Legal Decisions[1]

Income Tax

LD/67/13

Vora Financial Services Pvt. Ltd.
Vs.
Asst. Commissioner of Income Tax
29th June, 2018

Addition under Section 56(2)(viia) not applicable on buy back of shares by a private limited company.

The assessee bought back 12.19 lakh of its existing share capital at ₹ 26 per share from one of its director-shareholder and paid consideration of ₹ 316.95 lakhs. The AO noted that book value of shares was ₹ 32.80 per share. The AO assessed the difference between the book value of shares and purchase price of shares amounting to ₹ 82.89 lakhs as income of the assessee under Section 56(2)(viia) of the Act. The Ld CIT(A) also confirmed the same. Aggrieved, the assessee appealed before Mumbai ITAT.

ITAT analysed provisions of Section 56(2)(viia) and noted that the provisions of Section 56(2)(viia) would be attracted when "a firm or company (not being a company in which public are substantially interested)" receives a "property, being shares in a company (not being a company in which public are substantially interested)". As per ITAT, the shares should become "property" of the recipient company; such shares could not be its own shares since own shares cannot be become the property of the recipient company.

Thus, ITAT held that since the assessee had purchased its own shares under buyback scheme and the same has been extinguished by reducing the capital and hence, the tests of "becoming property" and also "shares of any other company" fail in this case. Thus, ITAT deleted the addition made under Section 56(2)(viia).

Additionally, the AO had disallowed a deduction under Section 35(1)(ii) with respect to a donation made by the assessee to research society on the ground that registration of the society under Section 12AA was cancelled with retrospective effect. ITAT allowed this deduction stating that even if the approval was cancelled subsequently with retrospective effect, deduction cannot be denied since there was valid and subsisting approval to the society when the donation was given by the assessee.

ITAT, thus ruled in favour of the assessee.

LD/67/14

Binod Kumar Agrawala
Vs.
Commissioner of Income Tax
21st June, 2018

Addition due to variance of figures in Balance Sheet and P&L prepared for availing bank loan and those in actual audited Balance Sheet and P&L account for the same period, upheld by the High Court.

The assessee was interested in obtaining credit facilities from a bank and had a balance-sheet prepared by a firm of chartered accountants by the name of Roy Ghosh and Associates. The balance-sheet was necessary for the purpose of the application to the bank to obtain credit facilities. The balance-sheet indicated figures which may not have been commensurate with what was reflected in the books of accounts of the assessee. Nonetheless, a certificate was issued by the Chartered Accountants in Form 3CB under Rule 6G(1)(b) of the Income Tax Rules, 1962. The figures in the balance-sheet of 18th July, 2005 prepared by Roy Ghosh and Associates were at variance with the figures indicated in the balance-sheet presented by the assessee before the Assessing Officer prepared by another firm of chartered accountants by the name of Naredi and Co.

The assessee contended that the balance sheet dated July, 2005 was made on estimate basis and for the purpose of availing of the loan, and the correct audited profit & loss account and balance sheet was made subsequently on October, 2005 as signed by Naredi & Company, Chartered Accountant. On the basis of the audited balance sheet dated October, 2005 no addition can be made as assessee was holding fixed assets of ₹ 5.02 lakhs only. The difference of ₹ 20.09 lakhs was only due to the over valuation of the fixed assets for availing of the bank loan.

CIT(A) ruled in favour of the assessee but ITAT ruled in favour of Revenue. ITAT noted that the assessee got the tax audit and obtained the tax audit report from two different auditors, one is dated July, 2005 while the other is dated October, 2005. Section

[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 judgement, write to eboard@icai.in.*

44AB does not require that the tax audit should be conducted twice. The proforma of the audit report cannot be changed just to give a false impression to the assessing officer or to the public at large.

Before the High Court, the assessee argued that the certificate of Roy Ghosh and Associates appended to the July, 2005 balance sheet, which was presented to the bank and from which credit facilities had been sought was in Form 3CB; and it clearly stated that the information and explanations therein were purely based on estimates having no relation with the actual figures only to avail the bank loan.

High Court rejected the argument made by the assessee. High Court remarked that a rosy picture as to the financial position of the applicant, seeking credit facilities from a bank would be presented before the bank, for the bank to assess the creditworthiness of the applicant and the desirability of extending credit facilities to such applicant; but later another balance-sheet and profit & loss accounts would be slipped into the file, possibly indicating a less robust financial position of the constituent. The balance-sheet and profit & loss accounts of an assessee accompanied by a certificate as to its fairness, notwithstanding the caveat as noticed in paragraph 2(A) thereof, cannot be tailor-made to suit a particular purpose or window-dressed to make it attractive for bankers to rely thereupon; and all the gloss and sheen removed thereafter when it was the time to pay the tax.

