claimed deduction under Section 80IC for the entire amount of net profit earned. The assessee had earned interest on FD, which it had maintained with the bank for securing Bank Guarantee for business transactions. During proceedings initiated under section 263, the CIT held that the Assessing Officer was incorrect in allowing deduction under Section 80-IC on interest on FDR. ITAT affirmed the order of CIT, aggrieved by which the assessee preferred an appeal before the High Court.

High Court held that Section 80IC benefit is available only on profits and gains derived by assessee from carrying on eligible business. High Court placed reliance on Supreme Court ruling in *Pandian Chemicals Ltd. [(2003) 262 ITR 278 (SC)]* wherein the distinction between the words 'derived from' and 'attributable to' was discussed. High Court observed that in Section 80-IC, the words 'derived from' are used. High Court remarked, "Had the Legislature used the words, 'attributable to', then it would have a much wider effect and it may have encompassed within itself, the income, which is the subject matter of controversy before us".

High Court rejected assessee's stand on Assessing Officer 's treatment of such FD interest income as business income under Section 28. High Court stated that though the interest income qualifies as business income under Section 28, no deduction can be allowed under Section 80IC. High Court remarked that "Any income, which may be derived from carrying on the business, even if it is incidental, would qualify as business income under Section 28, but that is not the same thing as saying that it is a business income, which is derived from the said business."

High Court thus ruled in favour of Revenue and held that no deduction under Section 80IC can be claimed on interest earned on fixed deposits.

Aggrieved by this order of the High Court, the assessee had preferred an appeal before the Supreme Court. The Supreme Court dismissed the SLP and thereby upheld the order of the High Court.

LD/66/188

Principal Commissioner of Income Tax

vs.

Uttarbanga Kshetriya Gramin Bank

07th May, 2018

For the purpose of Section 36(1) (viia), aggregate average advance shall be calculated by computing 10% of the aggregate monthly average advances, made by each rural branch, outstanding at the end of the last day of each month.

The assessee is a regional rural bank and its main business is banking activity. The assessee claimed a deduction under Section 36(1)(viia) r.w. Rule 6ABA for AY 2008-09 and 2009-10 @ 10% of aggregate monthly average advance by taking cumulative outstanding advances by rural branch at the end of the last day of each month comprised in the previous year.

The Assessing Officer held that instead of the cumulative balance, only loans and advances made during the year should be considered for the purpose of deduction, otherwise it will lead to double deduction to assessee. Accordingly, Assessing Officer restricted the deduction under Section 36(1)(viia). CIT(A) upheld the order of the Assessing Officer.

However, ITAT held that provision for bad debt and doubtful debt deduction under Section 36(1)(viia) incase of assessee-bank has to be computed @ 10% of the aggregate monthly average advances by taking cumulative outstanding advances by rural branch at the end of the last day of each month comprised in the previous year. ITAT set-aside the order of CIT(A) and directed the Assessing Officer to take cumulative outstanding balance in line with Rule 6ABA.

Aggrieved, the Revenue appealed before Calcutta High Court.

High Court upheld the ITAT's order. High Court remarked that "We find from the amended direction

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made by the Tribunal that such direction is in terms of Rule 6ABA". High Court ruled that the amended direction by ITAT is the correct application of Rule 6ABA.

Ruling in favour of assessee, High Court held that no substantial question of law arose for its consideration.

LD/66/189

Ardent Steel Limited

vs.

Asst. Commissioner of Income Tax

04th May, 2018

Service of notice, required under Section 148, to Chartered Accountant of the assessee is not service at all and assessee's participation in reassessment proceedings cannot be held to be a valid service of notice.

The assessee filed its return of income for AY 2009-10. The assessee was served with notice on 13/04/2016, for the first time under Section 148(1) through its Chartered Accountant and the assessee was never served with the notice alleged to be issued under Section 148(1) on 15/03/2016. In response to this notice, the assessee filed the return and asked for reasons to believe. Subsequently, assessee filed objections against the reasons for reopening of assessment under Section 148, clearly stating that he was never served with notice dated 15/03/2016. This objection was rejected by the Assessing Officer by taking stand that the notice was issued on 15/03/2016 on the address shown in the tax returns and it was returned back on 28/03/2016 to the office citing the reason to be "left".

Aggrieved, assessee filed the Writ Petition before the High Court.

Revenue argued that the assessee filed its return of income in response to the alleged notice and also participated in the assessment proceedings and thus his right to claim non-service of notice under Section 148 was abandoned. Further, since the reference of notice dated 15.03.2016 was also given by the assessee in the return filed in response to notice, the assessee was deemed to have waived the service of notice under section 149(1) as per Section 292BB.

