Legal Decisions[1]

Income Tax

LD/67/68

Assistant Commissioner of Income Tax

Vs.

M/s GMR Projects Pvt. Ltd

October 26, 2018

Sponsorship payment made by the assessee for sponsoring an IPL Team held to be not deductible under section 37

The assessee is a company part of GMR group engaged in the business of civil and highway construction in various parts of India. The assessee had incurred an expenditure of ₹ 3 crores for the purpose of sponsoring an IPL team. The assessee had become an associate sponsor. Assessing Officer disallowed the said expenditure under section 37 noting that the expenses incurred by the assessee were not entirely related to the business activity of the assessee. CIT (A) ruled in favour of the assessee, aggrieved by which, the revenue preferred an appeal before the Bangalore ITAT.

Assessee submitted that its logo was mentioned as an associate sponsor on the advertisement displayed in IPL and on the jersey of the players and therefore business benefits were derived from that advertisement. ITAT noted that the assessee was entitled to benefits and rights such as Logo positioning on the non-lead arm of the Delhi Daredevils team jersey, appearance of logo in all media and marketing communications, etc.

ITAT remarked that it was incumbent upon the assessee to prove that the expenditure incurred was wholly and exclusively for the purpose of business. As per ITAT, no document was placed on record to show the name of the assessee on the jerseys/ advertisement which was in its own name; and only the common logo of GMR group was alleged to have been displayed. Further, ITAT observed that the assessee was not directly getting any contract but was merely executing the contract for the group company only, and thus no marketing benefit as such was derived by the assessee.

ITAT thus held that there was no justification in allowing the said expenditure under section 37 and ruled in favour of the Revenue.

Separately, in relation to the issue of disallowance of interest expenditure on FD's, ITAT restored the matter back to the Assessing Officer to re-compute the final loss/income.

LD/67/69

Ambience Developers & Infrastructure Pvt. Ltd.

Vs.

Commissioner of Income Tax

October 25, 2018

Agreement between two entities conferring rights to enjoy lease income of retail spaces held to be sham and just to divert rental income under a revocable transfer; Rental income held to be taxable in transferor's hands under section 60.

There are two petitioners to this case; viz Ambience Developers and Infrastructure (ADI) and Ambience Hotels and Resorts (AHR). AHR was constructing a five- star hotel at its own premises. This construction also had led to the creation of certain retail premises. AHR needed funds for completing the hotel project, and therefore it entered into agreement with ADI whereby ADI gave an interest free deposit of ₹ 75 crores to AHR in return of the rental income to be enjoyed by it for the retail premises constructed by AHR. On the direction of CIT under section 263, the Assessing Officer assessed lease income from the rent of retail-shops and other spaces in the hotel in hands of AHR under section 22 since it was the owner of premises. Assessing Officer, however, did not reduce the said amount from ADI's income by assessing the same on protective basis while making a substantive addition in the hands of AHR.

ITAT held that rental income was correctly assessed in the hands of AHR by the Assessing Officer, however, it directed to delete the protective addition of the same made by the Assessing Officer in the hands of ADI. Aggrieved by order of ITAT, the assessees preferred appeals before the High Court.

Before the High Court, assessees submitted that the Act does not clothe the taxing authority with any jurisdiction to rewrite the terms of the agreement,

[1]*Contributed by CA. Sahil Garud, CA. Mandar Telang, Indirect Taxes Committee, Disciplinary Directorate and ICAI's Editorial Board Secretariat.*
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which plainly in this case did not suggest that the parties were dealing with each other in any manner other than at arm's length. Assessees argued the concerned agreement was an entirely bona fide business transaction and plain and unambiguous in its terms which created certain rights and obligations which were acted upon and gave the assessee company an overriding title to the income derived from leasing of the shops.

High Court observed that CIT(A) and ITAT had relied on Section 60 to hold that income had been diverted under a revocable transfer or an arrangement and therefore, it would be chargeable in the hands of the transferor. The agreement conferred a right to receive rentals by ADI for which a consideration of ₹ 75 crores was paid, and that the agreement could be rescinded after 3 years, by giving back the deposit. Further, the agreement also stated that AHR's tenants were deemed to be that of ADI.

High Court noted that the judgements relied upon by the assessee before it were considered rightly by the CIT(A) as well as ITAT. High Court distinguished assessees' reliance on Supreme Court ruling in *Poddar Cement* as it did not involve interpretation of Section 60 which was in question in the instant case. High Court thus stated that the assessee was incorrect in stating that the Tribunal ignored or overlooked material facts or law.

High Court also noted that even after inclusion of rental income, ADI reported a loss for the year under consideration in its return whereas AHR declared profits; and therefore lower authorities had the view that the arrangement was made to avoid incidence of tax in AHR's hands.

High Court thus held that there was no infirmity in the impugned orders of the ITAT, and thus dismissed assessee's petitions.

LD/67/70

Director of International Taxation, Madras

Vs.

TVS Motors Co Ltd.

October 24, 2018

Payment made by the assessee to the Austrian company for a design to improve fuel efficiency held as fees for technical services and not royalty; the same is only taxable in Austria as per India-Austria DTAA

The assessee is a representative assessee of an Austrian company. It entered into a technical assistance agreement with an Austrian company for design of new 75CC, 3-valve cylinder head. The assessee contended that the fee paid to the Austrian company is only for the technical services and since the entire work was done in Austria and no part of the work was done in India, the entire income was taxable only in Austria in terms of provision of the DTAA with Austria. However, the Assessing Officer held that the amount received by the Austrian company from the assessee for design of 75CC 3-valve Cylinder head is royalty and thus is taxable in terms of Article 6 of DTAA with Austria.

