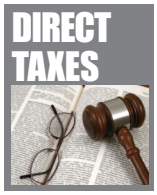
Legal Decisions[1]



Income Tax

LD/67/26

Principal Commissioner of Income Tax, Kolkata
Vs.
Infinity Infotech Parks Limited
18th July 2018

Merely because de-facto possession of land was made over to the developer for the purpose of construction thereon, it would not imply that the possession was made for enjoyment of the property; no transfer under Section 2(47) arises.

The assessee had entered into a joint development agreement (JDA) on 07-02-2007 which envisaged that the developer would construct upon the land and would be entitled to retain 61 per cent of the land as well as the proportionate constructed area while the balance 39 per cent of the land together with the construction thereon would belong to the assessee.

The Commissioner invoked the revisionary power under Section 263 and noted that since the possession of the land was made over by the assessee to the developer at or immediately upon the execution of the agreement of 7th February 2017, the transfer is deemed to have taken place at such point of time in view of Section 2(47)(v) of the Act. However, ITAT ruled in favour of the assessee.

Aggrieved, the Revenue appealed before Calcutta High Court. High Court observed that when the owner of a land enters into an agreement with a developer for the purpose of developing the land, the terms of the contract indicate when the transfer would take place. There could be rare situations where the transfer may be simultaneous with the execution of the agreement, but where the owner retains any right in the constructed area that may come up in future, it would scarcely be a case of a transfer taking place at the time of the execution of the agreement. Merely because de facto possession of the land is made over to a mason or a civil engineer for the purpose of construction thereon, it would not imply that the possession is made over to the mason or the civil engineer for enjoying the property. Such persons would be in de facto possession under the de jure possession of the owner and only for the purpose of undertaking the construction at the land in question.

As per JDA, the developer was to get 61 per cent of the land and the proportionate share in the constructed area whereas the assessee was to get the balance 39 per cent of the land and the proportionate constructed area thereupon. High Court held that till such time that the construction came up and 39 per cent of the constructed area was made over to the assessee, it could not be said that possession of the balance land, in the sense that the expression carries in Section 2(47)(v), had been made over by the assessee to the developer.

High Court held that it was only after the apportionment of the areas upon the construction on the land being completed that the developer could have rightfully retained possession of the developer's 61 per cent share and resisted dispossession by discharging his obligation under the agreement and seeking refuge in terms of Section 53A of the Act of 1882 despite the formal conveyance pertaining to the developer's entitlement not having being executed. Accordingly, High Court held that the right of the developer to retain possession and protect such possession under Section 53A of the Act of 1882 could never have arisen prior to the construction being completed and the apportionment effected.

High Court also noted Section 45(1) which provides the expression "chargeable to income tax under the head Capital Gains", operates on "Any profits or gains arising from the transfer of a capital asset …" and held that there can be no tax payable unless there is any profit or gain that has arisen and it could never have been the Revenue's case that there was any monitory profit or gain that accrued to the assessee at the time of the execution of the agreement of 7th February 2007.

Separately, with respect to the issue regarding depreciation on 39 per cent area leased by the assessee, High Court held that the Commissioner could not have reopened this matter under Section 263 since authorities superior to the Commissioner had already dealt with this aspect.

[1] *Contributed by CA. Sahil Garud, CA. Mandar Telang, Indirect Taxes Committee, Committee on International Taxation, 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.*

LD/67/27

BPTP Limited

Vs.

Principal Commissioner of Income Tax

16th July 2018

ITAT's unreasoned order, whereby various appeals of the assessee were consolidated without sending such notice to the assessee, quashed by Delhi High Court.

The assessee is aggrieved by the order of ITAT consolidating 13 appeals pending before different Benches. The assessee referred to the application of CIT requesting for consolidating of the appeals and stated that these applications did not disclose any reason as to why consolidation of all appeals, which were pending for a long time and were adjourned at the behest of the revenue by various benches and why those should be consolidated and listed before one bench. The assessee submitted that the Petitioner contends that the procedure adopted is not only curious but contrary to the principles enunciated in the ruling of *Olympia Paper & Stationery Stores vs. Assistant Commissioner of Income Tax, (63 ITD 148),* which was approved in *Dr. Prannoy Roy vs. The Deputy Commissioner of Income Tax & Ors, [W.P. (C) No. 4742/2018, decided on 04-05-2018].*

High Court observed that it was an admitted fact that ITAT did not give any notice to the assessee before issuing the consolidation order. Apparently, all these appeals preferred by the appellant were being listed and heard repeatedly by different Benches and the ground of adjournment was that the appeals would be consolidated. High Court stated that given these circumstances, the Tribunal ought to have at least followed the proper procedure, laid down in *Dr. Prannoy Roy* (supra) and even enunciated by its previous order in *Olympia Paper & Stationery Stores* (supra). Firstly, it should have given adequate notice to the assessee on the issue of consolidation and secondly, if the Revenue's request is found feasible and reasonable, indicate brief reason as to why the consolidation was essential. The failure of the ITAT to confirm to salient features vitiates its order.

High Court, thus quashed the ITAT order consolidating all the appeals and stated that in case the Revenue wishes to consolidate all these appeals, it should move a proper comprehensive application before the ITAT, serving a copy in advance to the assessee. High Court further directed the ITAT to issue a notice to the assessee before agreeing on the application and after considering the submission of both the parties, pass a reasoned order.

High Court, thus ruled in favour of the assessee.