High Court analysed provisions of Section 292BB and observed that a proviso is appended to the main provision which provides that the aforesaid provision would not apply where the assessee has raised such objection before the completion of such assessment or reassessment. In the instant case, the assessee raised an objection while submitting its reply to the reasons for reassessment about non-service of impugned notice. High Court noted that the plea of Section 292BB would not be available since the assessee had submitted its objection to the Assessing Officer prior to the completion of assessment proceeding.

Reference was made to *Delhi High Court ruling in CIT vs. Chetan Gupta [(2015) 62 taxmann.com 249 (Delhi)]* wherein it was observed that the mere fact that an assessee or some other person on his behalf, not duly authorised participated in the reassessment proceedings after coming to know of it, will not constitute a waiver of the requirement of effecting proper service of notice on the assessee under Section 148.

High Court held that no notice was served to the assessee under section 148(1) and service of notice to the chartered accountant of the assessee is not service at all and participation of the assessee by filing return and filing objection to the notice to the reasons to believe cannot be held to be a valid service of notice. Thus, the High Court held that alleged notice was not served in terms of Section 148(1) and hence, the reassessment proceedings initiated by the said notice and the order deciding objection were without jurisdiction and without the authority of law.

Further, the High Court noted that no notice under Section 149(1)(b) read with Section 148(1) was issued to the assessee, well within the period of limitation on or before March 31, 2016 on the officially notified correct address available in the official record for service of notice to the assessee, which was a jurisdictional fact and condition precedent for initiation of the assessment proceeding.

Thus, High Court ruled in favour of assessee and quashed the notice under Section 148.

LD/66/190

Ushaben Jayantilal Sodhan

vs.

Income Tax Officer

01st May, 2018

Since construction of new residential flat was completed before sale of capital asset being land in a transaction of self-development of property, benefit of deduction under Section 54F denied by High Court.

The assessee owned land with a bungalow on such land. The assessee demolished the bungalow

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to construct 8 flats on the land, out of which she retained 4 flats for her own use and the remaining 4 were meant for sale. After receipt of development permission from the competent authority on 29.07.2006, the building was constructed between February, 2007 and October, 2008 with the building use permission was obtained on 23.10.2008.

The assessee considered the proportionate land apportioned to the 4 flat purchasers as sale of land belonging to her and disclosed long term capital gain of 58.87 lakhs by claiming a deduction under Section 54F. The Assessing Officer noted that the 4 flats were sold by the assessee after October, 2008 and since no construction was carried after this date, deduction under Section 54F was not eligible to be claimed. The CIT(A) ruled in favour of Revenue. ITAT recorded that for grant of deduction under section 54F in case of construction of a residential house, the condition was that the assessee ought to, within a period of three years after the date of transfer of long term asset, construct a residential house. ITAT also, thus ruled in favour of Revenue, aggrieved by which the assessee preferred an appeal before the High Court.

High Court observed that with respect to 3 out of the 4 flats sold by the assessee, the sale deeds were executed after the date of grant of *building use permission*, i.e.; after the sale of these flats, no construction was carried out. Thus, High Court observed that if the date of the sale deeds was considered the crucial date for transfer of the capital asset, the construction preceded the transfer.

High Court referred to the Transfer of Property Act, 1882 which defined the term *transfer of property* and noted that an agreement to sale does not convey a property from one person to another, either in present or even in future. Only after bilateral obligations are discharged, sale deed gets executed and upon its registration under Section 17 of the Registration Act, 1908, the right, title and interest in the property is transferred to the purchaser. As per High Court, an agreement to sale immovable property would not cast obligations only on the seller and it would be based on reciprocal promises to be performed by both sides. High Court therefore held that upon mere execution of an agreement to sale, the immovable property would not get transferred to the purchaser. High Court also distinguished assessee's reliance on Supreme Court judgement in case of *Sanjeev Lal [2014] 365 ITR 389 (SC)].*

Thus, High Court held that the assessee's claim for deduction under Section 54F could not succeed except in relation to the transfer of one flat which had happened before the completion of construction, i.e.; before October, 2008. In case of this particular flat, since the construction could be stated to have been carried out after the transfer of the original capital asset, the claim of deduction under Section 4F could not be denied.

Thus, High Court denied deduction under Section 54F in respect of 3 out of 4 flats sold by the assessee.

LD/66/191

International Seaport Dredging Private Limited
vs.
Dy. Commissioner of Income Tax
25th April, 2018

High Court treats TDS order under Section 201 as a show cause notice against the assessee.

The assessee is engaged in the business of dredging and marine engineering services. The assessee had made payment for equipment during the AY 2011-12 to Belgian company and French company without deducting tax at source since no tax was deductible under relevant Double Taxation Avoidance Agreement (DTAA). The Assessing Officer held the assessee as *assessee-in-default* under Section 201(1)/ (1A) and levied interest. Assessee filed a writ petition before the Madras High Court seeking to quash the order passed by the Assessing Officer.