The CIT(A) ruled in favour of the assessee. The appellate authorities noted that it was not a readymade patented technology supplied by the Austrian company to the assessee and it is a specific service performed by the Austrian company in respect of engine manufactured by the assessee to meet the specified specifications.

Before the High Court, Revenue contended that it was noted in the agreement that the know-how and patents and the ideas introduced into the project shall remain the exclusive property of the Austrian company and therefore, what has been given to the assessee was only a right to use. Thus as per Revenue, the payment was in the nature of royalty. High Court held that this clause was just to protect Austrian Company's rights, know-how, patents ideas and that an interpretation of revenue holding that the agreement was a licence for which the payment was made, was an improper interpretation.

High Court observed that the engine was already developed by the assessee and scope of the technical services agreement was only to design a new 3-valve cylinder head with a specified combustion system for considerable improvement of fuel efficiency, performance and meeting the Indian emission standards. Further, all products, design of the engines and vehicles are supplied by the assessee, on completion all the drawings are also delivered by the Austrian company to the assessee, the entire project was carried out in Austria and no part of the project was performed in India. Thus, the payment did not constitute royalty.

High Court noted that the Tribunal in assessee's own case for past assessment year had examined

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Class	No. of Questions	Duration	Subjects	Mode	Negative Marking	Max. Marks	Pattern
IX	100	1 Hr 15 Min	(I)Social Studies (Economics) (II) Mathematics (III) Business Awareness (IV) Aptitude	Online/Pen & Pencil	0.25	100	
X	100	1 Hr 15 Min	(I) Social Studies (Economics) (II) Mathematics (III) Business Awareness (IV) Aptitude	Online/Pen & Pencil	0.25	100	Objective - type (Multiple Choice) questions
XI	100	1 Hr 15 Min	(I) Business Studies (II) Accountancy (III) Economics (IV) Aptitude	Online/Pen & Pencil	0.25	100	
XII	100	1 Hr 15 Min	(I) Business Studies (II) Accountancy (III) Economics (IV) Aptitude	Online/Pen & Pencil	0.25	100	
B.Com/BBA /BMS/ Allied Subjects Examination	100	1 Hr 15 Min	(I) Business Studies (II) Accountancy (III) Economics/ Financial Studies (IV) Aptitude	Online/Pen & Pencil	0.25	100	

Date Timings for the aforesaid test :

Class/Levels of Exam and Date	Level-I (Online test) 6th January, 2019 (Sunday)	Level-II Test : Online or Pen Pencil Mode in the designated test centre 20th January, 2019 (Sunday)
Class IX & Class X	09:30 AM to 10.45 AM	1. 09:30 am. to 10.45 am. for Class IX & Class X 2. 11:45 am. to 1.00 pm. for Class XI 3. 2:00 pm. to 3:15 pm. for Class XII 4. 4:15 pm. to 5:30 pm. for Class B.Com/BBA/BMS/Allied Subjects
Class XI	11.45 AM to 1.00 PM	
Class XII	2.00 PM to 3.15 PM	
Graduation-B.Com/BBA/BMS/Allied Subjects	4.15 PM to 5.30 PM	

Prizes for Participants

Level-I Test

- All participants In Level-1 test will receive a Participation Certificate.

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- 1st Rank holder will be awarded with Rs 1, 00,000/- for Class IX, Class X, Class XI , Class XII & B.Com/BBA/BMS/Allied Subjects Separately, if multiple winners are there, the prize amount will be shared by them. If more than 50 joint rank holders for the same, the awardee will at least awarded with the cash prize of Rs 2,000/-
- 2nd Rank will be awarded with Rs 50,000/-for Class IX, Class X, Class XI Class XII & B.Com/BBA/BMS/Allied Subjects separately, if multiple winners are there, the prize amount will be shared by them. If several joint rank holders for the same are there, the awardee will at least awarded with the cash prize of Rs 1,500/-
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Award Ceremony: Award Ceremony will be held in January/February, 2019 at Delhi NCR.

ICAI/Test Management Committee reserves the right to change in any of the modalities cited above.

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the similar agreement and had held that the payment could only be termed as 'fees for technical services' and could not be considered in the nature of royalty. High Court observed that the terms and conditions of that agreement were similar to that of the impugned agreement of instant case.

High Court, therefore, upheld the order of the appellate authority and held that the payments made by the assessee to the Austrian company were fees for technical services and not royalty. High Court thus ruled in favour of the assessee.

LD/67/71

Unifac Management Services (India) Pvt. Ltd.

Vs.

Deputy Commissioner of Income Tax, Chennai

October 23, 2018

Deduction for employees contribution to provident fund (PF) denied, being deposited after respective due dates provided in PF law.

The assessee company claimed a deduction for an amount paid towards Employees Provident Fund (PF) and ESIC. The contributions were paid beyond the due date under respective enactments but prior to the due date of filing of return as per Section 139(1), and the assessee claimed the amounts as deductible under section 43B. The Assessing Officer disallowed the said deduction as it was paid beyond the respective due dates mentioned in the relevant enactments, aggrieved by which the assessee filed a writ petition before the Madras High Court.

