Legal Decisions[1]

Income Tax

LD/67/83

Principal Commissioner of Income Tax - 23

Vs.

Mr. Peter Savio Pereira

November 26, 2018

Assessee had received sale consideration partly in cash and partly in the form of new flats to be constructed and allotted to the assessee; Section 54 deduction granted on such flats

The assessee owned 75% share in a residential property called "Violet Valley" situated at Bandra, Mumbai and remaining 25% share was that of assessee's sister. During the AY 2007-08, the property was sold for a consideration of ₹ 3.05 crore in cash. The purchaser additionally agreed to provide three flats of specified carpet area and three parking spaces in the same scheme which was part of the consideration that the sellers would receive from the purchaser.

In the return filed by the assessee, fair market value (FMV) of the property as on April 1, 1981 at ₹ 35 lakhs was adopted. Further, assessee also claimed exemption under section 54 pointing out that the allotment of the flats was in the nature of the assessee's investments in new residential property. AO did not accept assessee's claim of exemption under section 54. AO held that assessee had not included the value of the flats towards the total sale consideration received by the assessee. However, assessee subsequently agreed to include the price of the flats as part of the sale consideration. ITAT held that exemption could not be denied to the assessee, aggrieved by which the Revenue filed an appeal before the Bombay High Court.

High Court observed that assessee had received the sale consideration partly in cash and partly in form of new flats to be constructed and to be allotted to the assessee. High Court held that new flats amounted to assessee's investment for acquisition of new residential house. High Court rejected Revenue's contention that market value of flats should not be considered as an investment towards purchase/construction of new house property for the purpose of deduction under section 54(1), when the assessee had practically not made any payment in money terms or in kind towards the value of the flats and car space receivable from the builder.

High Court held that the AO was not justified in disallowing exemption under section 54 and thus ruled in favour of the assessee.

LD/67/84

Union Bank of India

Vs.

Addl. Commissioner of Income Tax, Kanpur

November 20, 2018

Penalty under section 271C levied; though TDS was deducted and deposited before the end of the financial year, for earlier months of that financial year.

The assessee-bank had various fixed deposits of the Agra Development Authority (deductee) under different IDs for many years. Assessee had failed to deduct tax at source (TDS) and deposit the same with the Central Government for the AYs 2012-13 and 2013-14. A penalty under section 271C was imposed for the AYs 2012-13 and 2013-14. The said penalty was affirmed by the CIT(A) as well as ITAT.

Aggrieved, assessee filed an appeal before Allahabad High Court.

The assessee submitted that for AY 2013-14, TDS on the FDs was deducted before the close of the relevant financial year and also deposited on 01.03.2013 and interest thereon was also deposited on 15.03.2013. Further, the deductee had furnished certificates of exemption under section 197 upto the FY 2010-11 and TDS for FY 11-12 was not deducted in time due to technical error. However, the same was deducted and paid at a later date.

High Court noted that the time of crediting interest income to the account of the payee is the point of time for deducting tax at source on such income. High Court observed that Section 194A(4) enables the person responsible for making payment of interest under section 194A(1) to make necessary

[1]*Contributed by CA. Sahil Garud, CA. Mandar Telang, Indirect Taxes Committee, Disciplinary Directorate and ICAI's Editorial Board Secretariat.*
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adjustments for any excess or deficiency arising out of previous deduction or failure to deduct it during the financial year before the close of the relevant financial year. Thus Section 194A(4) was an enabling provision to adjust any discrepancy or shortcoming in deduction of tax on interest income and it was wrong to construe it as leading to shifting the time/point of deduction and payment of such tax. As per High Court the time for deduction of tax is the time the interest income is to be credited in the account of the payee and the fact that deduction was made and paid before end of that financial year can in no way legitimise the failure or shortage of not deducting the tax at source at the appropriate time as per Section 194A(1).

As per Section 271 C penalty was imposable where there was failure to deduct tax as required to be deducted under section 194(1) on interest income which was undisputedly the time at which interest was to be credited to the account of the payee or when it was to be paid in cash/cheque or draft. Based on admitted facts about non-deduction of the tax at source at the time stipulated under section 194(1), High Court held that the assessee-bank was liable for penalty under section 271C.

Further High Court observed that the reason stated by the assessee that the non-deduction in time was due to improper feeding in the computer system or updation of the software, was not held to be a bonafide reason by the ITAT. High Court therefore held that the cause shown by the assessee was not a reasonable cause so as to give the benefit of Section 273B to the assessee.