High Court held that when the assessee presented the financial position of the assessee as per the balance-sheet of July, 2005, the assessee could no longer resile from such position and it was then open to the Assessing Officer to pin the assessee down on the basis of that. High Court, thus, ruled in favour of Revenue and dismissed assessee's appeal with costs of Rs. 10000/- to be paid by the assessee to Revenue.

LD/67/15

Brooke Bond India Limited

Vs.

Commissioner of Income Tax, Calcutta

18th June, 2018

Investment allowance claim under Section 32A on weighing machines, electrical equipments, other machineries and computers allowed by the High Court though it was not directly used in the manufacture.

The assessee had claimed investment allowance under Section 32A on weighing machines, electrical equipments, other machineries and computers. The AO rejected this claim noting that these items were not directly engaged in the production. The CIT(A) upheld the order of the AO. ITAT held that the blending of tea does not amount to manufacturing relying on Calcutta High Court ruling in Apeejay Pvt. Ltd., wherein it was held that blending amounts to processing, but not manufacture or production; since commercially no new and distinct commodity is brought to existence. ITAT upheld the AO's order not granting investment allowance.

Aggrieved, the assessee moved before Calcutta High Court.

High Court remarked that the tribunal exceeded its jurisdiction in trying to disapply the ratio of the Supreme Court in *Chowgule & Co. Pvt. Ltd. [47 STC 124].* High Court observed that ITAT was unjustified in enlarging the scope of the appeal in as much as the issue as to whether the blending of tea/coffee amounted to manufacture and/or production never fell for consideration before the ITAT and that it exceeded its jurisdiction in framing a new issue and deciding the same.

With regards to main issue of whether investment allowance was eligible on weighing machines, computers, electrical appliances, etc. installed after 31st March, 1976, High Court analysed the provisions of Section 32A. High Court referred to Lord Lindley's decision in *Yarmouth vs. France* wherein it was held that "*there is no definition of plant in the Act; but in its ordinary sense it includes whatever apparatus is used by a businessman for carrying on his business, not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business*". This definition was also relied in co-ordinate bench ruling in *Tribeni Tissues Ltd. [190 ITR 487]*, wherein it was held that weighing machines were considered as plant.

High Court held that as per the provisions of Section 32A, weighing machines, electrical equipments and other machineries, though not directly used in the production/manufacture of the finished goods, are the accessories integral to the business and without which effective production/manufacture of the final products may not be possible, are to be considered as *'machinery wholly used for the purpose of the business',*

and is entitled to the investment allowance under Section 32A. High Court made reference to the decisions in *Associated Bearing Co. Ltd [286 ITR 341], Oswal Woollen Mills Ltd. ((2002) 257 ITR 737*).

High Court concluded by stating that the benefit of using computers in running a business is immense and the use of machinery and computers has to be considered as *'wholly used for the purpose of business'*.

High Court, thus ruled in favour of the assessee.

LD/67/16

Commissioner of Income Tax

Vs.

Dr. P. N. Bhaskaran

12th June, 2018

Release of share of one partner in favour of other partner on dissolution of firm, is a transfer liable for capital gains.

The assessee was a partner of a firm engaged in the business of running hospital. On 31-03-1997, the firm, consisting of two partners, i.e., the assessee and his daughter, was dissolved and the daughter released her share in the firm to the exclusive share of the father i.e. the assessee herein. The assessee also took his share of the assets of the firm and the hospital belonged exclusively to him on such dissolution of the firm. It thus became a proprietorship, which was later sold in March, 1999 for ₹ 5 crores. The assessee filed return for AY 1999-2000, showing the apportionment of the consideration relating to building, furniture, electric and sanitary fittings, equipments and machinery, land, goodwill and trademark of the hospital and nursing home. With respect to the building, the assessee offered short term capital gains, and with respect to land, goodwill and trademark he offered long term gain and also claimed exemption under Section 54EA for investment in UTI.

Pursuant to proceedings under Section 263, it was held the that assessee became the exclusive owner of the property, therefore, the assets were 'short term capital assets' since they were held for less than 36 months till date of sale i.e. till March, 1999. Similarly capital gains for land, trade mark and goodwill was assessed as STCG in the hands of the assessee, being the exclusive owner from the date of dissolution of firm. CIT(A) upheld the order of AO. However, ITAT held in the favour of the assessee, and held that the AO had applied his mind; and the order under Section 263 as not sustainable. ITAT held that on dissolution of the firm there is no separate assignment of ownership to the partners and there is only allotment of the properties in proportion to the shares.

Aggrieved, the Revenue appealed before Kerala High Court.

High Court relied on Supreme Court ruling in *Addanki Narayanappa vs. Bhaskara Krishnappa [AIR 1966 SC 1300],* wherein it was held that partnership subsists, neither of the partners can claim a right on the partnership assets even to the extent of his share in the business. Only on dissolution and the exclusive rights coming into the possession of the partner could there be such exclusive right claimed, which again indicates that the partner so acquiring the rights on dissolution could only claim exemptions relatable to the date of dissolution of the firm.