LD/67/28

Commissioner of Income Tax

Vs.

Chhata Sugar Company Limited

16th July 2018

Excise duty payable to be included in valuation of closing stock.

The assessee is engaged in the manufacture and sale of sugar. For AY 1997-98, assessee filed return of income declaring a loss of 7.15 crores wherein Assessing Officer examined that while valuing the closing stock of sugar and molasses, the assessee had not included Central Excise Duty, Cess Duty etc., and, therefore, the value of the closing stock was shown at lower figure in the trading account. Thus, Assessing Officer finalised the assessment under Section 148 r.w.s. 143(3) making an addition of amount of excise duty not included in the value of closing stock amounting to ₹ 2.59 crores. CIT(A) ruled in favour of the assessee. However, ITAT ruled in favour of the assessee and held that excise duty was payable on goods lying in the bounded warehouse and, therefore, the assessee did not incur any cost on account of excise duty payable which can be added towards closing stock.

Aggrieved, Revenue filed an appeal before the Allahabad High Court.

High Court stated that the assessee was adopting the mercantile system of accounting. The true value of closing stock would include the amount of any tax duty, cess or having fully paid, payable or incurred by the assessee to bring the goods to the place of its location and condition as on the date of valuation which is evident from the

provisions of Section 145A of the Act. It is also to be noted that the provisions of Section 145A of the Act were introduced by the Finance Act No. 2 of 1988 w.e.f. 01-04-1999 which are infact clarifactory in nature and, therefore, it would be applicable even for Assessment Years prior to Assessment Year 1999-2000. Thus, provisions of Section 145-A would be applicable for this relevant Assessment Year.

As per High Court, excise duty became payable the moment excisable goods were manufactured, as the taxable event under Section 3 of the Central Excise Act was manufacturing or production of the excisable goods. It would be immaterial whether the assessee has paid the excise duty or not for the purposes of arriving at the correct valuation of the closing stock. Accounting system of the assessee would be of no consequence to arrive at the true and correct valuation of the closing stock.

High Court, thus ruled in favour of the Revenue.

LD/67/29

Principal Commissioner of Income Tax
Vs.
Samtel India Limited
09th July 2018

Penalty under Section 271(1)(c) for a wrong claim of 'write-off' of certain capital work-in-progress as loss, by the assessee, deleted by Delhi High Court.

The assessee company was primarily engaged in manufacturing of 'black and white' ("B&W" hereafter) picture tubes for use in televisions, which was shut down in FY 2005-06. During the FY 2007-08, the assessee company decided to set up another project for manufacture of 'metal parts' for which the company purchased machinery to the tune of ₹ 3.34 crores. During the FY 2008-09 the financial position of the company worsened and the assessee dropped the idea of this new project and accordingly the machinery so purchased was written-off after retaining its estimated scrap value in the books. The assessee stated that

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the machinery was not capitalised and was shown under the head 'Fixed Assets' as capital work in progress and no depreciation was ever claimed.

The Assessing Officer denied such writing-off as Revenue expense / loss. Also, the CIT(A) and ITAT ruled in favour of the Revenue. The Assessing Officer imposed penalty of ₹ 1.02 crores under Section 271(1)(c) for wrong write-off claim. CIT(A) ruled in favour of Revenue whereas ITAT ruled in favour of the assessee by setting aside the penalty order, aggrieved by which, the Revenue approached the High Court .

High Court referred to the ruling in case of *Commissioner of Income Tax vs. Reliance Petroproducts Pvt. Ltd. [(2010)322 ITR 158]* where the phrase "furnishing inaccurate particulars of income" was explained by the Supreme Court by bifurcating "particulars" and "inaccurate" where particular was explained to include the details of a claim, or the separate items of an account. The word "inaccurate" was explained as "not accurate, not exact or correct; not according to truth; erroneous; as an inaccurate statement, copy or transcript." When these words are read in conjunction with each other then it may seem that the details supplied in the Return are not accurate, not exact or correct, not according to truth or are erroneous.

High Court noticed that the assessee had disclosed all the particulars of his income in his return and the genuineness of the loss occurred is not at question here; thus the assessee cannot be penalised for making a claim which in itself is unsustainable in law. High Court concluded that the intention of the Parliament cannot be taken to have been penalising everyone who makes a wrong claim for deduction. The legislature does not intend to penalise every person whose claim is disallowed. This is not the aim of the legislature.

High Court, thus ruled in favour of the assessee and directed to drop the penalty.

LD/67/30

Popular Vehicles and Services P. Ltd
Vs.
The Commissioner of Income Tax
02nd July 2018

Belated payment of employees' contribution to PF/ESI beyond the PF Act due-date is not deductible

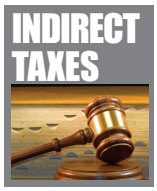
The assessee failed to pay the employees contribution under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 [for brevity, the EPF & MP Act] and the Employees State Insurance Act, 1948 ["ESI Act"] before the due date provided under the said enactments for AY 2008-09. Coordinate bench had ruled on this issue in favour of Revenue in case of *CIT vs. Merchem Ltd. [(2015) 378 ITR 443 (Ker.),* however, the assessee submitted that it required re-consideration. Assessee relied on Supreme Court ruling in *Alom Extrusions Ltd* and contended that Section 43B being the non-obstante clause overrides all other provisions and deduction of employees contribution would also be allowed under Section 43B even if paid after due date of fund.