Thus the High Court held that the deduction of tax at source on interest income before close of the financial year concerned under section 194A(4) cannot absolve the assessee Bank from penalty for not deducting the tax at source. High Court thus ruled in favour of the Revenue.

LD/67/85

Assistant Commissioner of Wealth Tax

Vs.

Shri. M.R. Jayaram

November 20, 2018

Distance of 8 Kms not be measured aerially prior to 01st April 2014; Amendment in Section 2(14) of Income-tax Act is prospective

The assessee had filed returns of net wealth for relevant AY 2007-08 and AY 2009-10. The AO observed that a land located in a village in Bangalore was not included in the value of the lands in assessee's returns. As per the assessee, the land did not come under the definition of 'urban land' as per Explanation 1(b) to Section 2(ea) as it was situated 11 kms away from the municipal limits. AO held that the land was situated within 8 kms from the municipal limits by straight line method and also within the jurisdiction of the newly created administrative authority which as per the AO was an authority akin to a Municipality or Cantonment Board. AO thus brought the said lands under the ambit of wealth tax. CIT(A) allowed the appeals of the assessees aggrieved by which the Revenue filed an appeal before Bangalore ITAT.

Revenue argued that the calculation of distance of 8 kms was to be measured as the crow flies, i.e. aerial distance. Further the amended provision of Section 2(14)(iii)(b) of Income-tax Act 01/04/2014 was clarificatory in nature and if the said lands were aerially measured, then the same would come within the municipal limits.

ITAT observed that the newly created administrative authority was not akin to a local authority and hence the said lands were agricultural in nature and not urban. ITAT observed that provisions of sub-clause (b) of clause (iii) of Section 2(14) of the Income Tax Act, 1961 which were substituted by the Finance Act, 2013 w.e.f. 01/04/2014, were applicable only for and from assessment year 2014-15 onwards; and therefore they operated prospectively and cannot be given retrospective operation. Thus the same were not applicable to AY 07-08 and AY 09-10 in question.

ITAT noted that 'substitution' of new Section 2(14)(iii)(b) consisted of two steps; the first being that the existing provision/rule would cease to exist and then the new provision/rule is brought into existence in its place. Further, it is a settled principle that every statute is prospective unless it is expressly or by necessary implication made to have retrospective effect. Thus ITAT held that for the AY 2007-08 and 2009-10, the distance had to be calculated by road and not aerially.

ITAT thus ruled in favour of the assessee.

LD/67/86

Deputy Commissioner of Income Tax

Vs.

Piramal Realty Pvt. Ltd.

November 16, 2018

Existence of huge premium of nearly ₹1 lakh per share cannot be a ground to doubt the genuineness of transaction so as to make an addition under section 68.

The assessee is engaged in the business of real estate and real estate development and incidental services. During the assessment proceedings for AY 2012-13, AO observed that the paid up share capital had gone up from 1 lakh to 1.50 crore by issuance of 59,850 cumulative compulsory convertible preferential shares (CCPS) of ₹10 each with share premium for the same at ₹ 99,990. The shares were issued to assessee's sister concern Piramal Estates Private Ltd. AO held that the huge premium was not justified since the assessee-company was incorporated only in December 2010 and had also suffered losses in the subsequent years. The AO made an addition of share premium as unexplained income under section 68. CIT(A) deleted the said addition, aggrieved by which the Revenue filed an appeal before Mumbai ITAT.

Before ITAT, Revenue contended that when there is negative net worth of the assessee company in view of huge loss suffered by it regularly during these two AYs 2011-12 and 2012-13, the charging of premium on CCPS was without any basis and nature.

ITAT observed that assessee-company issued the preference shares in two tranches where the first tranche money was received in AY 2011-12 and the second tranche money was received in AY 2012-13. Further the necessary formalities to be done with the Registrar of Companies [RoC] were made by the assessee-company for these transactions where the details of accounts of number of shares, face value and premium of share, name and address of shareholders, etc was disclosed by the assessee.

ITAT observed that Revenue had not doubted the identity, source and creditworthiness of the transaction but disputed the nature of the transaction in light of the huge premium charged by the assessee.

ITAT noted that the assessee had filed sufficient evidences viz, return of income, share allotment, annual return, details including name, address and PAN of the shareholder which were not negated by the AO. ITAT remarked that merely because the AO felt that the share premium was high, the genuineness of the transaction was doubtful, was an incorrect premise.