High Court observed that the allotment of assets of the partnership firm on dissolution, being the realisation of a pre-existing right, does not amount to *transfer.* High Court noted that the partnership firm, at the time of dissolution, had two partners and on dissolution, the daughter of the assessee, who was the other partner, had also released her share in favour of the assessee. High Court noted that it cannot be said that the assessee had merely taken away a pre-existing right in the assets of the firm. High Court held that assessee was a partner in the firm and on dissolution was entitled to the assets in proportion to his share in the firm; in which he definitely had a pre-existing right. But, on the release of the share of the other partner, there is a transfer occasioned and the rights over that property accrue to the assessee, only on such release being effected by the other partner. Thus High Court allowed assessee's claim of capital gain being a long term capital gain and therefore, the exemption under Section 54EA in that. However, on the value of the shares in which the other partner had a pre-existing right, which was released in favour of the assessee, the right over can be claimed only from the date of release and if subsequent sale falls within the 36 month period, necessarily the assets are to be assessed as short term capital gains to that extent.

High Court affirmed ITAT's order only to the extent ITAT allowed the exemption on LTCG under Section 54EA and held that there was no ground for a suo moto revision to that extent; since the AO's finding on that count was not erroneous. The High Court, thus ruled in favour of the assessee on this issue.

However, with respect to the issue of value of the assets released in assessee's favour by the other partner on dissolution, High Court held that the finding of the AO in the original order was an erroneous finding, which was also prejudicial to the interest of the Revenue and hence, the CIT was perfectly justified in invoking the powers under Section 263. Since the exact shares of partners were not available on record and valuation was also to be decided High Court remanded the matter to ITAT, before whom the assessee shall produce the deed of dissolution and release executed in the year 1997-98 and directed ITAT to decide the quantum of LTCG/STCG, determining the same at the valuation as seen from the dissolution deed, and if lesser than the market value as on the date of release of the share of the other partner in the assets; on the market value.

LD/67/17

Alamelu Virappa

Vs.

The Income Tax Officer, Chennai

07th June, 2018

Spouse (Legal heir) of deceased assessee cannot be compelled to participate in deceased's reassessment.

The petitioner is the wife of Mr. S. Veerappan (assessee), who died on 26-01-2010. Petitioner received a notice dated 30-03-2017 addressed to her late husband – Mr. S. Veerappan, wherein it was stated that certain income of Mr. S. Veerappan escaped assessment for the AY 2010-11 and thus, re-assessment under Section 147 was proposed for the relevant AY. Petitioner sent a reply pointing out that her husband has died and in this regard, enclosed a copy of the death certificate. On being intimated about the death, the Department sent a notice to the petitioner to participate in the proceedings. This notice was sent beyond the period of limitation. Aggrieved, the petitioner filed a writ petition before Madras High Court.

Before the High Court, the petitioner contended that impugned notice was void and unenforceable in law.

High Court noted the settled legal principle that a notice issued in the name of the dead person was unenforceable in law. Further Revenue's contention that they had no knowledge about the death of the assessee and so notice sent to petitioner was not defective, was rejected by the High Court.

High Court observed that the limitation period for issuance of notice for reopening expired on 31st March, 2017 and the impugned notice was issued on March 30, 2017 in the name of the dead person. However, after being intimated about assessee's death, the Department sent the notice to the petitioner and this notice was served well beyond the period of limitation. High Court stated that a notice issued beyond the period of limitation was a nullity, unenforceable in law and without jurisdiction. High Court remarked that the fact that the Department was not intimated about the death of the assessee, cannot by itself, extend the period of limitation prescribed under the Statute. Further, there was no statutory obligation on the part of the legal representatives of the deceased assessee to immediately intimate the death of the assessee or take steps to cancel the PAN registration. Further, Section 159 was also not attracted since Section 159 could be invoked only if the proceedings had already been initiated when the assessee was alive.

High Court referred to Section 292 and observed that the issue relating to limitation was not a curable defect for the Revenue to invoke Section 292B. Further, relying on certain other judicial pronouncements it was observed that by the High Court that the provisions of Section 292B are not applicable, and that framing of assessment against a non existing entity/person goes to the root of the matter; which is not a procedural irregularity, but a jurisdictional defect, as there cannot be any assessment against a dead person.

High Court, thus held that the impugned notice was wholly without jurisdiction and so unenforceable. High Court, thus ruled in favour of the assessee.

LD/67/18

Tamilnadu Magnesite Ltd.

Vs.

The Asst. Commissioner of Income Tax

05th June, 2018

Expenses incurred on abandoned project held to be deductible.

Assessee had claimed deduction for project expenses related to a project which was ordered to be closed by the Government of Tamil Nadu. Consequently,

upon considering the commercial prudence, major portion of intangible assets were shown as revenue expenditure by the assessee. The AO held that the expenditure is capital in nature and therefore, declined to accept the assessee's claim of expenses in the profit & loss account, as they had utilised money from the capital account and aid from the Government of Tamil Nadu termed as "capital work-in-progress". Further, the AO held that the assessee was making expenses for the new venture from the capital account and in the balance-sheet only, it would have been better if the capital work-in- progress was reduced instead of operating revenue.