Before High Court, assessee argued that the delayed payments of the contribution would only attract interest and penalty and cannot be termed as though no payment was made in order to deny the deduction in entirety. Revenue contended the assessee was not entitled to take shelter under section 43B, since the said section pertained to "employer's contribution" only and assessee's case was that regarding "employees contribution" which was dealt only by Section 36(1)(va).

High Court observed that the Revenue had rightly placed reliance on Circular No.22 of 2015 dated 17.12.2015 which specifically dealt with the employers contribution and the scope of Section 43B after amendment, excluding the extension of such scope to employees contribution. Further the expression 'due date' defined under the explanation to Section 36(1) (va) clearly stated that it was in reference to the relevant Act and not in reference to the due date for filing of return. High Court stated that a combined reading of Section 2(24)(x) and Section 36(1)(va) clearly indicated that both sections were in respect of employees contribution received by the assessee and not employer's contribution.

High Court held that in the absence of any amendment made to Section 36(1)(va), contributions viz., "employees" and "employers" cannot be brought under the same scope. High Court stated that a sum payable by the assessee as an employer by way of his contribution towards the beneficial fund cannot be treated as an income at his hand but only as an expenditure allowable for deduction. When such payment is made in accordance with Section 43B(b), then the same is entitled for deduction. Therefore, there is a clear distinction between the scope of Section 43B(b) and Section 36(1)(va). High Court stated that the accumulated contribution by the employee is available with the employer for that year and he is holding such an amount in the capacity of trust and not as a beneficiary. High Court held that benefit of deduction cannot be claimed since the belated payment is not a valid payment under IT Act.

High Court thus denied deduction of delayed payment of employees contribution and ruled in favour of revenue.

LD/67/72

M/s SPIC Jel Engineering Construction Co. Ltd.

Vs.

The Assistant Commissioner of Income Tax

October 09, 2018

Assessee's project in Abu Dhabi held to be within the scope of foreign project under section 80HHB as assembly or installation of any machinery or plant; benefit of Section 80HHB thus granted.

The assessee undertook a foreign project in Abu Dhabi and filed Form 10CCAH to claim deduction under section 80HHB in respect of said foreign project. Assessing Officer held that the project in Abu Dhabi was not a 'foreign project' within the meaning of Section 80HHB and thus denied the deduction. CIT(A) ruled in favour of

the assessee. However, ITAT ruled against the assessee.

Aggrieved, the assessee filed an appeal before the Madras High Court.

Revenue contended that the assessee was a sub-contractor of Abu Dhabi's company and the work awarded was part of a general refinery shut down and purely in the nature of repair and maintenance work. It stated that assessee had not contributed for construction of any road, building, dam, bridge or other structure.

High Court stated that Section 80HHB granted incentive to the assessee for growth and development and therefore should be liberally construed in order to promote economic growth of the country. High Court observed that the term 'shut down' did not denote repairs and maintenance but was a technical term peculiar to assessee's industry. High Court observed that CIT(A) had gone through the agreement and the drawings and found that the nature of work carried on by the assessee, clearly came within the scope of foreign project under 'assembly or installation of any machinery or plant outside India' as per Section 80HHB(2)(b)(ii).

High Court relied on Supreme Court decision in *Continental Construction Limited [(1992) 195 ITR 81]* wherein it was held that Section 80HHB should not be interpreted in a narrow or pedantic fashion but should be understood to take within its fold all utilisation of technical knowledge or rendering of technical services necessary to bring about the construction, assembly and installation.

High Court held that the work done by the assessee fell within the meaning of expression 'foreign project' as defined under section 80HHB (2)(b) and thus directed the Revenue to grant deduction to the assessee.

High Court thus ruled in favour of the assessee.

LD/67/73

Surendra Kumar Jain
Vs.
The Principal Commissioner of Income Tax, Delhi
October 01, 2018

Time limit under section 153B is applicable only for original block assessments for the search proceedings and not for de-novo assessments consequent to remand by ITAT

Pursuant to search and seizure proceedings under section 132 of the Act, the assessment was completed for the block period on 28.03.2013 by the concerned Assessing Officer. The Commissioner of Income Tax (A) partly allowed the assessee's appeal on 14.08.2014. The matter was carried further to the Income Tax Appellate Tribunal (ITAT) which remitted the matter back to the Assessing Officer to complete the assessment de novo. Assessing Officer sought tax effect by re-computing the income under section 153A of the Act, in effect, following the ITAT's order of 18.02.2016. Relying upon that order, the assessment proceedings were taken up after remand by the Assessing Officer who completed them on 22.12.2017. As per the assessee, apart from Assessing Officer's order made after the ITAT's decision on February 18, 2016 there was evidence that the Revenue had clearly admitted that the order was served by hand to the CIT on 30.03.2016. Thus relying on the then existing provision under section 153(2A), assessee urged that the time available to the Assessing officer for working out the remand and completing the assessment was only up to December 31, 2016.

Aggrieved, the assessee filed a writ petition before the Delhi High Court.

High Court stated that limitation would begin from the point of time when the departmental representative has received the copy ITAT order; High Court noted that in instant case the CIT had received a copy of the ITAT order by 30.03.2016 and therefore the starting point of the limitation would therefore be March 31, 2016. High Court placed reliance on ruling in *Odeon Builders Pvt. Ltd [(2017) 393 ITR 27].*

High Court observed that under section 153 no order of assessment would be made either under section 143 or section 144 any time after expiry of twenty one months from the end of the assessment year in which the income was first assessable. However, Section 153(2) carved out an exception that in cases covered by reassessment, the period would be reduced to nine months from any financial year in which the notice for re-assessment is served.