High Court observed that it cannot be deciphered very clearly as to which finding is rendered by the Assessing Officer *vis-a-vis* the assessee's contention and what are the details and materials pertaining to the party, whom the assessee has effected payments. Further, materials which have been disclosed or mentioned in the impugned order were never disclosed to the assessee. As per the High Court, there was gross violation of natural justice.

High Court noted that since the Assessing Officer has referred to several materials and information not pertaining to the petitioner/assessee in the impugned order and arriving at a conclusion against the petitioner largely based on such information, the impunged proceedings can be directed to be treated as a show cause notice.

High Court directed the assessee to submit preliminary objection to the impugned order wherein the assessee shall be entitled to raise a plea of

limitation on initiation of TDS proceedings. Further, if the assessee requires any documents, records, statement, etc., then it shall clearly indicate what are the documents required by it and the relevancy of the documents to their case; and upon such request of assessee, High Court directed the Revenue to furnish copies of the records required.

High Court finally directed the Revenue to pass fresh order in accordance with the law after following the principles of natural justice and further directed that no coercive action shall be initiated against the assessee till the entire exercise is completed.

Service Tax

LD/66/192

Vasantha Green Projects
vs.
CCT
11st May, 2018

Tribunal quashed service tax demand on flats given to land owners by developer, free of cost, as value of such flats which represents consideration for securing development rights, which was already included in value charged to prospective buyers and thereby also stands included in the assessable value on which service tax liability is paid.

Facts:

Appellant entered into joint development agreement for construction of houses and residential premises with different land owners. In respect of one such agreement, appellant was required to give part of the area to land owners fully developed and entered into an agreement with prospective buyers for sale of the flats of his area. Department demanded service tax from appellant by alleging that appellant has not discharged service tax liability towards the construction services provided to the land owners towards allotted share of developed property. The demand was issued on the basis of nearest sale value of the villas, charged to the new prospective customers of the property lying with the appellant. While rebutting the same, appellant submitted that in consideration of the land given by the land owners, they constructed villas for land owner which were allotted to them free of cost. The appellant

submitted that, since the said cost is included in the price of villas and that it has paid service tax on such sale price, no further liability arises.

Held:

Hon'ble Tribunal noted that appellant has provided construction services to the land owner and as a consideration, received legal rights on his share of land. In terms of the said right, it constructed villas on that portion of land and sold them to prospective buyers. This would mean that appellant is investing the consideration received from first transaction with land owners i.e. right to construct, in the second transaction. Tribunal held that when the consideration received from land owners is invested in construction of villas to other buyers on which service tax is paid, it cannot be concluded that service tax paid on consideration received from land owners have to be evaluated differently. Further, it was noted that the construction of villas for the land owners is a consideration towards the land on which villas were constructed and offered for sale to prospective customers. The value which has been arrived at for sale of villas to prospective customers, would include the consideration paid or payable for acquisition of land. Tribunal noted that it is not a case that appellant has not discharged the service tax liability on the value received for the villas from prospective customers. Accordingly, Tribunal held that if the consideration towards the acquisition of the land has been included in the value of the villas sold to prospective customers and appropriate service tax liability has been discharged on the same value, the appellant cannot be again made liable to service tax under the premise that sale value of the villas given to land owners is a consideration on which service tax liability was not discharged, as this would lead to double taxation.

Further, Hon'ble Tribunal observed that in terms of Section 67 of Finance Act, 1994, service tax is liable to be paid on gross amount charged i.e. to say consideration received from land owners in kind and consideration received from prospective customers i.e. total gross amount. Tribunal found that the amount attributable to the consideration received by appellant in the form of land rights from the land owner stands included in the value of villas sold to prospective customer. This would mean that consideration received by the appellant in form of developmental right was considered in assessable value. Also, reliance was place on chartered accountant certificate which clearly stated that to arrive at the value of construction, areas of villas to be shared to land owners, the appellant had undertaken an exercise to determine the value of construction per square feet for the villas and the said construction value of the villas built up area which was shared free of cost to the land owner, was considered while arriving at the service tax liability. Thus, the tribunal set aside the impugned order and the appeal was allowed in favour of the Appellant.

Excise

LD/66/193

M/s Santani Sales Organisation
vs.
CESTAT, Delhi and Others
31st May, 2018

Mandatory pre-deposit of 7.5% paid under Section 35F of CEA, 1994, at the time of appellate proceedings before Commissioner (Appeals) can be adjusted while making payment of pre-deposit of 10% for second stage appeal before tribunal.