The CIT(A) noted that assessee's basic intention was to take over the Chemical Beneficiation Project from the Tamil Nadu Industrial Development Corporation (TIDCO) for production of 'high quality sintered magnesia', which is one of the products of the assessee company. Noting that no new venture came into existence, CIT(A) allowed the deduction as revenue expenses. ITAT ruled in favour of Revenue, aggrieved by which, the assessee appealed before the Madras High Court.

High Court noted that the Chemical Beneficiation Plant was already established by TIDCO and on account of their not being able to achieve the desired result, the assessee was invited to take over the project, as the assessee possessed expertise in the field. Assessee had entered into arrangement with bank and had imported machineries, but 12 years had passed by and the project had not taken off. High Court noted that therefore, IBDI bank had withdrawn from the project as it was found to be unviable and another co-promoter also expressed his inability to continue the project. High Court noted that after 12 years, the Government took a decision to sell the project and consequently, cancelled the allotment of 47 acres of land in favour of the assessee. Thus though the assessee had entered into an arrangement with the banks and co-promoters, and took action for acquisition of land, import of machineries, etc., no new venture was established by the assessee.

The venture did not fructify, not on account of the conduct of the assessee, but on account of the decision of the Government of Tamil Nadu. As per the High Court, the AO was incorrect in holding that the expenditure was non-deductible being capital in nature; as the parameters to ascertain as to whether the expenditure is revenue or capital are that there should be an enduring benefit, which should accrue to the assessee and there should be a creation of a new asset, and which remained unfulfilled.

High Court relied on Co-ordinate bench ruling in *Tiruvengadam Investments Pvt. Ltd [(2016) 95 CCH 0024],* wherein it was held that the film production expenses of abandoned films should be treated as revenue expenditure. High Court held that the abandoned project was not a new one and it was a decision taken by the Government after about 12 years after the assessee was invited to take over the project, which was already in existence.

High Court thus held, that the expenditure was revenue in nature and not capital, and thus ruled in favour of the assessee.

LD/67/19

Commissioner of Income Tax
Vs.
Sudev Industries Limited
31st May, 2018

High Court quashes ITAT order which held that the service of Section 148 notice on a person other than 'principal officer' was not a valid service; Notice was sent by registered post at assessee's factory and was served on the security guard, but assessee's principal officer had appeared before the AO.

For AY 1995-96, the assessee filed its return of income declaring Nil income. After recording "reasons to believe" in writing, ACIT issued notice under Section 148 r.w.s. 147 by registered post. However, ITAT quashed the re-assessment holding that notice under Section 148 was not served on the assessee's officer-in-charge, but given to security guard at assessee's factory and thus was not a valid service of notice. Aggrieved, Revenue filed an appeal before Delhi High Court.

High Court noted that notice under Section148 had been sent by registered post vide receipt No.4896 dated 15th September, 1998. Secondly, it was noted that upon service of the said notice, Mr. Rajeev Aggarwal, director of the respondent assessee had appeared before the AO and on request was given a copy of the notice issued under Section. 148 and of the reasons recorded for issue of notice. The third aspect, which the High Court noted, was that the assessee, during the assessment proceedings before

the AO, did not contest or object that notice under Section. 147/148 was not duly served as it was not served on the authorised officer or director or that the notice was not addressed to the principal officer. As per the High Court, if the respondent-assessee had taken the said plea, the Assessing Officer had the option to furnish and serve the notice on the director or the authorised representative.

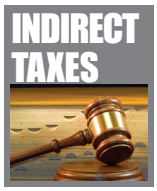
High Court perused Section 282 and noted that this provision was enacted to ensure compliance of principles of natural justice and for ease of service, and not for hairsplitting and fault finding. High Court noted that in case of a company, notice may be addressed to the principal officer. High Court observed that use of the word "may" in Sub-section (2) reflected that this provision was permissive and not mandatory. Thus, the High Court rejected ITAT's observation that the notice under Section 148 not being addressed to the principal officer, but to the company itself was invalid and completely illegal so as to not confer jurisdiction on the AO.

High Court relied on ruling in *Malchand Surana [(1955) 28 ITR 684 (Cal.)]*, wherein it was observed that the mere fact, that the physical delivery of the notice was made to a person, other than the addressee, who had no authority to receive the letter on the addressee's behalf, would not be sufficient to prove lack or failure of proper service. Presumption would still be there and would remain unrebutted notwithstanding that the actual service had been affected on a different person. As per GC, legality and sufficiency of service would depend on facts.

High Court observed that there was no occasion for the assessee to object as Mr. Rajeev Aggarwal, Director of assessee-company was duly furnished a copy of the notice. Thus, the object and purpose of service of notice was to inform and make the company aware that proceedings under Section 147/148 were initiated. High Court thus concluded that the initiation to this extent was valid, and not disputed and challenged in the present case.