Further, as per the High Court the special provision under section 153B of the Act in the opinion of the Court carves out a special period of limitation without which search/block assessments would

not be completed. High Court noted that a specific period of limitation prescribed for completion of original block assessments for the search proceedings is within two years, applying this two years period to block assessment proceedings after remand of matter, was not a feasible interpretation. The general provision of two years was provided with one important objective regarding to catering to a situation where upon search, if new material is found, already completed assessments can be revisited.

High Court held that the only provision that prescribed a period of limitation in respect of remands at the relevant time in this case is Section 153(2A). High Court held that the period of limitation prescribed for completion of remand (nine months) constituted a special provision, which applies to every class of remand regardless whether they originate from assessments/re-assessments/revisions or search and seizure assessments. High Court thus held that the completion of block assessment proceedings by the impugned order dated 22.12.2017 was clearly beyond the period of limitation, which ended on 31.12.2016.

High Court thus quashed the block assessment order and its consequential orders and thus ruled in favour of the assessee.

Wealth Tax

LD/67/74

Devineni Avinash

Vs.

The Principal Commissioner of Income Tax

October 11, 2018

Execution of Development Agreement on vacant land does not make it stock-in-trade so as to exclude it from Wealth Tax levy.

The assessee had filed his return of wealth, for the AY 2009-10. Assessee had purchased urban land in July 2007 and a development agreement related thereto was entered into by assessee immediately. Assessing officer held that the same was to be considered while calculating wealth and wealth tax thereon. As per the assessee the immediate execution of development agreement showed assessee's intention to carry on business and therefore the said vacant land would not fall within the definition of an "asset" under the Wealth Tax Act. The Commissioner (Appeals) as well as ITAT ruled in favour of the Revenue, aggrieved by which the assessee filed an appeal before Andhra Pradesh and Telangana High Court.

High Court observed that the purchase of property by the assessee was an isolated transaction, and they had not carried on any business either before or thereafter. Only purchasing a property under profitable bargain with the desire to sell the property would not justify assessee's intention of starting a venture in the nature of business or trade.

Filing of return under Form No ITR-2 and not in Form No.ITR-4 was also an indication whereby the subject land was treated as an investment / capital asset, and not as stock-in-trade under the head 'current assets'. If assessee had intended to use the land for the purpose of carrying on business, it would have been shown the same as 'stock-in-trade' under the head 'current assets' and not as immovable property under the head 'fixed assets'. Merely because assessee entered into a Joint Development Agreement with a builder, the same would not itself amount to treatment of subject land as stock-in-trade.

High Court thus ruled in favour of the Revenue.

GST

LD/67/75

Apex Company Vantage India Pvt. Ltd.

Vs.

CCT

(CESTAT-HYD)

June 14, 2018

Tribunal held that refund claim of accumulated CENVAT credit, filed in terms of Rule 5 of CENVAT Credit Rules, 2004, needs to be debited in the books of accounts at the time of filing refund claim and violation of said condition would lead to rejection of refund claim.

Facts:

Appellant exporter filed refund claim of accumulated CENVAT Credit in terms of Rule 5 of CENVAT Credit Rules, 2004 (CCR, 2004). The entry for refund claim was recorded by the appellant in their books of account, not at the

time of filing of refund claim but subsequently. Department rejected the refund claim on the ground that appellant had not debited the CENVAT credit amount from their books of accounts at the time of making the claim as stipulated under erstwhile notification which dealt with safeguards, conditions and limitations to which refund claim under Rule 5 of CCR, 2004 was subjected to. Even, the First Appellate Authority dismissed appeal filed by the appellant. Being aggrieved, the appellant filed present appeal before the Tribunal. They pleaded that they were under mistaken belief that the debit in their books of accounts had to be done after one year from the end of the quarter for which the refund claim has been filed. Further, though these details were mistakenly not entered in ST-3 returns, but they had subsequently filed revised returns rectifying the defects.

Held:

Hon'ble Tribunal found that the notification lays down that the amount claimed as refund of CENVAT amount should be debited before applying for the refund and the appellant had not done so. They have debited the amount, but much later and thereby they violated the condition 2(h) of the notification. Tribunal held that the Rule or the notification does not provide the flexibility to the officers or the Tribunal to relax condition 2(h) of the notification and thereby rejected present appeal by upholding impugned order.

Service Tax

LD/67/76

M/S Indian Institute of Technology

Vs.

Commissioner of Service Tax

(CESTAT-DEL)

July 06, 2018

Tribunal held that when assessee educational institution made payments to the overseas vendors towards online subscription of various educational resources, being in the capacity of representative of consortium of various educational institutions, no service tax liability would arise under reverse charge as such activity is meant for education and not in relation to any business or commerce.

'Training and placement charges' collected by educational institution from its students as part of fee structure are not liable to service tax under category of 'manpower supply services'.