Facts:

In terms of Section 35F of the Central Excise Act, 1994, the appellant is required to mandatory pre-deposit of 7.5% of duty and penalty in dispute, in case of first stage appeal i.e. appeal before Commissioner (Appeals) and mandatory pre-deposit of 10% in case of second stage appeal i.e. appeal before tribunal. The question of law raised in present writ petition is whether the petitioner assessee, on filing second appeal before the Tribunal is required to make an additional pre-deposit of 10% of the duty and penalty in dispute, over and above 7.5% pre-deposit paid before the Commissioner (Appeals). In other words, whether 7.5% of pre-deposit paid at first stage can be adjusted at the time of second appeal, thereby requiring payment of only balance 2.5% of disputed demand.

Held:

Hon'ble High Court noted that in terms of Section 35B(1)(a) of CEA, 1944, any person aggrieved by an order or decision of the Principal Commissioner of Central Excise or Commissioner of Central Excise as the adjudicating authority, can file an appeal before the Tribunal and such person has to pay pre-deposit of 7.5% in terms of Section 35F(ii). As per Section 35B(1)(b), appellant can file appeal before

Tribunal against an order passed by commissioner (Appeals), which is the first appellate authority in some cases. As per Section 35F(iii), where appeal is preferred against order referred in Section 35B(1)(b), appellant has to pay pre-deposit equivalent to 10% of disputed demand. High Court noted that the distinction between clause (ii) and (iii) of Section 35F is predicated on whether an appeal has been preferred against the order-in-original or against the order passed by the first appellate authority, i.e., Commissioner (Appeals). In the former case, 7.5% of the duty and penalty which is in dispute is to be pre-deposited, whereas in the latter case, 10% of the duty and penalty in dispute has to be pre-deposited. HC found that Section 35F draws distinction on the quantum of pre-deposit depending on whether the appeal is the first or the second appeal. HC also noted that in Section 35F, as the expression or words 17.5% or an additional 10% deposit have not been used instead of using mere 10% pre-deposit, the appropriateness of the meaning attached to 10% pre-deposit in the context is apparent.

Further, referring to CBEC circular no. 984/08/2014-CX dated 16.09.2014, HC held that deposits made during the pendency of the proceedings, or even after the order-in-original is passed, have to be taken into consideration for determining and deciding whether condition of pre-deposit of 7.5% or 10% has been satisfied and thus, the earlier deposits do not get obliterated and are not to be treated as inconsequential, especially in light of para 3.1 of said circular which states that any shortfall from the amount stipulated in the Section 35F shall have to be paid before filing of an appeal before the appellate authority.

Accordingly, HC held that the assessee is required to deposit 10% of the amount of duty/penalty as confirmed by the first appellate authority inclusive of 7.5% pre-deposit made for the first appeal, because the requirement of pre-deposit of 10% would not be in addition to and over and above 7.5% of pre deposit made for the first appeal.

LD/66/194

Shiva Alloys Private Limited

vs.

Commissioner of Central Excise

07th May, 2018

Despite discharge of differential duty before passing of adjudication order, penalty under Section 11AC of Central Excise Act upheld by High Court in respect of clearance of goods without payment of excise duty.

The issue in the instant case was whether the CESTAT was right in upholding levy of 100% penalty under Section 11AC of the Excise Act, 1944 notwithstanding that the entire payment of disputed tax was paid by the appellant on or before passing of the order-in-original?

The assessee is a manufacturer of S.S. ingots and S.S. flats. Upon a search operation conducted by Central Excise Officers, shortage of goods was found on comparison with the balance shown in the books. Further an unexplained quantity of goods was found in the premises of other concerns. The Director of the assessee-company admitted that these goods found in premises other concerns belonged to it and were cleared without payment of duty. Therefore, a show cause notice was issued for payment of differential duty along with penalty. The demands and the adjudication order were affirmed by CESTAT, with certain redemption fine and personal penalty.

Regarding the issue of this matter, it was an admitted fact that it is accepted and admitted that the appellant herein did not pay the penalty imposed under Section 11AC of the Central Excise Act. High Court noted that mere payment of differential duty would not matter once the conditions for imposition of penalty under Section 11AC were satisfied.

High Court referred to Supreme Court ruling in *Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3 (SC)]* wherein it was held that once the conditions mentioned in Section 11AC were fulfilled, there was no discretion left with the authority concerned to reduce the penalty to an amount less than the duty determined. High Court stated that this decision again highlighted that conditions mentioned in Section 11AC should be first fulfilled.

High Court further remarked that the payment of duty, whether made before or after issuing of show cause notice, is not determinative and a relevant factor for deciding whether or not penalty should be imposed under Section 11AC of the Excise Act. This issue is to be decided having regard to the satisfaction or non-satisfaction of the conditions stipulated in Section 11AC of the Act. The reconditions which have to be satisfied are fraud, misrepresentation, suppression of facts and contravention of the Act and Rules.