High Court held that the assessment proceedings under Section 147/148 were not invalid or void for want of proper service of notice. However, High Court stated that an order of remand was required to be passed as the ITAT had not adjudicated and decided the appeal filed by the assessee on merits.

Thus, High Court ruled in favour of Revenue



Service Tax

LD/67/20
Radiowani
Vs.
CST
(Mumbai- CESTAT)
29th May, 2018

Mere registration under 'sound recording services' under service tax law, does not make contract of producing entire radio programme as taxable under 'sound recording services'. When there is no proposal in show cause notice to tax it under any other category, demand under the said other category is not sustainable.

Facts:

The appellant was registered with service tax department as provider of sound recording services. They were engaged by advertising agencies for producing radio spots for clients i.e. mini-programs that are intended to be broadcasted by clients. Alleging that appellant provided sound recording services by producing said radio spots, revenue demanded impugned service tax liability under category of 'sound recording services'.

Held:

At the outset, tribunal noted that merely obtaining registration for sound recording services is not sufficient to operate as a conclusive ground of taxability because the levy under Finance Act, 1994 is not on the persona but on the activity. Neither the registration nor wherewithal for rendering the service can substitute for classifying the activity within the definition of the service.

As regards appellant's submission of alternative classification of impugned activity under 'advertising agency services', tribunal noted that the entire programme is produced by appellant and is then submitted to its client for further use. These may well be in the nature of subcontract by an advertising agency, but is yet an independent one. It was held that in absence of proposal in show cause notice to tax the activity as provision of 'advertising agency service', the appellant is not required to choose between alternate classification as that is the responsibility of the tax collector. Fitment within an alternative classification suffices to erase the proposal in the notice but cannot crystallise

liability unless the alternative was also proposed in the notice. Therefore, tribunal declined to test the activity of appellant for fitment under a different classification.

Further, tribunal noted that every taxable service may be an end in-itself to a consumer. However, there is no bar on such a taxable service being an input for another service. That is the nature of a commercial supply chain. Tribunal observed that the appellant undertakes the conceptualisation, the script preparation, identification of voice, actual recording, editing and ultimate development of the entire radio spot programme as a package ready for broadcast and the client pays compensation for the entire range of activities. Therefore, tribunal held that though sound recording is part of activity but it does not make for whole of the activity as that of sound recording, nor can the consideration be disaggregated to value the sound recording undertaken in pursuance of the contract. Thus, it was held that the activity of the appellant is clearly not that of sound recording per se and impugned demand was set aside.

LD/67/21

CCE & ST

Vs.

Shree Nakoda ISPAT Ltd.

(Delhi- CESTAT)

18th May, 2018

Activity of providing assistance in implementation of 'clean development mechanism' project in terms of Kyoto protocol which resulted in generation of transferable 'emission reduction certificates' i.e. carbon credits was held to be taxable as 'services of management or business consultancy'.

Facts:

Respondent-assessee is manufacturer of iron and steel products. While installing power plant for manufacturing activities, it entered into contract with foreign service provider for assistance in implementing clean development mechanism as per Article 12 of Kyoto protocol. The said services involved assistance in obtaining registration and certification of CDM project involving project design validation, registration, regular verification and arranging independent validation of such CDM. The execution of CDM project resulted in emission reduction certificates (CERs), which can be transferred/sold for a consideration. Further, the foreign service provider agreed to provide marketing of such credit certificates arising out of CDM project by obtaining most favourable terms, for annual fees of 7.5 % of the value of CERs arising out of such CDM project. SCN proceedings were initiated against respondent on the ground that respondent received 'management or business consultancy services' and thus, were liable to pay service tax under reverse charge mechanism. Aggrieved by confirmation of impugned SCN by impugned OIO, appellant filed appeal before first appellate authority.

During said appellate proceedings, the first appellate authority held that the CERs are 'goods' sold by respondent to foreign company. Further, relying upon CBEC's circular dated 27-06-2011, it was held that since the foreign service provider acted as an agency in pursuance of Act/Regulation, no service is provided to respondent assessee and thus, impugned OIO was set aside. Being aggrieved, Revenue filed present appeal.

Held:

Hon'ble Tribunal noted that as per the terms of agreement, the foreign service provider was assisting respondent in project design, validation, registration and regular verification of such CDM project and the CERs were generated in said CDM project implemented in respondent's power plant. Tribunal noted that the annual fees were charged by foreign service provider for providing consultancy and other related activities in creation of CDM project. Further, tribunal categorically observed that the generation of CERs and their saleability no doubt are in terms of Kyoto Protocol of international convention, however, the respondent did not receive any statutory service from foreign company and the transaction is purely commercial in nature. Accordingly, tribunal held that the terms of the agreement and the manner of consideration to be paid, make it clear that the services received by the respondent are covered under the category of 'management or business consultant service'. Consequently, impugned OIO was restored by allowing Revenue's appeal.