Facts:

The appellant is an institute of national importance established by the Institutes of Technology Act, 1961, an Act of Parliament, for fostering excellence in education. The Ministry of Human Resources Development (for short 'MHRD') set up the 'Indian National Digital Library in Engineering Sciences and Technology Consortium' (INDEST) and the appellant, was designated as the Consortium Headquarters to coordinate its activities. The Consortium enrolls engineering and technological institutions as its members and subscribe to electronic resources for them at discounted rates of subscription and favourable terms and conditions. The Ministry provides funds required for subscription to electronic resources for various centrally-funded Government institutions. The benefit of consortia-based subscription to electronic resources is not confined to its core members but is also extended to all educational institutions under its open-ended proposition. With the aim of subscribing to various electronic educational resources at highly discounted rates for the benefit of its members, the consortium enters into subscription agreement with the resource owners. Department took a view that appellant is receiving Online Information and Database Access or Retrieval Services (OIDAR) from the overseas vendors and thus, liable to pay service tax under reverse charge mechanism. Further, service tax was demanded under category of manpower supply services in respect of 'training and placement charges' collected by appellant from its students.

Held:

Hon'ble Tribunal found that in terms of erstwhile Taxation of Services (Provided from outside India and Received in India) Rules, 2006, the recipient based services were taxable only when they are received by a recipient located in India for use in relation to business or commerce. It was categorically found that the OIDAR services were received by the appellant, not in relation to business or commerce, but were meant for use in education only. Further, Tribunal noted that said services were received by appellant as representative of all

the educational institutions. Accordingly, Tribunal held that appellant is not liable to pay service tax under reverse charge for payments made to overseas vendors for various subscriptions taken by consortium.

As regards demand under manpower supply services, Tribunal noted that said training and placement charges were collected by appellant from its students as a part of their fee structure. Neither the appellant is a commercial concern nor did they provide services to any commercial concern. Further, Tribunal held that issue is squarely covered in the case of *Motilal Nehru National Institute of Technology vs. CE & ST, Allahabad – 2015 (40) S.T.R. 375 (Tri. – Del.)* Therefore, Tribunal set aside impugned demand under manpower supply services.

LD/67/77

SETH CONSTRUCTION

Vs.

CCGST MUMBAI (SOUTH)

(CESTAT-MUM)

August 02, 2018

Tribunal held that once the assessee engaged in providing taxable as well as exempted services, reverses the CENVAT credit attributable to exempted services, no proceedings can be initiated against the assessee for payment of 8%/10% reversal of value of exempted services under Rule 6(3) of CCR, 2004.

Facts:

Appellant, provider of works contract services, discharged service tax liability in some cases and availed benefit of exemption notification in other cases. Since the appellant provided both taxable as well as exempted service, department proceeded against it under Rule 6 of the CENVAT Credit Rules, 2004 for payment of amount of 8% / 10% of the value of exempted service. After issuance of show-cause notice, the appellant had reversed the CENVAT credit availed by it in respect of the exempted service provided it, by availing the exemption benefit under Notification dated 20.06.2012 and also paid the interest at the appropriate rate. Thereafter, the proposals made in the show-cause notice were dropped by the Adjudicating Authority. Being aggrieved, revenue preferred appeal before first appellate authority wherein the first appellate authority confirmed the CENVAT credit demand along with interest and appropriated the amount already reversed by the appellant towards such confirmed demand and also imposed penalty. Being aggrieved, appellant has filed present appeal. The issue before Tribunal for consideration was whether upon reversal of CENVAT credit on the exempted service along with interest, can the department proceed further for recovery of amount as contemplated under Rule 6 of CENVAT Credit Rules, 2004 and impose penalties on the appellant.

Held:

Hon'ble Tribunal held that the present dispute is no more *res integra* in light of its own decision in *Order No. A/85944-85946/2018 dated 02.04.2018* in the case of *Ahmednagar Zilla Prathamik Shikshak Sahakari Bank Ltd. & Ahmednagar Shahar Sahakari Bank Ltd. vs. Commissioner of Central Excise, Aurangabad - 2018 (4) TMI 1330-CESTAT Mumbai*. In the said decision, reliance was placed on *Nagar Urban Cooperative Bank Ltd. vs. Commissioner of Customs, Central Excise and Service Tax, Aurangabad-CESTAT-MUM* and it was held that the option available to the assessee to reverse proportionate CENVAT credit, once exercised by the assessee, the demand cannot be confirmed for recovery of the value of the exempted service provided by the assessee. Accordingly, it was held that since on the date of passing of the impugned orders, there were no outstanding liability recoverable from the appellants, the demand of amount in terms of Rule 6(3) of the rules cannot be sustained. Relying on the same, Tribunal allowed present appeal by setting aside order of first appellate authority.

LD/67/78

M/s SMP Constructions Pvt. Ltd.

Vs.

Commisssioner of Central Excise and Service Tax

(CESTAT-AHM)

August 01, 2018

Where assessee avails benefit of abatement notification in some contracts (wherein he has not availed CENVAT Credit), the benefit of abatement notification cannot be denied

merely because in some other contracts (where assessee discharged service tax liability on entire value of contract), the assessee has availed the CENVAT Credit. The abatement notification is not required to be applied in a uniform manner across all contracts undertaken by it.

Facts:

Appellant is engaged in providing the service of "Commercial or industrial construction services". While taking benefit of abatement notification stipulating non-availment of CENVAT credit as pre-condition for claiming abatement, out of total contracts undertaken by appellant, in some contracts they paid service tax on the 100% of gross value without availing the abatement and availed CENVAT credit. In some of the contracts, they paid the duty on 33% of the gross value after abetment of 67% and did not avail the CENVAT credit. The case of the department is that since the appellant in respect of some of the contracts availed CENVAT credit and discharged the service tax on 100% gross value of the service, they cannot opt for abatement notification for remaining contracts and thereby, is liable to pay service tax on entire value of contract.