High Court observed that the assessee did not dispute or challenge the satisfaction of conditions mentioned in Section 11AC as it did not submit that fraud, misrepresentation or suppression of facts in contravention of provisions of the Act or the Rules were missing and absent.

High Court held that since the assessee had not paid 25% of the penalty within the stipulated time of 30 days and therefore, 100% penalty was payable by it.

High Court thus ruled in favour of Revenue.

LD/66/195

Commissioner of Central Excise

vs.

M/s Ceat Limited

03rd May, 2018

Bar of Unjust enrichment is not legally applicable to the provisional assessment cases before amendment to Rule 9B.

The assessee being a manufacturer of tyres had cleared the goods under provisional assessment for the Financial Year 1998-1999 and the same was finalised vide order dated 04.06.2001 and the duty paid in excess was determined at ₹91.59 lakh. Consequently, the Assistant Commissioner had refunded the claim of assessee on such finalisation of provisional assessment. The Commissioner ruled in favour of Revenue and held that assessee had incorrectly claimed deductions on the assessable value; however CESTAT ruled in favour of assessee and set aside this order of the Commissioner, thereby holding that refund relatable to the deduction was permissible to the assessee.

The Assistant Commissioner also observed that in the year 1998-99 the assessment was made provisional as the assessee claimed various discounts from sale price as actual discount was not known to them at the time of the clearance. In July 2003, Revenue issued a show cause notice to the assessee asking why the amount of ₹91.59 lakh, erroneously refunded to them, should not be recovered from them under the provisions of Section 11A(1). The said show cause notice was issued on the basis that assessee was not entitled for refund and the same should have been credited to the consumer Welfare Fund as laid down under the provisions of Section 11B(2) and as the assessee has not produced any evidence to prove that they have not passed on the burden of the duty to their customers during the relevant period.

The Commissioner held that as far as the issue of unjust enrichment is concerned the provisions under Rule 9B(5) of Central Excise Rules, 1944 were made applicable with effect from 26.06.1999 and the said amendment is to be made applicable prospectively. It was therefore, held that for the period in question i.e. 1998-99, the said amendment would not be applicable. CESTAT also ruled in favour of the assessee.

High Court observed that as per Rule 9B(5), upon final assessment of duty, the provisionally assessed duty would be adjusted there against, and if the same fell short of or was in excess of duty finally assessed, the assessee would pay the deficiency or be entitled to a refund, as the case may be. As per the proviso that was appended thereto w.e.f. June 26, 1999, if an assessee was entitled to refund, same shall not be made except in accordance with the procedure established under Section 11B(2) of the Act.

High Court observed that the event of payment of excise duty was not completed till the finalisation of the assessment, because it would only be thereafter

that the question of recovery of duty short paid or refund of excess duty would arise. High Court held that the Commissioner was perfectly justified in recording a finding that the said show cause notice as not at all sustainable and that the issue of unjust enrichment was not applicable for the reason that the goods were assessed on provisional basis and the refund claimed was after finalisation, as per Rule 9B(5) of the Central Excise Rules.

High Court referred to Supreme Court judgement in *CCE vs. Allied Photographics India Ltd, Mafatlal Industries Ltd [1997 (89) ELT 247]* and *Commissioner of C. Ex. Bangalore-II vs. ITC Ltd.*, and observed that entitlement to refund and finalisation of assessment under Rule 9B was independent from the provisions of refund under Section 11B. Even if the amendment made by Notification No. 45/99 w.e.f. June 25, 1999 was noted, only the procedure established under Section 11B(2) had been made applicable to the refund arising out of the finalisation. High Court observed that the doctrine of unjust enrichment would not be attracted to the refunds from finalisation of provisional assessment for the period prior to 1999. The proviso to Rule 9B(5) would be applicable only w.e.f. June 25, 1999 and hence, unjust enrichment will not apply even if assessments were finalised after the said date.

High Court held that the CESTAT order did not suffer from any perversity and thus ruled in favour of assessee.

Customs

LD/66/196

Commissioner of Customs
vs.
Arif Khichi
23rd May, 2018

CESTAT was not justified in setting aside adjudication order and would have to decide the issue on merits including question of DRI's jurisdiction without being influenced by High Court decision or without awaiting Supreme Court judgement.

The issue before Delhi High Court was whether CESTAT was justified in remanding the matter to the Adjudicating Authority to decide the issue of jurisdiction of DRI to issue show cause notice, after the decision of the Supreme Court against the ruling of High Court's Division Bench in *Mangali Impex Limited vs. Union of India*.