LD/67/22

Holtec Asia Pvt Ltd.
Vs.
CCE, GST PUNE-I
(CESTAT-Mumbai)
20th April, 2018

A foreign entity and its Indian project office are different establishments in terms of Section 65B(44) of Finance Act, 1994. Thus, for the purpose of services directly rendered to such entity located abroad, the location of recipient of such services cannot be said to be in India only for the reason that such foreign entity has project office in India as registered premises under service tax.

Fact:

Appellant provided consulting engineer services to its parent company located outside India. They filed refund claims under Rule 5 of Cenvat Credit Rules, 2004 read with Rule 6A of the Service Tax Rules, 1994 in terms of *Notification No. 27/2012 CE (NT) dt. 18-06-2012* towards Cenvat Credit paid on input services used in providing output services. Meanwhile, the foreign parent company opened project office in India for providing services under a separate and independent project. While sanctioning instant refund claim, lower authorities took a view that in terms of rule 2(i) of Place of Provision of Service Rules, 2012 (i.e. POPS rules), the location of service recipient i.e. foreign parent company would be premises for which the registration has been obtained i.e. India (project office in India). Thus, as the location of service provider and service recipient is in India, the conditions laid down in rule 6A of STR, 1994 are not fulfilled and the impugned service cannot be said to be exported. Appellant replied the said objection by clarifying that impugned services provided by it to foreign parent company are independent of services provided by Indian project office of foreign parent company to third party service recipients, thus service tax registration of said project office shall not have any bearing on impugned refund claims. However, the lower adjudicating authorities as well as first appellate authority rejected appellant's refund claim by holding that the conditions laid down by Rule 6A of STR, 1994 are not fulfilled. Being aggrieved, appellant filed present appeal.

Held:

Hon'ble tribunal observed that there was no connection between the services provided by appellant to foreign company and the services rendered by Indian project office of foreign parent company. Appellant filed instant refund claims on account of services rendered by it to recipient located outside India and the refund claim was filed in terms of Rule 5 of CCR, 2004. Hon'ble tribunal did not concur with the contention of lower authorities that, in terms of provisions of Rule 2(i) of POPS Rules the location of the service recipient automatically becomes the 'premises for which service tax registration' is obtained. Tribunal noted that in the present case the services were rendered to service recipient who is located outside India. The Indian project office was not at all concerned with such services. Further, it was observed that in terms of explanation 3 to Section 65B(44), different establishments located in non-taxable territory and taxable territory are to be treated as establishment of different persons i.e. the parent company located outside India is different from its project office in India. Therefore, tribunal held that since it is the parent company located abroad which has availed services from appellant, such services would clearly fall under category of export of services under Section 6A and thus, appellant's refund claim cannot be denied. Accordingly, impugned order was set aside.

Excise

LD/67/23

Commissioner of Central Excise Bengaluru
Vs.
Indian Telephone Industries Limited.
20th June, 2018

Unjust enrichment principle not applicable to refund/adjustment of excess duty upon finalisation of provisional assessment.

The assessee is a manufacturer and supplier of telecommunication equipment to the Department of Telecommunication (DOT) (now known as 'BSNL'). During the period 1998-99 to 1999-2000 at the time of removal of goods and sale thereof to BSNL, the final price of goods sold was to be determined under the contract between the assessee and DOT/BSNL. Therefore, the goods were allowed to be cleared on

the basis of provisional assessment, on payment of provisional duty in terms of Rule 9B.

As per the Revenue, the assessee was entitled to a refund only after following the procedure under Section 11B(2) of the Act. Therefore, the assessee was required to satisfy the Revenue about the aspect of unjust enrichment that it had not passed on the incidence of provisional duty paid by it at the time of removal of goods. As per the Revenue, the adjustment/refund under Rule 9B was impermissible.

Assesee relied on Supreme Court decision in *CCE, Mumbai-II vs. Allied Photographics India Ltd. [2004 (166) E.L.T. 3],* wherein the Apex Court had held that Section 11B of the Act and Rule 9B operate in different spheres. In cases where duty is paid under Rule 9B and refund arises on adjustment under Rule 9B(5), then such refund will not be governed by Section 11B of the Act. Only if an independent refund claim is made and if any adjustment under Rule 9B(5) re-agitating the same issue is made, then only such claim would attract the provisions of Section 11B. High Court observed that though Revenue had referred to this Supreme Court judgement, it had not followed its ratio in the order passed by the Adjudicating Authority.

High Court remarked that the very fact that the Central Excise Department made an allegation of 'unjust enrichment' and wanted to enquire into it against the Government of India Undertaking (assessee) is not palatable, especially because the customer / purchaser of Tele-equipments from the assessee was none else than Central Government Department (DOT) itself or BSNL. Thus, the High Court stated that who was getting "unjustly enriched" at whose cost is anybody's guess, but still the Excise Officer of the Central Government in the Central Excise Department chose to put public money in precious man hours and other resources in the whirlpool of litigation at various forums by taking a rather too narrow and pedantic approach in the matter.