Held:

Hon'ble Tribunal noted that the Notification is not applicable in case where the CENVAT credit in respect of inputs or capital goods or input services used for providing such taxable service has been taken. Tribunal held that when the condition of the said Notification was complied with qua a particular contract, merely in some of the contract the appellant had availed the CENVAT credit, has no effect on the services where the benefit of abetment notification was availed. Tribunal noted that the issue is no more *res-integra* in light of the decision in *Bharat Heavy Electrical Ltd. Vs. CCE-2014 (34) STR 430 (T-Mumbai) 2012-TIOL-348-CESTAT-MUM* and *Afcons Infrastructure Ltd. Vs. CCE - 2016-TIOL-1818-CESTAT-MUM* wherein it was held that there is no stipulation in the notification that the option to avail/ non-avail CENVAT credit has to be exercised uniformly in respect of all the contracts executed by the assessee. It is for the assessee to choose which formulation he wants to follow in a given contracts.

LD/67/79

Shyam Mani, Umesh Nigam

Vs.

Commisssioner of CGST and Central Excise, Mumbai

(CESTAT-MUM)

June 20, 2018

Penalty under section 78A of Finance Act, 1994 i.e. penalty for offences by Directors etc., cannot be imposed in cases where period under dispute is before 10.05.2013.

Facts:

The short issue for consideration before the Tribunal in present appeal was whether penalty under section 78A of Finance Act, 1994, providing for imposition of penalty for the offences by the Directors, etc., can be imposed in cases where period under dispute is prior to enactment of said Section 78A w.e.f. 10.05.2013?

Held:

Hon'ble Tribunal held that in present appeal, during the disputed period, Section 78A was not incorporated in the statute and the same was inserted by Finance Act, 2013 with effect from 10th May 2013, thus, the provisions of Section 78A cannot be invoked for imposition of penalty on the employees for the offence committed by the company. It was noted that similar view was taken in *Dato Seri Shahril Shamsuddin vs. Commissioner of Service Tax, Mumbai - II -2016-TIOL-559-CESTAT-MUM* and the penalty on the employees of the company under section 78A, was set aside.

Excise

LD/67/80

Mangalam Alloys Limited

Vs.

The Commissioner of Central Excise, Ahmedabad

September 05, 2018

Input Credit denial by CESTAT on the ground of no actual movement of goods, which the assessee failed to satisfactorily rebut, upheld by the High Court.

The assessee is a manufacturer of goods and availed credit on inputs received from two suppliers namely two of the suppliers of such

inputs, namely, M/s. Goodluck Empire, Bhavnagar and M/s. Jenil Empire, Bhavnagar, about which the revenue noticed certain clandestine Transactions. CESTAT noted that Revenue had obtained a report from the RTO suggesting that the twelve invoices pertained to goods stated to have been transported by vehicles which were incapable of carrying the quantity of such inputs.

Regarding such discrepancies, CESTAT neither found any satisfactory explanation from suppliers' statements nor from assessee's side. Assessee merely stated that goods were ordered on FOR basis and therefore transportation of goods was responsibility of the supplier and not assessee. CESTAT affirmed revenue's contention that goods were not physically received by the assessee and CENVAT credit therefore could not be claimed.

High Court noted that when the RTO report strongly suggested that the vehicles in which the goods were stated to have been transported were incapable of doing so, the burden would be on the assessee to dislodge these primary findings particularly when the report of the RTO was not challenged. Assessee's stand that it had ordered goods on FOR value and therefore was not obliged to explain the manner of transportation was too simplistic in background of facts on record.

High Court rejected assessee's contentions that CESTAT's conclusions were based on drawing presumptions or adverse inference. High Court thus upheld the order of CESTAT and thus ruled in favour of the Revenue.

INTERNATIONAL TAXATION

Transfer Pricing

LD/67/81

Cairn India Limited

Vs.

The Assistant Commissioner of Income Tax, Gurgaon

October 24, 2018

Redeemable Preference shares issued to associated enterprise of assessee can't be categorised as loans.

An addition on account of arm's length price on notional interest regarding investment made through 0% Redeemable Preference Shares by the assessee in its subsidiary company based in Jersey was made by the Transfer Pricing Officer. Transfer Pricing Officer observed that the assessee raised a loan of ₹ 1, 345 crore from SBI for one of its projects and however on the same day, made an investment in the subsidiary by way of the Redeemable Preference Shares. The Transfer Pricing Officer characterised the same as an unsecured loan to the subsidiary. ITAT remitted the matter back to Transfer Pricing Officer noting that litigation on similar issue for immediately preceding year was pending in case of the same assessee. The Delhi High Court, however, held that ITAT was incorrect in doing such remission and that it should have proceeded to decide the issue on merits since it did not involve elaborate fact finding. High Court thus directed ITAT to hear the matter again.

ITAT noted Section 80 of Companies Act makes detailed provisions for the issue by a company of redeemable preference shares which *inter alia* provide that no such share shall be redeemed except out of profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of share capital made for the purpose of redemption. ITAT also relied on from the Delhi High Court ruling in the case of *Globe United Engineering and Foundry Co. Ltd [44 Comp. Cases 347]* wherein it was held that Preference Shares / Optionally Fully Convertible Debentures are not 'loans'.