High Court perused provisions of Section 2(24)(x) and noted that it considers any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948 or any other fund for the welfare of such employees as income of the assessee. It further perused provisions of Section 36(1)(v)/(va) and Section 43B and noted that the Act treats employer's and employee's contribution distinctly. High Court noted that Section 36(1)(va) speaks of the employee's contribution to a welfare fund for the benefit of employees alone, by virtue of the specific reference to Section 2(24) and if the contribution is remitted on the due date as prescribed in the statute or order creating such fund, then it is eligible for deduction under Section 36. High Court further noted that Section 43B refers to "a sum payable by the assessee as an employer", to an employee's welfare fund which is the employer's contribution.

High Court noted that Co-ordinate bench in *Merchem Ltd.* had considered the Supreme Court ruling and after that had held that the belated payment of employees' contributions will not qualify for deduction. High Court noted that Explanation to Section 36(1)(va) deals with due date for employee contribution and Section 2(24)(x) treats the employees' contribution not remitted to fund as income and Section 43B(b) deals with employers' contribution, therefore, held that the Act treats employer and employee contribution differently.

According to High Court , employees' contribution is regulated by Section 2(24)(x) and Section 36(1)(va) and would not be affected by Section 43B. High Court held that by virtue of Explanation to Section 36(1)(va), no deduction could be claimed if the contribution has not been paid, after collection from the employees by way of deduction from their salaries, within the due date under the EPF & MP Act. High Court held that if the employee's contributions, which the employer deducts from the salary of the employees, is not remitted into the fund within the due date, the employer not only has defaulted the stipulation in the labour legislation but has received an income; albeit an illegal enrichment.

High Court, thus concluded that the payment of employees contribution to PF/ESI beyond due date specified under Section 36(1)(va) would not be deductible. High Court, thus ruled in favour of the Revenue.



Service Tax

LD/67/31

N & N Chopra Consultants Pvt. Ltd

Vs.

Principal Commissioner, Goods & Service Tax & Central Excise

24th July 2018

Simultaneous penalties under Section 76 & 78 upheld; Payment of tax before issuance of notice would not help the assessee to avoid penalty.

The assessee was engaged in providing commercial coaching and training services. The assessee had not paid his service tax liability for the period of 09-09-2004 to 31-03-2008 and had filed returns stating that there was no service tax liability. The Income Tax Search and Seizure proceedings apparently triggered investigations by the Service Tax Authorities. The assessee in these circumstances offered to pay service tax dues and filed returns on 02-03-2009. In the meanwhile, a show cause notice was issued on 23-06-2009. For a later period, the assessee again approached the Service Tax Authorities, conceding its liability and offering to pay up its dues. The show cause notice culminated in order in original dated 06-01-2012. Besides the tax liability penalties were also imposed by the Commissioner. Assessee's appeal to CESTAT was rejected, who declined to interfere with the findings and the penalties imposed by Commissioner (Appeals). Hence, it approached the High Court.

The assessee submitted that it deposited the additional amount of ₹ 5 lakhs (approx) after the issuance of notice and had paid ₹ 34 lakhs prior to that. The assessee therefore argued that imposition of penalty under Section 76 was unjustified. Assessee referred to the High Court rulings in *Raval Trading Company vs. Commissioner of Service Tax [(42) STR 210 (Guj)], First Flight Courier Ltd. [2011 (22) STR 622] and Commissioner of Central Excise vs. Pannu Property Dealers, Ludhiana [2011 (24) STR 173 (P&H)].*

High Court noted that the assessee was aware about its service tax liability and yet, it filed returns claiming no liabilities and when it smelt investigation and adverse orders, it approached the service tax authorities and deposited the amounts that were admittedly liable to be paid. As per the High Court, such case of foreknowledge, itself is an important factor that ought to have been and was taken into account by the lower revenue authorities which lead to the imposition of recovery of dues assessed as well as imposition of penalty under Section 78. High Court thus was of the opinion that invocation of Section 78 could not be faulted with having regard to facts of this case. As per the High Court depositing the amount due before issuance of notice per se, does not absolve the assessee of its responsibility to file the returns, since the option of imposing other penalty under Section 76 was exercised.

High Court further also rejected assessee's contention about the amendment to Section 78 being retrospective and that imposition of penalties under Section 78 and 76 was mutually exclusive. High Court referred to the ruling in case of *Bajaj Travels Ltd. vs. Commissioner of Service Tax [2012 (25) STR 417]* wherein it was held that the amendments are prospective in nature.

High Court, thus ruled in favour of Revenue and upheld imposition of penalties under Section 76 and 78 of the Finance Act, 1994.

LD/67/32

National Insurance Academy
Vs.
Commissioner of Service Tax, Pune-III
(CESTAT-Mumbai)
21st June 2018

'Masters in Business Administration programme' cannot be said to be covered within scope of 'vocational training' so as to exclude the same from the service tax liability.

Conducting examination for member constituents is held to be not chargeable to service tax under category of 'business auxiliary services'.

Consideration received for submission of project reports by students, would not attract service tax under 'management and business consultancy services' since it cannot be treated as services by professional business consultant.

Facts:

The appellant is a society registered under Societies Act, 1860 and Bombay Public Trust Act, 1950 with Life Insurance Corporation, General Insurance Corporation along with its four subsidiaries and the Government of India as members and offers various courses. The allegation pertaining to non-payment of tax on 'commercial training or coaching service' pertains to the fees charged from candidates registered for the 'Masters in Business Administration' programme. Appellant contented that impugned service tax liability does not arise as they are not in the business of providing education but are a public institution under Government of India. It also contended that since it is recognised by AICTE, as evident from various mandatory approvals obtained by them, the absence of affiliation to a university does not in any way alter their eligibility for exclusion from taxability. Further, the appellant submitted that the course being one that prepares the students for professional employment or self-employment is a vocational course that was excluded from tax during part of period under consideration.