High Court further remarked that it is hopeful that the concerned persons in the Government will awaken to this stark reality and take better reasoned and considered decisions before launching a trail of litigation in the Courts of law.

High Court held that the adjustment/refund or short payment of the provisional duty was required to be determined by the Adjudicating Authority under Rule 9B(5) of the Rules as it then existed during the contemporary period of taxable event of manufacture and removal of goods. The Rule governing the obligations or liability of the assessee relevant on the date of removal of goods and payment of provisional duty would apply, rather than the Rule as amended subsequently after which the belated order came to be passed. High Court opined that Revenue should have followed the Supreme Court ruling in Allied Photographics and thus, the order of Authority was contrary to this ruling.

High Court, thus, dismissed Revenue's appeal and ruled in favour of the assessee.

Customs

LD/67/24

Commissioner of Central Excise and Customs
Vs.
M/s OEN India Ltd.
18th June, 2018

In case of diversion of imported goods to unregistered factory for manufacture, the High Court states that there could not be an exemption claimed and utilisation established, without the factory in which manufacture has been carried out, having registration under the said Rules.

The assessee is a manufacturer of "Electrical-Relays". It had imported copper wire, which would be wound inside the Relays. The assessee's factory at Cochin is registered under the Rules of 1996 and it availed of duty concession under the Rules of 1996. The assessee at its factory in Cochin having reached its maximum capacity, sought for transfer of a portion of the goods imported to its Peenya unit in Bangalore. The Revenue did not respond to the same, and hence, the transfer was made to the factory at Bangalore and the manufacture of Relays was carried out there. The factory at Cochin maintained simple accounts of the utilisation of inputs as provided under the Rules of 1996. The accounts maintained at the factory at Cochin involve both the Relays manufactured in Cochin and that manufactured in Bangalore. The question raised by Revenue is that whether the manufacture made at the factory at Bangalore could be taken as due utilisation for the exemption, when and if the factory at Bangalore is not registered under the Rules of 1996.

High Court observed that there could not be any exemption claimed and utilisation established,

without the factory in which the manufacture had been carried out, having registration under the Rules. Perusing rule 3 and rule 4 regarding Registration and Application by the manufacturer to obtain the benefit, High Court observed that, "the registration has to be obtained from the Officer having jurisdiction over the factory, of whose certificate shall contain the following particulars: (1) Name and address of the manufacturer. (2) Excisable goods produced in his factory. (3) The nature and description of imported goods used in manufacture". Under Rule 4, the manufacturer has to indicate the estimated quantity and value of the goods to be imported, which is utilised in the manufacturing process; for the purpose of claiming exemption under Rules of 1996. High Court stated that a registration under the Rules of 1996 is required for every factory owned by the same manufacturer. Only in such circumstances, there could be a proper monitoring of the transfer of goods as also the utilisation, by the respective officers, who granted registration to the various factories of same assessee.

High Court refused to rule on the question as to whether the assessee was disentitled to the benefit under the Rules and liable to differential duty, noting that in the present case, the issue as to whether the factory at Bangalore had registration under the Rules, had not been looked into by any of the authorities.

High Court vacated the orders of the Tribunal to the extent it found that the claim of exemption was being availed on the ground of establishment of utilisation in the other factory premises; and stated that this issue shall be left open to be considered in an appropriate case. Additionally, on the issue of whether the proceedings were beyond the period of limitation, the High Court observed that since the diversion of goods was intimated to the Department and since the permission was sought for by the assessee, the extended period of limitation was inapplicable. Thus High Court ruled, in favour of the assessee on this front.

Accordingly, it disposed Revenue's appeal.

Transfer pricing

LD/67/25

Principal Commissioner of Income Tax

Vs.

Kirloskar Toyota Textile Machinery Private Ltd

26th June, 2018

Gross profit ratio upheld as a profit level indicator to benchmark transaction of purchase of auto-components.

The assessee is engaged in manufacture and sale of textile machinery, manufacture and sale of auto transmission components and engaged in distribution of material handling equipment. The assessee purchased components from its AE. The TPO made an adjustment of Rs. 8.98 crores. Assessee did not get relief at DRP level, aggrieved by which the assessee filed an appeal before Bangalore ITAT.

ITAT had noted that the TPO himself in many cases had acknowledged the fact that in case where in the rate of depreciation impacts the profit margin of the company, then the company should be allowed depreciation adjustment or can opt for PLI as PBDIT/TC. ITAT held that 'GP over sales' can eliminate the difference in claim of depreciation due to age of machinery, rate at which it was claimed and method of claims like straight line or WDV". ITAT, thus directed the AO/TPO to adopt the comparison of profitability ratios using GP over sales. ITAT observed that since the details of capacity utilisation of the comparable companies and rate of depreciation could not be analysed as commented by DRP, it would be better if GP analysis was undertaken taking sales less cost of raw material as basis (excluding cost including depreciation, interest, etc.) so that auto components profitability could be analyzed so as to consider whether the import of material from AE had affected the profitability of assessee under the TP provisions. ITAT, thus set aside, the impugned order of the Revenue and restored the matter to the file of the AO/TPO.