ITAT observed that in AY 2012-13, preference shares were redeemed by the AE and redemption was accepted by the Revenue. Accordingly, ITAT concluded that re-characterisation of the transaction was erroneous and the resultant transfer pricing adjustment was unwarranted. Further with respect to addition of 'notional interest', ITAT stressed on importee of 'Real Income' theory and stated that real income meant profits arrived at on commercial principles subject to provisions of the Act.

ITAT thus held that re-characterisation of the impugned transaction as "Loans" was erroneous and no transfer pricing adjustment was warranted.

ITAT thus ruled in favour of the assessee.

LD/67/82

Ericsson Telephone Corporation India AB

Vs.

The Deputy Director of Income Tax, (International Taxation)

September 28, 2018

Arm's Length Price calculation based on Profit level indicator of 6 months of year before business of assessee was restructured, upheld by ITAT.

The assessee is an entity incorporated in Sweden with limited liability, which is a fully owned subsidiary of M/s Telefonaktiedolaget LM Ericsson AB, Sweden. It set up a branch office in India to carry out its business activity. In 1995-96, the assessee was awarded contracts by Indian telecom companies for installing GSM mobile telephone network. In 1996, the installation contracts with Indian companies were assigned to Ericsson Communications Pvt. Ltd which is a wholly owned subsidiary of the parent company (LM Ericsson AB). Thereafter, all the installation contracts concerning setting up of mobile telephone systems were carried out by Ericsson Communications Pvt. Ltd. (ECI), now known as Ericsson India Ltd. (EIL).

The assessee restructured its business and closed down the installation/assembly business and transferred it to M/s EIL, alongwith transfer of assets. The assessee used Transactional Net Margin Method (TNMM) as the most appropriate method and OP/TC as the Profit Level Indicator [PLI]. 51 comparables were used and the mean OP/TC of the comparables was determined at 8%. The assessee calculated its margin at 10% and termed its international transaction as at arm's length.

Transfer Pricing Officer held that the profit on sale of fixed assets should not be included while computing assessee's operating profit and thus recalculated assessee's margin, leading to addition of ₹ 1.27 crores to the international transaction. CIT(A) held that profit on sale of fixed asset cannot be considered as operational income and also held that financial results should be considered up to the sale of business for the purpose of benchmarking, i.e. Before CIT(A), assessee submitted that 6 months operation in installation and erection activity only should be compared and benchmarked. It was further contended that since the assessee sold the business in the middle of the FY, the assessee was incurring unutilised capacity in the form of fixed cost no longer recoverable through normal business activity. Therefore, it was pleaded that the excess costs towards unutilised capacity should be excluded from the total operating cost in order to bring the level of capacity utilisation of the comparable in line with that of the assessee. CIT(A) held that the calculation submitted by assessee in the installation and erection segment, whereby assessee showed that it earned an OP/TC for six months after excluding profit from sale of fixed assets of 14%, was consistent with policy of the group company. Further, consideration of mean OP/TC of the comparables determined at 8% was also upheld. CIT(A) noted that the international transaction carried out for 6 months before business of assessee was restructured resulted in a mark-up of 14% as against 8% of the comparables, and thus the same was correctly held to be at arm's length by the assessee. CIT(A) thus ruled in favour of assessee.

Aggrieved, Revenue filed an appeal before ITAT.

ITAT noted that the assessee was incurring unutilised capacity in the form of fixed costs which were no longer recoverable through normal business activity and thus there was no level playing field with the 51 comparables, in as much as, the comparables were not on the same platform with that of the assessee. ITAT opined that CIT(A) had given a very reasonable and justifiable finding in coming to the conclusion that the appellant has earned OP/TC of 14%. ITAT held findings of CIT(A) were not ill founded.

ITAT thus ruled in favour of the assessee. ■

Disciplinary Case

Summary of a disciplinary case, in the matter of:

CA. ABC, Mumbai

Facts of the case

1. A letter dated 15th October, 2007 was received from the Managing Director, M/s. DFG containing certain allegations against CA. LMN. Aforesaid letter of the M/s. DFG, subsequent Written Statement dated 14th January, 2009 of CA. LMN alongwith prima facie opinion formed by the Director (Discipline) under Rule 9(1) of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 were considered by the Board of Discipline and ordered for closure of said Information case. However, while passing order for closure of said case, the BOD directed the Directorate to initiate disciplinary case against the incoming auditor, CA. ABC (hereinafter referred to as the **"Respondent"**) for not obtaining 'No Objection Certificate' from CA. LMN before accepting the position as an Auditor of M/s. DFG for the financial year 2004-05.
2. Thus, as per the directions of BOD, matter arising out of the same has been treated as 'Information' within the meaning of Rule 7 of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 (hereinafter referred to as the "**Rules")** against CA. ABC.
3. As per the information letter dated 23rd March, 2010, read with Written Statement dated 14th January, 2009 of CA. LMN, the allegations, in brief, are as under:-
   - CA. LMN was the auditor of M/s. DFG from the financial year 1998-99 to 2003-04. His audit fees was pending for three financial years, i.e. ₹ 26,250/- for FY 2001-02, ₹ 27000/- for FY 2002-03 and ₹ 10,800/- for FY 2003-04.
   - The Respondent has audited the accounts of the Company for the FY 2004-05 without seeking NOC from previous auditor, i.e., CA. LMN