Show cause notices had been issued by Additional Director General, DRI to the assessees and thereupon, adjudication orders were passed by the Principal Commissioner of Customs (Import), Inland Container Depot., New Delhi. These original adjudication orders were challenged and set aside by the Customs, Excise and Service Tax Appellate Tribunal ('Tribunal' for short) in view of its earlier decision in Final order No.53941-53942/2017, Doaba Stud & Agriculture Farm versus Commissioner of Customs (I&G) decided on 12th June, 2017.

High Court referred to Supreme Court ruling in case of *Commissioner of Customs vs. Sayed Ali [2011 (265) ELT 19 (SC)]*, wherein it was held that DRI were not proper officers under Section 2(34) of the Customs Act, 1962. Post this judgement, a notification no. 44/2011- CUS (NT) dated 6th July, 2011 was issued by the CBEC, assigning functions to various officers including Additional Director General, DRI for the purposes of Section 28 of the Customs Act. Thereafter, sub-Section (11) was inserted under Section 28 of the Customs Act vide the Customs (Amendment and Validation) Act, 2011 with effect from 16th September, 2011, assigning the function of proper officers to various DRI officers with retrospective effect. However, Division Bench of Delhi High Court in the case of *Mangali Impex Ltd.* had held that the newly inserted sub-Section 11 to Section 28 of the Customs Act would not empower the officers of DRI or the DGCEI to issue show cause notice for the period prior to 8th April, 2011 i.e.; period prior to the date on which the Finance Act, 2011 had received assent of the President. However, High Court noted this decision had been stayed by the Supreme Court vide its order dated October 7, 2016.

High Court further referred to *Bombay High Court ruling in Sunil Gupta vs. Union of India [2015 (315) ELT 167]* and Telangana and Andhra Pradesh High Court ruling in *Vuppalamritha Magnetic Components Ltd. vs. DRI (Zonal Unit) Chennai [2017 (345) ELT 161 (AP)]* where these courts had taken a contrary view to the one expressed by the Division Bench.

High Court observed that CESTAT was not justified in setting aside the order-in-original to await the decision of Supreme Court in Mangali Impex Ltd, instead of deciding the said issue on merits. High Court observed that once an order-in-original is set aside, it would mean that the entire adjudication proceedings may have to be

undergone again and this would cause harassment to the assessee as well as inconvenience to the department.

High Court stated that in several orders, it had given an option to the CESTAT to decide the issue on merits including the question of jurisdiction of the officer of DRI to issue show cause notice without being influenced by the decision of the Delhi High Court in the Mangali Impex (*supra*) or without awaiting the judgement of the Supreme Court.

High Court thus ruled in favour of Revenue and remanded the matter to CESTAT, without passing any order on merits.

Transfer pricing

LD/66/197

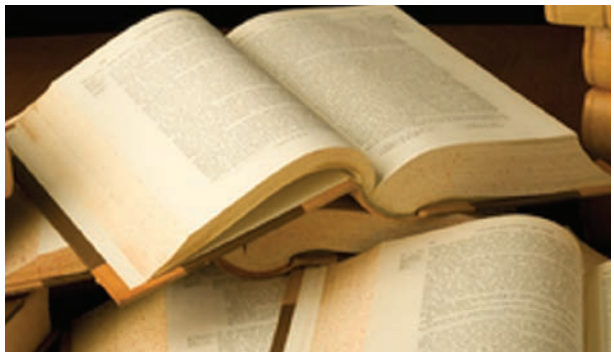
M/s Kaypee Electronics & Associates Pvt. Ltd.
vs.
Dy. Commissioner of Income Tax
29th May, 2018

ITAT erred in upholding royalty adjustment although royalty payment formed a part of the operating cost under entity level TNMM.

Assessee is a company engaged in the business of manufacturing magnetic based electronic coils, transformers and inductors. It is a subsidiary of Falco Limited, Hong Kong (AE) and had entered into a technology collaboration agreement dated 29/03/2006 with its AE for manufacturing electronic components by using technology, enterprise and know-how of Falco, marketing, selling the same under the Brand name of Falco, in India and abroad.

The assessee was required to pay royalty at 8% to the AE in terms of the agreement and accordingly the assessee had made a payment of royalty of ₹4.39 crores as per its declaration in Form 3CEB. Transfer Pricing Office (TPO) determined the arm's length price in respect of royalty at ₹2.75 crore holding that payment of Royalty at 8% on sales was not justified as there was no value addition made by the AE. DRP also confirmed the adjustment.