Thus ITAT ruled in favour of assessee on this matter, aggrieved by which the Revenue filed an appeal before the Karnataka High Court.

High Court relied on co-ordinate bench ruling in *Softbrands India Pvt. Ltd [I.T.A.No.536 & 537/2015]*, wherein the High Court had held while dealing with appeals under Section 260A, High Court would not disturb those findings of fact, unless such findings are ex-facie perverse, unsustainable and exhibit a total non-application of mind by the Tribunal to the relevant facts and evidence before the Tribunal.

High Court therefore held that no substantial question of law would arise in the present case, and thus dismissed Revenue's appeal, thereby ruling in favour of the assessee. ■

Disciplinary Case

Summary of a disciplinary case, in the matter of:

CA. ABC In Re:

Facts of the case

1. A letter dated nil was received from Shri XYZ (hereinafter referred to as **"Informant"**) containing allegations against CA. ABC (hereinafter referred to as **"the Respondent"**). On receiving the aforesaid letter, Shri XYZ was requested vide letter dated 25th February, 2008 to file the complaint in prescribed Form 'I'. But he did not file the same in the prescribed form nor provide any document in spite of reminder letters dated 21st August, 2008 and 5th November, 2008.
2. In the absence of formal complaint and on an overall examination of allegations, it was treated as 'Information' within the meaning of Rule 7 of the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007.
3. As per the 'Information' letter dated 22nd December, 2008, the allegations in brief were as under:-

- The Respondent is the Director of M/s. LMN Pvt. Ltd (hereinafter referred to as the Company). The Respondent has raised loans from different banks fraudulently. Further, the Respondent has absconded from the Company after taking ₹ 10 crores approximately from the investors.
- Shri KOP, elder brother of the Respondent has informed to the worried investors that the Respondent is not well and gone to USA for taking treatment. Due to the connections of Shri KOP with police officials, no investor dares to speak against the Respondent. The Informant has made FIR against the Respondent, but no action was initiated against him due to his connections with higher authorities.
- The Respondent is missing and absconding

and has not registered the Company with the Reserve Bank of India as per its directives.

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

- The Board noted that despite the fact that the documents were called from various sources but except from DEF, an investor, no documents were received. Smt. DEF who was one of the investors who had deposited certain money in the Company run and managed by the Respondent. It was noticed that the said documents *inter-alia* includes copy of the FDR, copy of the FIR lodged by her against the Respondent, newspaper cuttings and registration copy of the said Company. The said investor has informed in her letter that she has deposited a total amount of ₹ 1,20,000/- with the Company, out of which ₹ 80,000/- has remain unpaid even after a period of 12-13 years has elapsed.

- On perusal of the said documents, it has been also noted that Respondent was one of the Directors of the M/s. LMN and has signed the Fixed Deposits receipts issued in the name of the investor by the Company which on maturity have remained unpaid. The Respondent has not only failed to honour his commitment of paying back a fixed amount on the maturity date but has cheated the general public at large of their hard earned money and the facts mentioned above is with reference to one of such instances.

- The Board noted that there were various documents on record to substantiate that the Respondent who was one of the Directors of M/s LMN which has defrauded general public by accepting public deposits through his Company. The Board noted that there is a letter dated 17th March, 2006 on record which has been written by the Chief Manager, State Bank of India to the Police making a complaint against the Respondent for forging amount of loan of ₹ 40 lakhs and another letter dated 19th October, 2007 addressed by the Manager, R.B.I. to the informer of the instant Information case mentioning that the matter of accepting deposits from public unauthorisedly has been registered to Economic Offence Wing, U.P. for necessary action. The Board further noted the fact that the Reserve Bank of India has also taken cognizance and referred the misconduct of the Respondent while acting in the capacity of the Director of M/s LMN of defrauding the public at large to Economic Offence Wing, Uttar Pradesh police for further Investigation.

Thus, the Board in the light of the above opined that the Respondent while acting as a Director of M/s LMN has acted in a manner which is unbecoming of Chartered Accountant who is required to maintain high standards in their dealings with the Society and on whom the Society places a great trust. The said act of the Respondent with the intention to defraud public has brought disrepute to the profession of Chartered Accountancy and 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 of Discipline, after affording an opportunity as required under the aforesaid Rules, and on considering the fact that the said member is not responding to the notices, is of the view that the Respondent should be levied with a maximum punishment along with monetary fine. Accordingly, the Board ordered that the name of the Respondent be removed from the Register of Members for a period of three months and further imposed a fine of ₹50,000/- (₹ Fifty Thousand only) upon him. ■