As regards another demand raised under category 'business auxiliary services' in respect of examinations conducted by the appellant for its constituent members, the appellant submitted that, appellant and its members are not in client principal relationship.

Further, as regards various project reports submitted by the student of appellants to outside bodies, which were prepared as part of curriculum, revenue alleged that consideration received from outside bodies for such project would attract service tax under category of 'management and business consultancy services'.

Held:

As regards first issue, the Tribunal noted that as emerging from various judicial pronouncements, the consideration received from students enrolled for education are, owing to legislative intent, indeed taxable and that, to the extent of specific exclusion in the taxable entry, conformity with the description therein has to be strictly adhered to. It is undisputed that appellant is provider of commercial training and coaching services. Tribunal held that despite the inclusion of 'commercial' in the description of the taxable service, the absence of a profit motive, does not, of itself, alter the tax liability. It suffice that earnings are received for an activity to be commercial. Non-availability of an affiliation for the award of a degree at the end of the course would take the activity out of the exclusion. Reliance was placed on decision in *Sadhana Educational and People Development Services Ltd. vs. Commissioner of Central Excise, Pune-III [2014 (33) STR 575 (Tri. - Mumbai)] - 2013 - TIOL - 1830-CESTAT-MUM,* wherein it was held that the professional management course cannot be considered as vocational course that imparts skill to enable the trainee to seek employment or self-employment after said course. Following the said decision, the Tribunal rejected appellant's plea that 'business administration course' shall be considered 'vocational training' and upheld impugned demand.

As regards demand under 'business auxiliary services' on amounts received from constituent members for conducting examinations, it was held that for the consideration to attract tax liability under said category, the appellant would have to promote a service provided by client or provide any customer care service on behalf of client. Tribunal held that it cannot be said that the conduct of an examination was with a third party service provider as a recipient or promotion of any activity of the constituent members. Accordingly,

impugned demand in this regard was set aside.

Further as regards demand under 'management and business consultancy services', the Tribunal observed that the consideration was received for various reports which were submitted by students of appellant to outside bodies upon conclusion of various projects as a part of curriculum of the course. Tribunal held that though the said reports may be of use to outside entities, but since they are not a product of a professional business consultant, demand under 'management and business consultancy' would not sustain.

LD/67/33

Infinity Infotech Parks Ltd & Anr
Vs.
Union of India & Ors
(Kolkata-HC)
9th July 2018

Hon'ble HC quashed the notice of audit issued in terms of Rule 5A(2) of Service Tax Rules, 1994.

Facts:

The petitioner challenged the notice dated 16-02-2015 issued by the department for conducting audit of records of petitioners by invoking Rule 5A(2) of Service Tax Rules, 1994. The petitioner sought declaration from Hon'ble HC that the said Rule 5A(2) as substituted by notification no. 23/24/ST dated 25th December, 2014 is arbitrary and in conflict with the provisions of Section 72A of the Finance Act, 1994 and also, the provisions of Section 94(2)(k) of Finance Act, 1994 is unguided and gives uncontrolled power of delegation. Petitioner also prayed that during the pendency of appeal proceedings before Hon'ble SC against the order of *Hon'ble Delhi HC in 2014-TIOL-1304-HCDEL-ST Travelite (India) vs. Union of India and 2016-TIOL-1061-HC-DEL-ST Mega Cabs Pvt. Ltd. vs. Union of India,* wherein said provisions have been struck down, the impugned notice issued to petitioners be quashed.

Held:

Hon'ble HC held that since the appeals are pending against the judgement and order passed in *Travelite (India)* (supra) as well as *Mega Cabs Pvt. Ltd.* (supra), till such time there is a decision in the appeals, the provisions stand struck down by the Delhi High Court. Therefore, it would be iniquitous to allow the respondents to proceed on the basis of provisions struck down by a High Court, against the petitioner. Accordingly, HC held that the impugned notice dated 16th February, 2015 is, therefore, quashed. Further, it was held that so far as the declaration of ultra vires of sub-rule (2) of Rule 5A of the Service Tax Rules, 1994 as substituted by the notification dated 5th December 2014 is concerned, it would be appropriate to follow *Mega Cabs Pvt. Ltd. (supra).*

International Taxation

LD/67/34

HM Publishers Holdings Limited
(New Delhi)

Non-compete fee received by UK based company, as a part of consideration for transfer of shares, shall not be taxable in India in the absence of PE

Facts:

HM Publishers Holdings Limited (Applicant) is a UK based company. It is the holding company of MPS Ltd., (MPS) a leading international publisher incorporated in India.

Applicant and ADI BPO services private limited, (ADI), an Indian company, entered into a share purchase agreement (SPA) whereby ADI will purchase all the shares held by the applicant in MPL.

Due to the nature of its association with MPS, the applicant has confidential and proprietary information relating to the business and operations of MPS. This information is material to the business of MPS and shall continue to be so after the completion of the transactions contemplated in the SPA. Disclosure of this information to others, especially competitors of MPS, or the unauthorised use of this information by others would cause substantial loss and harm to MPS and its shareholders. Hence, in addition to the share purchase price, separate consideration as non-compete fee was agreed to be paid for not competing with business of MPS in India for a period of 3 years.