ITAT held that if the Revenue wanted to contend that what is apparent is not real, it was the onus on the Revenue to prove that it was Assessee's own money which was routed through a third party and only then can the provisions of Section 68 be invoked.

ITAT stated that the valuation of preference shares was a completely different exercise as compared to valuation of equity shares. The losses and reserves as mentioned by the AO were relevant for valuation of equity shares and not relevant for valuing preference shares as preference shares get priority over the equity shareholders in terms of payment of dividend and during winding up. Further, as per the ITAT the assessee had discharged its onus by adequately disclosing the transaction and by furnishing relevant documents.

ITAT observed that the amended Section 68 does not refer to valuation of share and it is the parallel amendment in Section 56(2) of the Act which brings in its ambit so much of the share premium as charged by a company, not being a company in which the public are substantially interested, as it exceeds the fair market value of the shares. ITAT held that if the Revenue's contention is accepted that Section 68 can be applied even where valuation for charging premium on share allotment was not justified, it would make the provisions of Section 56(2)(viib) redundant and nugatory.

Separately, ITAT deleted the addition made by the AO regarding disallowance of interest under section 36(1)(iii) on account of diversion of interest bearing funds as interest free advances to an entity in which the assessee had 50% stake. ITAT held that the interest-free advance was for the purposes of assessee's business and according to its corporate strategy.

ITAT thus ruled in favour of the assessee.

LD/67/87

Calibre Financial Services Limited

Vs.

Income Tax Officer, Chennai.

October 31, 2018

Loss on sale of mutual funds held to be a 'Revenue loss', for an assessee being a financial service company dealing in shares and mutual funds.

The assessee is engaged in financial advisory and syndication services and the Memorandum of Association of the company authorised the company to deal in shares and stocks vide its main objects clause. Loss arising and accruing from the transaction of sale of mutual fund units was treated as a 'capital loss' as against the claim of 'revenue loss' by the AO. CIT(A) ruled in favour of the assessee whereas the ITAT ruled in favour of the Revenue.

Aggrieved, Revenue filed an appeal before the Madras High Court. High Court noted that the assessee was a financial service company rendering financial advisory and syndication services. Along with trading in shares, units of mutual funds, etc., the Memorandum of Association (MOA) of the Company authorised the assessee to deal in shares and services vide its main objects clause. Assessee had invested in mutual fund units and sold the units during the same year, as authorised by its constitution deed, which proved that trading was done in the ordinary course of its business and as such revenue in nature. High Court observed that in the earlier financial year also similar transaction was treated as revenue expenditure and the same was allowed by the AO.

High Court observed that CIT(A) had rightly held that the transaction of purchase and sale of mutual funds was revenue in nature. CIT(A) took into consideration the Memorandum and Articles of Association of the assessee and had held that the assessee had acquired equity shares, which were held as stock-in-trade and out of which, a portion was sold, incurring a loss, which was accounted for as business loss. Further CIT(A) had also held that the method of accounting and the principle of accounting for loss or gains from investments or stock-in-trade have been consistently and regularly followed by the assessee.

High Court thus held that the loss booked by the assessee on the sale of mutual funds was a revenue loss and thus ruled in favour of the assessee.

LD/67/88

AA 713 the Kodumudi Growers Cooperative Bank Ltd.

Vs.

Income Tax Officer, Erode

October 31, 2018

Deduction benefit under section 80P allowed for sale under Government's Public Distribution System by Cooperative society.

The assessee-society is engaged in the business of banking and providing credit facilities to its members. Assessee filed its Nil return of income for AY 2005-06 and an addition of ₹ 22.16 lakhs was made by the AO. Out of this amount, a sum of 2.55 lakhs was represented income on account of sale of goods for the Public Distribution System (PDS) of the Government of Tamil Nadu. AO noted that the aforementioned activity was not related to the assessee's banking activity and therefore income arising therefrom would not be allowed as deduction under section 80P(2)(a). CIT(A) as well as ITAT ruled in favour of the Revenue, aggrieved by which the assessee filed an appeal before the Madras High Court.

High Court noted that under Tamil Nadu Cooperative Societies Act, 1983, the principal object of 'credit society' was raising funds to be lent to its members for the purposes of agriculture, animal husbandry, etc., or for such other purposes as the Government may, by notification, specify in this behalf. Thus a credit society as defined under the provisions of the Act was not only confined to extending loans to its members, but also to such other members as the Government may, by notification, specify. The fair price shops for sale of fertilizers to the members were opened based on the directives issued by the Government of Tamil Nadu and therefore activity fell within the ambit of the Tamil Nadu Cooperative Societies Act, 1983.