ITAT while rejecting the contention that when Transactional Net Margin Method (TNMM) was applied at the entity level, there was no necessity for benchmarking in respect of royalty transactions, observed, "on mere perusal of order of the Ld. TPO its is manifest that the TPO had picked up the transaction royalty alone for the purpose of benchmarking". ITAT dismissed assessee's appeal while rejecting the ground of appeal raised by the assessee as regards assailing of the addition of ALP



adjustment on account of royalty payment with respect to the concerned AYs in question. Aggrieved, assessee preferred an appeal before the Karnataka High Court.

Before the High Court, assessee also argued that ITAT had disposed of the appeals by recording a finding only as regards the issue of royalty and its adjustment by the TPO, and there was no occasion to advance arguments as regards the other issues adverted to in their memorandum of appeal. Further, assessee submitted that the question regarding the necessity of separate benchmarking in respect of royalty payment when the TPO had accepted the TNMM at the entity level was covered by the decision of Sony Ericsson Mobile Communications India Pvt. Ltd and the decision of the co-ordinate Bench of this court in the case *Siemens VDO Automotive Ltd. [(TP) A No. 923/B/2012]*, wherein it was held that as the royalty paid was already forming part of operating cost, there was no necessity of separately bench marking royalty.

High Court observed that there was strength in the assertion of the assessee regarding non-hearing on the grounds raised in the memorandum of appeal referred above. High Court observed that assessee's question regarding ITAT's upholding the royalty adjustment although such royalty formed part of operating cost under enterprise level TNMM, was decided without discussing the applicability or otherwise of the Delhi High Court ruling in the case of *Sony Ericsson Mobile Communications India Pvt. Ltd*, and the decision of the Co-ordinate Bench of the Tribunal in the case *Siemens VDO Automotive Ltd.*

Thus, ruling in favour of assessee, High Court observed that ITAT erred in law in failing to adjudicate various other grounds raised by the assessee. Thus, High Court remanded the issue back to ITAT directing to hear the appeals afresh on all grounds urged in the memorandum of appeal.

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 9th April, 2009 was received from Central Bureau of Investigation (hereinafter referred to as the "CBI/Complainant"), against CA. XYZ (hereinafter referred to as the "Respondent"). In the absence of formal complaint and on overall examination of allegations, the matter was treated as "Information" on 19th June, 2009. The charges alleged in brief are as under:

- The Respondent and CA. AAA (Respondent in another case) were running a syndicate to provide 'Accommodation Entry' and services for siphoning off the funds from the bank accounts.
- The Respondent and CA. AAA have been found maintaining/operating multiple fictitious bank accounts for this purpose.
- The Respondent and CA. AAA rendered their services to M/s. MMM in siphoning off ₹5 crores from PPP Bank.

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

- The Board submitted that the charge against the Respondent was that the Respondent alongwith CA. AAA was running a syndicate to provide "Accommodation Entry" and service for siphoning off the funds from the bank accounts. For the same purpose, they opened and operated multiple fictitious bank accounts. The Respondent and CA. AAA rendered their services to M/s MMM in siphoning off ₹5 crore from PPP Bank.
- In addition to submissions made by the Counsel for the him, the Respondent also made the following submissions in his defence, which are as under:-
  - The case pertained to the year 1999 which is more than 11 years old and he was not having any record pertaining to that year.
  - He was not running any syndicate to provide "Accommodation Entry" and services for siphoning off of the funds. He had not rendered any professional services during the period mentioned in the allegations to M/s MMM.
  - No documents were supplied to support the allegations. The Respondent never met Shri. SSS or did any business with whom they had claimed that he had received some income from him.
  - The Respondent also requested to keep the proceedings of Board of Discipline in abeyance till the decision/disposal of the proceeding pending adjudication before the Ld. Chief Metropolitan Magistrate, Delhi.
- As regard the request of the Respondent to keep the proceeding of Board of Discipline in abeyance till the disposal of Court matter, the Board is of the view that Board of Discipline is an independent quasi-judicial body. Even though the charges and allegations in the proceeding before the Court and Board of Discipline/ Disciplinary Committee could be same, yet the scope of proceedings before the Hon'ble Court and proceedings before the Board of Discipline are entirely different and the standard of proof required to be placed before the two are entirely different. While the Hon'ble Court of law would be looking into the facts/evidences to find out the truth of the matter concerned, the hearing by the Board of Discipline is aimed at enquiring into the professional and/or other misconduct, if any by the members of the Institute.
- The same was duly clarified to the Respondent vide letter dated 28th March, 2011. The Board also noted that all the documents available on record were duly provided to the Respondent.
- The Board noted from the CBI Charge Sheet that in the year 1999, Shri. KKK, Shri. BBB, Shri. KKK and Executive director of M/s MMM had entered into a Criminal conspiracy with Shri. SSS (Corporate Advisor of M/s MMM), the Respondent and CA. AAA & Others to obtain fund from the PPP Bank, New Delhi on the basis of forged and fabricated documents with the ulterior motive to siphon off the sanctioned advance for non-business purpose.
- As regard the role played by the Respondent, it has been noted that in order to obtain loan from PPP Bank for 5 crores, the Directors of M/s MMM had shown purchase order in the name of following fictitious companies/firms:-
  i) E.E.E. ii) T.T.T. iii) I.I.I.
- The Directors (Borrower) have shown 10% advance payments to the fictitious suppliers and shown 15% of the amount deposited in Bank as advance. Believing the bonafide of the borrower and papers submitted, the bank approved/ sanctioned the proposal. After acceptance of the terms and conditions of the advance by the borrowers and the sanction of advance, Hire Purchase lease agreement was entered by the bank with the borrower. For releasing the fund/ advance, pay orders have been issued in the name of purported suppliers.