Question before AAR

Whether, the non-compete fees received by the applicant from ADI as a part of the consideration for transfer of the shares held in MPS shall be chargeable under the head "Profits and gains of business or profession" as provided under Section 28(va) of the Income-tax Act read with Article 7 of the DTAA between India and UK, in absence of any PE of the Applicant in India?

Decision

Hon. AAR stated that though the applicant held the shares of MPS to the extent of 61.46%, the right to carry on business was with MPS and not the applicant. AAR stated that there was a distinction between the company (i.e. MPS) and its shareholders (i.e. applicant) as they were distinct legal entities enjoying different rights and obligations.

AAR remarked that shareholders enjoy rights such as right to profits, right to dividend, right to vote, etc. but they cannot be said to be carrying on the company's business or having a right to carry on business of a company. Thus, AAR held that the applicant did not hold a legally enforceable right which can be treated as a 'capital asset' under Section 2(14) and therefore no question of transfer of any right to carry on business would arise.

AAR held that the fee received by the applicant is for a negative covenant to not compete with MPS and not for transfer of any right to carry on business to the payer as contended by the Revenue. As per Section 2(47) of the Act, extinguishment of a right is permanent in nature that cannot be revived. Thus, the non-compete fee was received by the applicant for not competing with MPS for 3 years subsequent to which the applicant would be free to compete with MPS without any of the restrictions provided in the SPA.

Thus, AAR concluded that the applicant has received consideration in the form of non-compete fee for a negative covenant and not for transfer of any right to carry on business.

Since, there is no capital asset as per Section 2(14) and no transfer as per Section 2(47), there can be no income chargeable to tax under the head of Capital Gains. In this regard, AAR also relied Hyderabad Special Bench ruling in *Dr. B.V. Raju* and Madras HC ruling in *Chemech Laboratories Ltd.*

LD/67/35

Morgan Stanley Asia (Singapore) Pte.

Vs.

DDIT

(Mumbai ITAT)

Reimbursement of salary paid to the deputed employee not a Fees of Technical Services as per provisions of domestic law as well as India Singapore DTAA.

Facts

Morgan Stanley Asia (Singapore) Pte. ("assessee") a company resident in Singapore, deputed one of its Director / employee to India for the period from May 2004 to April 2007 to set up the business in India in the name and style of Morgan Stanley Advantage Services Private Limited ("MSAS"), an associate concern in India.

The assessee, as per the terms of contract, agreed to continue paying salary of the employee in Singapore and cross charging India for the same. According to AO, employee was previously working with the assessee before he was deputed to look after the operation of MSAS. According to the AO and TPO no unrelated party would lend the services of its experienced employees for mere reimbursement of expenditure or salary and other entitlement incurred on the employee. According to the AO and TPO, the reimbursement is nothing but FTS and he also applied mark up of 23.23 % so taken for the purpose of computing the ALP of the payment and accordingly adjustment was made. The CIT(A) also confirmed the action of the AO/TPO.

Issue

Whether, in the given facts and circumstances, the reimbursement of salary to the deputed employee, is FTS under the provisions of Act or India-Singapore DTAA?

Decision

Hon. ITAT observed that the contractual agreement between MSAS and assessee clearly provides that salary is paid by the assessee on behalf of MSAS and the same is recharged by the assessee to MSAS.

Further, Hon. ITAT noted that there is dispute on the fact that assessee has made payment towards the reimbursement of salary expenditure and there is no element of profit in the said payment. Hon. ITAT, then referred to the Explanation 2 to Section 9(1)(vii), which defines the FTS, which clearly excludes consideration which is which income of the recipient chargeable under the head "salaries".

ITAT held that payment by MSAS being pure reimbursement of salary cost incurred by the assessee in the nature of payment of salary, which is covered under the exception mentioned in explanation-2 to Section 9(1)(vii) of the Act.

Hon. ITAT relied upon the decision of ITAT in case of *ADI vs. Marks & Spencer Reliance India (P) Ltd. (38 Taxmann.com 190) (2013) and United Hotels Ltd. Vs. ITO (2005) 2 SOT 0267.*

LD/67/36

Bellsea Ltd.
Vs.
ADIT
(ITAT Delhi)

A building site or an assembly project can be construed as fixed place of business only when an enterprise commences its activities at the project site. Any other activity which may be related or incidental but was not carried out at the site in the source country, would not be counted for determining duration of PE

Bellsea Limited is a company incorporated in Cyprus is engaged in the business of dredging and pipeline related services to oil and gas installations. During the relevant financial year, the assessee was awarded a contract by Allseas Marine Contractors SA (AMC) for placement of rock in sea bed for protection of gas pipelines and umbilical of subsea structures in oil and gas field developed at Krishna Godavari Basin, East Coast of India. Under the terms of the contract, the work was intended to commence from January 4, 2008 i.e. "effective date" as per the contract and the completion of the work was reckoned from the date mentioned in completion certificate by AMC i.e. September, 2008. Therefore, according to the assessee since the contract lasted for less than 12 months which is the threshold period for the establishment of PE in India in terms of Article 5(2) (g) of India Cyprus DTAA, income earned from such contract cannot be attributed or taxed in India.