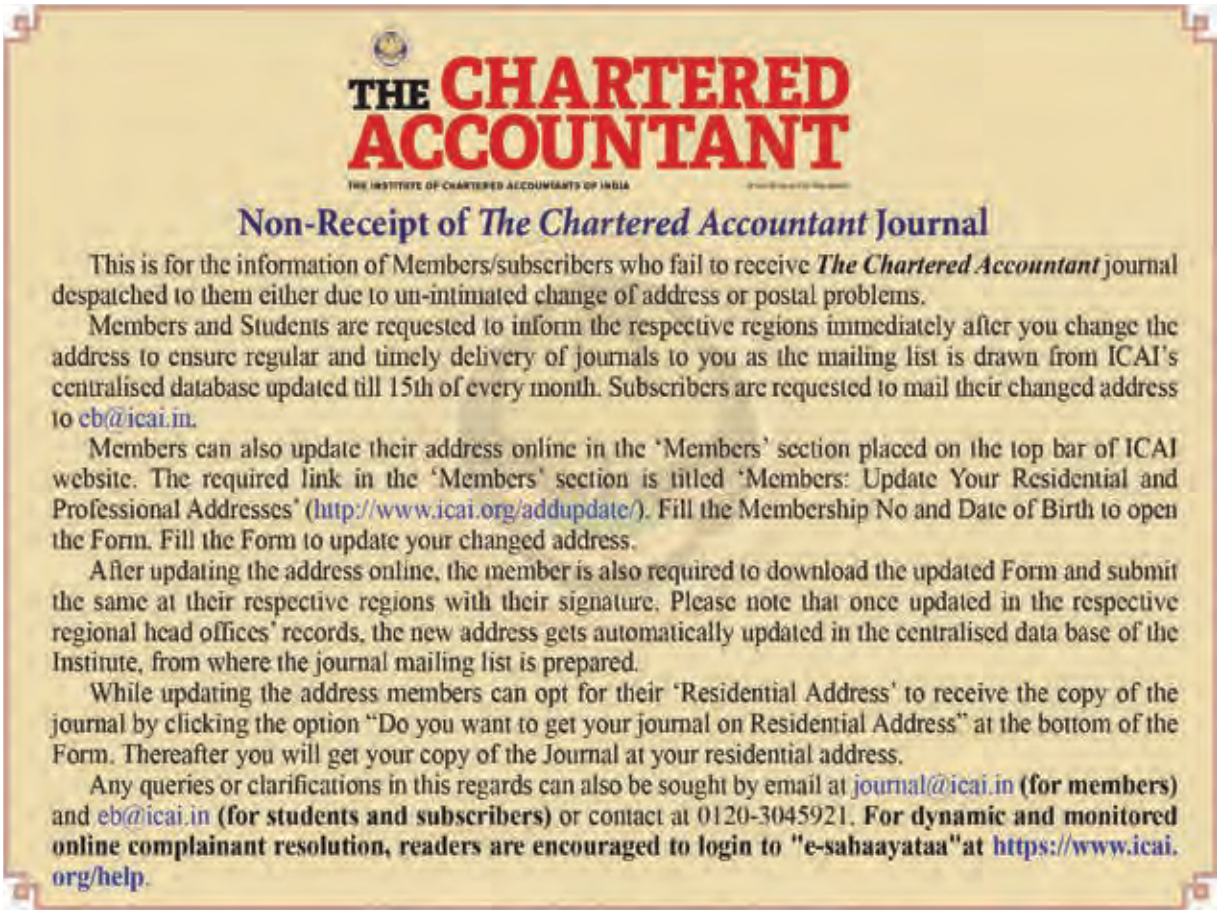
The matter was enquired into by the Board of Discipline and the Board inter-alia, gave its findings as under:

- The Board noted that the only allegation against the Respondent was that the Respondent did not seek "No Objection Certificate" from the previous auditor, i.e. CA. LMN. As regard the second allegation pertaining to non-payment of audit fees, the Board agreed with the opinion of the Director (Discipline) and accordingly, decided not to give any finding on the same. Since there was no document/submissions from the Respondent, the Board decided to examine the documents on record.
- The Board further noted that CA. LMN was the Statutory Auditor of M/s. DFG for the financial year upto the financial year 2003-04 and it is evident from Annual Report of the Company for the year 2003-04. Thereafter, the Respondent was appointed as auditor of the Company for the financial year

2004-05. The Respondent was asked vide Institute letters dated 23rd March, 2010, 21st May, 2010, 15th July, 2013 and letters dated 19th July, 2013 to submit documents in his defence to show that he has in fact communicated with the previous auditor. But the Respondent did not reply to any letter of the Institute and did not submit any documents in his support.

Thus, on perusal of the above and in absence of any document from the Respondent, the Board is of the view that no response from the Respondent's side shows that the Respondent was in agreement with allegation of CA. LMN that he did not seek NOC before accepting audit of Company for the financial year 2004-05. Accordingly, the Board opined that the aforestated act of the Respondent has brought disrepute to the profession. Thus, the Board held that the Respondent is guilty of professional misconduct falling within the meaning of Clause (8) of Part I of the First Schedule to the Chartered Accountants (Amendment) Act, 2006.

Upon the consideration of all the material on record, the Board is of the opinion that the misconduct and the indifferent attitude of Respondent by neither appearing before the Board nor submitting anything in his defence have brought disrepute to the profession. Thus, the Board is of the view that although the nature of misconduct does not qualify for the maximum sentence, however, ends of justice shall be met if a lighter punishment is awarded to the Respondent. Accordingly, the Board ordered to reprimand the Respondent. ■



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