High Court rejected Revenue's stand that there are two categories of sales effected by the assessee, one in favour of its members and the other to non-members and that the income earned out

of the sale to non-members cannot be held to be a banking activity of the assessee. High Court stated that the activity of establishing a fair price shop clearly fell within the scope of By-law No. 3(b)(2) under the by-laws of the society. High Court also stated that the directives issued by the Government of Tamil Nadu, as communicated by the Registrar of Cooperative Societies were binding on the assessee-society. High Court stated that the assessee herein is entitled to distribute the items under the PDS, as it is one of the allied activities of the society and is bound by the directives of the Government.

High Court thus held that the activity done by the assessee-society cannot be truncated from the activities of the credit society and therefore the Revenue erred in not granting the benefit of the deduction under section 80P(1) r.w.s. 80P(2)(a)(i) to the assessee.

High Court thus ruled in favour of the assessee.

LD/67/89

The Commissioner of Income Tax

Vs.

M/s Trident Minerals.

October 10, 2018

Merger of another firm with the assessee does not disentitle the assessee from claim under section 10B on ground of change in ownerships.

The assessee is a partnership firm and a 100% Export oriented unit [EOU] engaged in the business of production, manufacture and export of iron ore. Assessee commenced production and manufacture in AY 2008-09. KMMI is a sister concern of assessee engaged in the same business of manufacture, production and export of iron ore and it was also granted a 100% EOU status in November 2006 by SEZ. KMMI merged with the assessee concern and return of income was filed for AY 08-09 by claiming deduction under section 10B. AO held that since there was a merger and that the assets of KMMI Exports were taken over by Trident Minerals (assessee), deduction under section 10B was not allowable. As per Revenue, the deduction claiming undertaking cannot be formed by the transfer to a new business, machinery or plant previously used for any purpose CIT(A) as well as ITAT ruled in favour of the assessee, aggrieved by which the Revenue filed an appeal before the Karnataka High Court.

High Court observed that Section 10B(9) as per which deduction is disallowed if there was a transfer of ownership or beneficial interest in the undertaking, was omitted w.e.f. 01.04.2004. Similarly sub-section 9A as per which deduction under section 10B can be allowed when the firm is succeeded by a company, was also omitted w.e.f. 01.04.2004. High Court stated that since the limitations specified in sub-sections 9 and 9A did not exist, the conclusion of the AO that deduction under section 10B of the Act cannot be granted on the merger of firms is not correct.

High Court observed that as per CBDT circular no. 1 of 2013, it was clarified that on the sole ground of change in ownership of an undertaking, the claim of exemption cannot be denied to an otherwise eligible undertaking and the tax holiday can be availed for the unexpired period subject to fulfilment of prescribed conditions; and violation of those conditions in the instant case were not disputed by the Revenue.

High Court therefore held that the deduction claim under section 10B made by the assessee after its merger with sister concern was correct. High Court thus ruled in favour of the assessee.

GST

LD/67/90

Sonodyne International Pvt. Ltd

Vs.

Commissioner of CGST, Mumbai East (CESTAT-MUM)

October 18, 2018

Tribunal held that mere maintenance of records and reflection in ST-3 Returns of Cenvat credit in respect of input services, which is otherwise refundable to SEZ unit, so as to let the department know about Cenvat credit lying with such SEZ unit, does not amount to "taking"/availment of Cenvat credit by SEZ unit.

Facts:

The appellant, SEZ unit, discharged service tax liability under the reverse charge and claimed refund

of the same in terms of Notification No. 17/2011-ST dated 1.3.2011 and Notification No.40/2012-ST dated 20.6.2012, in terms of which the input services, utilised by the SEZ developer, for the authorised operations, are exempt from payment of service tax. Department rejected refund claim on the ground that inasmuch as the appellant had reflected the said service tax in their ST-3 returns, they have availed the Cenvat credit of service tax so paid by them and as such, the condition of the notification i.e. not taking Cenvat credit of service tax paid on specified services, stands violated by them. While rebutting revenue's contentions, appellant submitted that they have merely maintained a record of the service tax so paid by them in respect of various input services and the total amount of such service tax was reflected by them in their ST-3 returns so as to let the department know that the total service tax availed by them is to that extent. The so called credit of service tax does not stand utilised by them, thus satisfying the conditions of the notification. Thus, the question to be decided in present appeal was as to what exactly is the meaning of the expression "taken" appearing in sub-clause (g) of Explanation (2) appended to the notification in question.