During the court of assessment, Assessing Officer (AO) noted from terms of contract and scope of work that it cannot be said that role of the assessee was limited to mere rock placements in river sections, so as to fall within the ambit of Article 5(2)(g) of the India Cyprus DTAA. AO held that even if the assessee's contention is accepted that its activities are covered under Section 5(2)(g), then also they constitute a PE, because one of the employee of the assessee had come to India in September, 2007 to collect data and information. Hence, AO concluded that the assessee has rendered service for a period of more than 12 months and therefore, there is an installation PE. Accordingly, AO computed the income under Section 44 BB, that is, @ 10% of gross receipt.

DRP upheld the order of AO. Aggrieved, the assessee appealed before Delhi ITAT.

Issues

Whether, in the facts and circumstances of the case, activities of the assessee constitute a Permanent Establishment (PE) under Article 5(2)(g) of the DTAA between India and Cyprus.

Decision

ITAT rejected the Revenue's contention that since one of the employee of the assessee had come to India in September, 2007 to collect data and information, the assessee has rendered service for a period of more than 12 months.

ITAT noted that before entering into the contract with AMC, such preparatory work like pre-survey engineering, investigation of site, etc., for tendering purpose without actually entering into the contract and installation of project cannot be held that the activity *qua* the installation project has started. ITAT held that auxiliary and preparatory activity which are carried out before entering of the contract and without carrying out any activity of economic substance cannot be construed as carrying out any activity of installation or construction.

ITAT held that a building site or an assembly project can only be construed as fixed place of business only when an enterprise commences its activities at the

project site. Any activity which may be related or incidental but was not carried out at the site in the source country would clearly not be construed as a PE. Albeit, preparatory work at the site itself can be counted for the purpose of determining of duration of PE.

As regards completion date of contract, ITAT noted all the activities connected with the project including the receiving of the payments and the completion certificate was of September 30, 2008. Further, last barge sailed out or was decommissioned from India on September 25, 2008 and the entire payments were received on or before that date. Therefore, ITAT held that activity *qua* the project comes to an end when the work gets completed and the responsibility of the contractor with respect to that activity comes to end.

Therefore, ITAT held that threshold period of 12 months have not exceeded in the present case and consequently no PE can be said to have been established in Article 5(2)(g) . Accordingly, ITAT held that no income of the assessee on the Contract executed by the assessee in India can be held to be taxable in terms of Article 7.

LD/67/37

Skaps Industries India Pvt Ltd

Vs.

ITO

(ITAT, Ahmedabad)

Mere non-furnishing of Tax Residency Certificate cannot disentitle the assesse for tax treaty benefit

Facts

The Skaps Industries India Pvt. Ltd. (Assessee), an Indian company, made payments to a US entity for services in relation to installation and commissioning of certain equipment purchased by the assessee. Assesse did not withhold any taxes as it was not falling within the ambit of fees for included services (FIS) under the DTAA. The Assessing Officer (AO) was of the view that such payments were in the nature of FIS under the DTAA and, thus, the assessee was liable to appropriately withhold taxes. The First Appellate Authority ruled in favor of the Department and observed that, in the absence of a TRC, the US entity was not entitled to protection under the DTAA. Aggrieved, the Assessee filed an appeal before the Tribunal.

Issue

Whether the treaty protection is to be denied if the taxpayer is unable to provide the Tax Residency Certificate?

Held

The Tribunal ruled that the tax treaty protection cannot be denied merely on the ground that the assessee had not been able to furnish a TRC in the prescribed form.

The provisions of the Income Tax Act, 1961 ('Act') that provide an option to the Assessee to be governed by the beneficial provisions between the DTAA and the Act, provide an unqualified tax treaty override. The restriction on the application of tax treaty benefits on failure to provide a TRC does not have an overriding effect over the provisions of the Act which provides for application of beneficial tax treaty provisions.

The requirement to furnish a TRC was introduced so that the TRC is regarded as sufficient evidence for granting tax treaty benefit and the Tax Authority is denuded of the powers to demand further details in support of the tax treaty benefits claimed. The TRC provision cannot be construed as a limitation to the superiority of the tax treaty over the domestic law.

Mere non-furnishing of a TRC cannot be a reason to deny tax treaty benefit and the assessee should substantiate its eligibility to claim tax treaty benefits by means other than a TRC.

As per the DTAA, the assessee should be able to prove its residential status in the other jurisdiction by reason of domicile, residence, citizenship, place of management, place of incorporation or any other criterion of similar nature. Any other criterion in this context would mean any locality-related attachment that attracts residence-type taxation. Unless the assessee is able to satisfy the preliminary requirement of it being treated as a resident of the US, it cannot be regarded as entitled to tax treaty protection.

The requirement of satisfying residential status by any other mode is far more onerous, as the TRC can be obtained from the US authorities for a modest user fee after filing a statutory form. Furthermore, the documents submitted by the

US entity did not prove its residential status, as the document was merely a declaration by the US entity and cannot be treated as a certification by any authority. A declaration by the US entity, without any material to substantiate the basic facts set out in the declaration, cannot be accepted as legally sustainable foundation for a finding of fact.

As the assessee was earlier not asked to submit evidence other than a TRC to prove residential status of the US entity, the matter was remanded to the Tax Authority for fresh adjudication, with direction to give the Assessee a fresh opportunity to furnish evidence not limited to, but including, the TRC in support of the US entity's entitlement to the tax treaty benefits of the DTAA.

Transfer pricing

LD/67/38

Alden Prepress Services Private Limited
Vs.
Dy. Commissioner of Income Tax
12th July 2018

Notice under Section 92CA stayed by High Court since Assessing Officer had not disposed-off assessee's objections to reassessment proceedings.