- The aforesaid pay orders were to be issued to the purported suppliers but the same were obtained by Shri. KKK, the then Chief Managing Director of M/s MMM, in furtherance of the said criminal conspiracy and with a view to get pay orders issued by PPP Bank.
- Bank encashed pay orders were handed over to the Respondent and CA. AAA.
- The Respondent and CA. AAA deposited/got deposited pay orders in the fictitious accounts opened/got opened in the banks. The bank accounts wherein pay orders were deposited were opened by the Respondent and CA. AAA. After depositing the pay orders in bank accounts, the amount was withdrawn by the Respondent from fictitious accounts and was handed over to the accused Shri. SSS.
- It was noticed that for the account in the name of M/s. XXX. (one of suppliers) with DDD Bank, was being maintained by the Respondent wherein pay order of ₹23,30,640/- was deposited. In addition to above, it has also been noticed that fictitious accounts in the name of M/s. T.T.T. Pvt. Ltd. were got opened by the Respondent and CA. AAA in Corporation Bank, Janakpuri by showing their employee Shri. GGG and Shri. UUU as Directors of this Company, wherein pay orders of ₹14,78,880/-; 18,15840/-; 8,84,520/; 36,50,400/-; 25,70,256/-; 22,96,008/-were encashed.
- During the investigation, it was found that in the account opening forms and most of the cheques, through which money was withdrawn from respective fictitious account, had signatures/ writing of the Respondent and CA. AAA and Others.
- Further, CBI investigation revealed that for the purpose of providing fictitious bills and accommodation entry, number of bogus accounts were opened/got opened by the Respondent and CA. AAA in their name and also in the name of their employees.

Details of some of accounts are as under:-

Sr. no.	Account number and Name of the firm/Co.	Name of Account holder
1	CA No.11111 in the name of M/s. FFF	CA. RRR
2	CA No.22222 in the name of M/s. HHH	CA. RRR
3	A/c No.33333 in the name of M/s. JJJ	The Respondent
4	A/c. No.44444 in the name of M/s. OOO	The Respondent
5.	A/c. No.55555,66666, 44444 in the name of M/s. PPP, M/s. ZZZ and M/s. YYY	The Respondent and/ or CA. RRR were the introducer in the accounts.

- The CBI investigation revealed that no machinery was found having manufacturer label of any of the 3 suppliers in question.
- The Board noted that the Respondent has not submitted on the merits of the allegations. He only submitted that since he had plans of doing some business at that time, he opened the accounts in the name of M/s. QQQ & Others. Moreover, the Respondent's Counsel has mentioned that the proceedings before the Board of Discipline be kept pending till the trial before the Court is over.
- In view of the above, the Board noted that the proceedings before the Board of Discipline are separate and they cannot be kept pending till the trial before Ld. Chief Metropolitan Magistrate, is over, since the Board has to look into the conduct of its member in an independent manner. Further, the Board noted that the Respondent has created fictitious suppliers firms/Co. and also opened bank accounts in the name of respective firms /Co. in order to provide accommodation entries and fictitious bills to the main accused with a view to siphon off advance sanctioned by PPP Bank. The Board is also of the view that even though the advances were repaid by the borrower, yet the fact still remained that the firms and bank accounts were opened with an ulterior motive to defraud the Bank.

Thus, the Board in the light of the material available on record opined that the Respondent was found running a syndicate to provide 'Accommodation Entry' and services for siphoning off the funds from the bank accounts. 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 and the fact of pendency of the criminal proceedings cannot mitigate the gravity of the alleged misconduct on the part of the Respondent. Thereafter, the Board is of the opinion that looking into the facts of the case and the misconduct of the Respondent does not qualify for the maximum sentence and ends of justice shall be met if a less harsh punishment is awarded. Accordingly, the Board *ordered that the name of the Respondent be removed from the Register of Members for a period of* 1 (One) Month. ■