Held:

Hon'ble Tribunal noted that a mere maintenance of an account showing the total quantum of service tax paid by the assessee cannot be held to be the availment of Cenvat credit. The mere entries in such records which are not even prescribed in the statutory records, cannot lead to the inevitable conclusion that the assessee has taken the credit. Similarly, the reflection of such account in the ST-3 Returns so as to let the department know about the total service tax quantum earned by the assessee will also not amount to the fact that as if the assessee has taken and utilised the credit. Tribunal categorically found that not only that the appellant in their subsequent ST-3 Returns has again shown the opening balance of such account maintained by them as zero and has reflected the total service tax earned by them in that period. Thus, it was held that the appellant cannot be said to have availed Cenvat credit of service tax paid by them.

Further, the Tribunal observed that the lower authorities in their impugned orders have nowhere disputed the fact that such amount of service tax reflected by the appellant in their ST-3 Returns was utilised by them. The condition of the notification is that no Cenvat credit would be availed by the assessee. Such availment cannot be held to be there unless such service tax accumulated in the accounts of the assessee-appellant stands utilised by them. Accordingly, it was held that such accumulated service tax so paid by the appellant is liable to be refunded to them in terms of the notification in case the assessee-appellant has not availed the credit and utilised the same. The underlying crux of the notification is that the double benefit of availment and utilisation of the Cenvat credit as also for refund of the same should not be granted to SEZ unit.

LD/67/91

A V R Storage Tank Terminals Pvt. Ltd.

Vs.

CCT Visakhapatnam GST

(CESTAT-HYD)

September 20, 2018

Tribunal held that the benefit of Cenvat credit of common services such as security, lift maintenance etc. cannot be denied partially, merely for the reason that other entities located in the same premises also benefited from such services.

Facts:

Appellant, inter alia, claimed Cenvat credit on in respect of input services of security agency and lift maintenance services for which all the invoices were raised on appellant along with service tax paid by them. Revenue contended that since the other two firms located within the same office complex enjoyed benefit of the said services, appellant is entitled to only 1/3rd of the total amount of service tax paid on these two services, although other two entities have not paid for such services.

Held:

Tribunal noted that it is not undisputed that the appellant hired these services and paid for them along with the service tax. Given the nature of these

services, others running their business from the same complex would have also benefited from them. This enjoyment is like the enjoyment of one's porch light by the passersby. It does not dilute the utility of these services by the appellant or their nexus with their output services. Further, the Tribunal found that there is no rule under which the Revenue can vivisect and partly deny the credit on these services simply because somebody else also incidentally benefited from them. The entire service has been hired by the appellant and has been paid for and the entire tax has been borne by the appellant. Accordingly, tribunal held that there is no reason to deny the benefit of CENVAT credit of service tax paid by appellant on these services and set aside impugned demand.

Service Tax

LD/67/92

Zenith Birla India Ltd.
Vs.
CCG ST MUMBAI-III
(CESTAT-MUM)
October 4, 2018

When the service tax liability is demanded by the department on the basis of scrutiny of the service tax returns, trial balance, ledger and final accounts maintained by the assessee, in terms of proviso to Section 78 of Finance Act, 1994, the amount of penalty is restricted to 50% of the amount of service tax demand.

Facts:

During the period December 2013 to March 2015, the appellant did not discharge service tax liability under the reverse charge mechanism. Subsequently, while scrutinising the records maintained by the appellant, department pointed out non-payment, such default was made good by appellant along with the payment of interest. The lower Adjudicating Authority as well as the First Appellate Authority held that penalty under section 78 should be equal to entire amount of the service tax liability paid by the appellant. However, appellant has assailed the impugned order on the ground that in the absence of fulfilment of the ingredients such as fraud, collusion, wilful mis-statement, etc., with intent to evade payment of service tax, the provision of Section 78 of Finance Act, 1994 cannot be invoked for imposition of equal amount of penalty.

Held:

On the basis of Audit Report issued by the department, Hon'ble Tribunal found that the objections were raised by the department on the basis of service tax returns, trial balance, ledger and final accounts maintained by the appellants. Tribunal noted that during the period covered under dispute, when the assessee maintains specified records, the proviso appended to Section 78 of the Act, mandates that imposition of penalties should be restricted to 50% of the determined amount of service tax. Accordingly, Tribunal held that since the statutory provisions are clear about the quantum of penalty, in case of maintenance of records by the assessee, in present case, the equal amount of penalty imposed by the authorities is unwarranted. The Tribunal, therefore, reduced the quantum of penalty under section 78 to 50% of the amount of service tax confirmed in the adjudication order.