Assessing Officer issued a notice dated 09-09-2009 under Section 148 to assessee proposing to re-assess the income of the assessee. The Assessing Officer communicated reasons for reopening which were related to ALP-computation of services rendered by assessee to its AE [associated enterprises]. The assessee submitted its objections to Assessing Officer which were pending for disposal. In the meanwhile, the TPO issued notice under Section 92CA, aggrieved by which the assessee filed a writ petition before the Madras High Court.

As per the High Court, if the Assessing Officer had reason to believe that the income chargeable to tax had escaped assessment, Assessing Officer was bound to dispose of assessee's objections and if Assessing Officer chooses to refer the matter to TPO, that should be done only after disposing assessee's objections. High Court rejected Revenue's stand that the Assessing Officer had referred the matter to the TPO to consider the fresh Form 3CEB and TP documents filed by the assessee in response to the reasons issued by him.

High Court remarked that the Assessing Officer has missed out a very important aspect with regard to powers exercisable by the Assessing Officer and the powers exercisable by the Transfer Pricing Officer. High Court concluded that without disposing of the assessee's objections by passing a speaking order, the Assessing Officer could not have straight away referred the matter to the TPO for consideration.

High Court, thus directed TPO to keep this notice under Section 92CA in abeyance and directed the Assessing Officer to dispose of assessee's objections by passing a speaking order.

LD/67/39

The Commissioner of Income Tax
Vs.
Philips Software Centre Pvt. Ltd.
10th July 2018

ITAT's remarks that TP provisions are not applicable to assessee who is entitled to tax holiday benefit is a mere obiter and has not caused any prejudice to revenue in instant case; Revenue's appeal is hence, dismissed.

The assessee is engaged in rendering captive contract software development services to its [Associated Enterprises] AEs for AY 2003-04. The assessee was also availing tax holiday benefit under Section 10A. The assessee borne only nominal business and operational risks. Rejecting assessee's Costplus Method, TPO had adopted TNMM and made adjustment.

ITAT noted that that the basic intention behind introducing TP provisions is to prevent shifting of profits outside India. As the assessee was claiming benefit under Section 10A, ITAT held that TP provisions need not be applied to it. Further ITAT also observed that Revenue had failed to establish that the assessee had manipulated prices to shift profits outside India, and thus TP provisions were not applicable to the assessee as per CBDT Circular No. 14/2001. Further ITAT also held that the TPO had erred in disregarding the method adopted by the assessee, and that there was no infirmity in the TP study conducted by the assessee.

ITAT also observed that the TPO had not provided any reasons for applying the turnover filter considering ₹ 100 crores as the appropriate lower end. ITAT also held that the Revenue authorities had erred in including companies that had related party transactions below 25 per cent As per ITAT, Legislature did not intend to provide any such cut-off for the purpose of eliminating companies. Further ITAT held that for the purpose of comparability, companies with even a single rupee of transactions with 'associated enterprises' cannot be considered as comparables. ITAT also held that the assessee was entitled to adjustments for differences in risk, working capital and accounting policies. Allowing a 'standard deduction' of 5 per cent, ITAT held that if the assessee opts, the adjustment can be computed with reference to the 95 per cent of the mean price. ITAT held that by not allowing a standard deduction of 5 per cent from the arithmetical mean, the authorities had ignored a specific and mandatory provision of law.

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

On the issue of ITAT's remarks that TP provisions were not applicable to assessee enjoying tax holiday benefit, High Court held that such observation could not be said to be finding of fact, and was only merely an obiter. High Court further observed that though such an obiter seemed to be made by ITAT in ignorance of the Section 92C(4) of the Income Tax Act, it did not have any binding character since as far as the computation of income of the assessee was concerned, the Assessing Officer has not given any benefit of Section 10-A of the Act to the assessee with respect to Transfer Pricing Adjustments made in the Assessment Order. High Court, thus held that no prejudice was caused to Revenue, and therefore dismissed the appeal on this front.

The High Court relied upon co-ordinate bench ruling in case of *Softbrands [I.T.A.No.536/2015 c/w. I.T.A.No.537/2015]* to dismiss Revenue's appeal noting it to be a covered matter.

High Court held that no substantial question of law would arise for its consideration and thus ruled, in favour of the assessee.

LD/67/40

Dimension Data Asia Pacific PTE Ltd.

Vs.

Dy. Commissioner of Income

06th July 2018

Assessing Officer passed a final order without passing a draft assessment order while giving effect to Tribunal's order in remand proceedings; Procedure of passing a draft assessment order under Section 144C(1) is mandatory in remand proceedings also.

The assessee is a Foreign Company which filed a 'Nil' return of income on 30-11-2011. A draft assessment order was passed on 20-03-2015 under Section 144C (1) for AY 11-12 against which the assessee filed its objections to DRP. On 04-12-2015 DRP issued directions consequent to which the Assessing Officer passed the final assessment order on 11-01-2016 under Section 143(3) read with Section 144(C)(13) of the Act. In further appeal, Tribunal passed an order dated 05-05-2017, restoring the matter back to Assessing Officer to give effect to its order. In the remand proceedings, Assessing Officer passed a final order on 31-01-2018 without passing a draft assessment order. Assessee, thereafter, filed a writ petition before the Bombay High Court contending that Assessing Officer's order dated 31-01-2018 was without jurisdiction since no draft assessment order was passed before passing of final assessment order and thus it was in defiance provisions of Section 144C of the Act.

High Court observed that in terms of Section 144C of the Act, a separate procedure for passing Assessment orders and appellate procedure thereupon is provided for eligible assessee as defined in Section 144C(15) of the Act, which included Foreign Company. Thus, assessee was entitled to a draft assessment order under Section 144(1) of the Act before the final assessment order as passed in this case under Section 143(3) read with Section 144(13) of the Act. High Court relied on ruling in case of *International Air Transport Association [241 Taxman 249]* wherein the co-ordinate bench had quashed the final assessment order on foreign company which was not preceded by draft order.

With respect to Revenue's argument that since ITAT had not set-aside the original assessment order but

had merely restored the matter back to Assessing Officer, requirement of passing draft assessment order was not necessary, High Court relied on ruling in *JCB India [2017] 85 taxmann.com 155 (Delhi)]* wherein it was held that even in partial remand proceedings from the Tribunal, Assessing Officer was obliged to pass a draft assessment order. High Court stated that the Assessing Officer is obliged to, in terms of Section 144C of the Act to pass a Draft Assessment Order in all cases where he proposes to assess the Foreign Company under the Act by making a variation in the returned income. According to High Court , the order dated 31-01-2018 was not an order merely giving an effect to the order of the Tribunal, but it was an assessment order which has invoked Section 143(3) of the Act and also Section 144C of the Act.

High Court observed that that even if one proceeded on the basis that the returned income stood varied by Tribunal's order in the first round, to the extent assessee accepted it, the Assessing Officer correctly invoked Section 144C of the Act. However, having once invoked this Section, Assessing Officer is to oblige to comply with it in full and not partly. Further, the ITAT had restored the matter to Assessing Officer for fresh adjudication and this "fresh adjudication" itself would imply that it would be an order which would decide the *lis* between the parties, may not be entire *lis,* but the dispute which has been restored to the Assessing Officer.

High Court stated that Section 144C (13) can only be invoked in cases where the assessee has approached the DRP in terms of sub Section 144(C)(2)(b) of the Act and the DRP gives direction in terms of Section 144C(5) of the Act. In this case, the assessment order has invoked Section 144C (13) of the Act without having passed the necessary draft Assessment Order under Section 144C(1) of the Act, which alone would make an direction under Section 144C(5) of the Act by the DRP possible. High Court, thus held that the impugned final order of Assessing Officer was completely without jurisdiction.

Separately, High Court quashed Revenue's contention about existence of alternate remedy available to assessee stating that the impugned order itself was without jurisdiction. ■

Legal Update

Disciplinary Case

Summary of disciplinary case, in the matter of:

XYZ vs. CA. ABC

Facts of the case

A Complaint in Form I dated 25th August 2009 was received from XYZ (hereinafter referred to as the "Complainant"), against CA. ABC (hereinafter referred to as the "Respondent"). The charges alleged in the Complaint are as under:

- The Respondent along with some other employees of the Complainant Corporation is involved in embezzlement of over ₹ 1.03 Crores in the UP State Tourism Development Corporation while working as Chief Accounts Officer. Several FIR's under various sections of IPC had been lodged against him and an investigation by Economic Offence Wing of UP Government is also going on. The Respondent was in jail for a long time before he was released on bail.
- The Respondent was suspended from the services of Corporation for the above misconduct and Departmental proceedings against him are in progress.

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

- The Board noted that departmental proceedings were initiated against the Respondent pursuant to which he was suspended from the services of the said Corporation.
- The Board also noted that the copy of the Inspection Report of Commercial Audit Wing, Accountant General, UP, Lucknow along with the reports of two Chartered Accountant firms prepared during the course of the special audit conducted for the period 2000-2001 to 2006-2007 clearly mentioned the role of the Respondent in the alleged forgery. It has also been stated that the embezzlement of funds of the Corporation and acts of forgery were done intentionally. The Board also took note of the copy of the letter received from the Office of the Jail Superintendent sent by the Jailer District Jail, Lucknow wherein it has been confirmed that the Respondent was in jail from 23-12-2006 to 12-12-2007 in 11 criminal cases lodged against him.
- Further, the Board also perused the report dated 20th October 2007 of the Economic Offences Wing, Government of Uttar Pradesh. On the basis of the documents on record, the Board noted that the Respondent along with three other officials of the Complainant Corporation was involved in an embezzlement amounting to ₹ 1.03 crores and the Respondent was instrumental in making payments through bearer cheques to various parties which were fake, withdrawing cash from banks for incurring expenditure which were not made and by cancelling account payee status intentionally by the Respondent and thereby withdrawing cash from bank by other officials. The afore-stated act of the Respondent as the Chief Accounts Officer of the Complainant Corporation is in true sense unbecoming of a Chartered Accountant and has brought disrepute to the profession. Thus, the trust which was bestowed by the Complainant Corporation on the Respondent as a Chartered Accountant was totally shaken. Accordingly, the Board held that the Respondent is guilty of "Other Misconduct" falling within the meaning of Clause (2) of Part IV of the First Schedule to the Chartered Accountants Act, 1949. Thereafter, the Board afforded an opportunity of hearing to the Respondent but the Respondent failed to appear and sent his written submissions. *After considering all the material on record, the Board is of the considered view that the Respondent should be levied with maximum penalty 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 3 (three) months and further imposed a fine of ₹ 10,000/-.* ■