VAT

LD/67/93

Commissioner of Value Added Tax, Delhi
Vs.
Otis Elevator Company (India) Ltd.
November 26, 2018

Supply of goods from Mumbai to Delhi to execute works contract held as not being interstate sales under CST Act.

The question of law to be dealt in the instant case is whether the supply of goods from Mumbai to Delhi to execute works contract, constitutes an inter-state sales under the Central Sales Tax Act, 1956 (CST). The assessee is engaged in the business of supply, erection, commissioning and installation of lifts/elevators in various classes of places including residential buildings, government offices and hospitals. It is also a registered dealer under the provisions of Delhi Sales Tax Act, 1975. It, however, has its manufacturing facilities at Mumbai, where its components are produced. The Mumbai unit

also stores the products so manufactured. The Delhi Sales Tax Authorities sought to assess transaction for three distinct periods covering AY 2002-2003, 2003-2004 and 2004-2005.

The adjudicating authority/Revenue held that the contracts were indivisible work contracts, title of each of the elevators passed onto the customer upon payment, and that for the purposes of dispute resolution, the Courts of Delhi had exclusive jurisdiction. The Commissioner ruled in favour of the Revenue, aggrieved by which the assessee approached the VAT Tribunal, which by its common order set aside the orders of the First Appellate Authority. Tribunal held that the goods were appropriated to the contract, which was concluded in Mumbai, upon acceptance of the offer/placing orders.

High Court observed that placement of an order by the agent for procurement of the lifts in this case was merely an offer and it was upon its acceptance and further steps taken by the supplier than an offer crystallises into a binding promise or contract which took place in Mumbai. High Court observed that the appropriation took place undoubtedly in Mumbai. High Court placed reliance on ruling in *Thyseenkrupp Elevator (India) Private Ltd. Vs. Assistant Commissioner of Commercial Taxes & Anr. [W.P.No. 13607/2017],* decided by the Karnataka High Court on 24th April, 2018.

High Court thus ruled in favour of the assessee.

Excise

LD/67/94

Vasantham Outdoor Advertising Pvt. Ltd

Vs.

Commissioner of Central Excise, Madurai

(CESTAT-MAD)

August 13, 2018

Tribunal held that services of renting of hoardings for display of advertisement cannot be said to get covered within the purview of 'advertisement agency services', merely because tax entry for advertising services extends to any connected service relating to advertisement display / exhibition.

Facts:

Appellant, engaged in providing services of advertising agency, were also engaged in renting of hoardings. Department contended that amounts received for such renting activities would also be chargeable to service tax under the category of 'advertising agency services', as otherwise the statutory provision relating to that levy on "any connected service relating to advertisement display/exhibition" would become absolutely meaningless. Being aggrieved, the appellant filed present appeal.

Held:

Tribunal noted that appellant was only renting out the hoardings which were either owned by them or leased to them, to various advertising agencies. There is no allegation that appellant had themselves made, prepared, displayed or exhibited any advertisings on their own. There is no dispute that the advertisements which may have appeared on the hoardings are those that were prepared by the concerned advertising agencies and certainly not by the appellants. The appellants have only rented out these hoardings to the concerned advertising agency. Further, Tribunal noted that though the definition of "Advertising Agencies" under erstwhile law, does include the phrase "any service connected with", discernibly, this phrase has to be read in keeping with the *principle of ejusdem generis*. Where a law lists specific class of persons or things and then refers to that in general, the general statements only apply to the same kind of persons or things specifically listed out. Relying on various decisions of Hon'ble Supreme Court, Hon'ble Tribunal held that it is evident that "any service connected with" the making, preparation, display or exhibition of the advertisement must obviously be a service of the same nature or generis. When the category of service concerns and involves creativity; and even specifically seeks to include "advertising consultant", it would be too farfetched to bring in renting of hoardings

within the scope of such service. It was also noted that in *Chaya Lakshmi Creations Pvt. Ltd. Vs. CST Chennai - 2017 (8) TMI 1117–CESTAT,* where renting of space for display of advertisements at various places of theatre complex in the form of hoardings etc. was addressed, it was held that the said activities cannot be regarded as "Advertising Agency Service". Accordingly, Tribunal set aside impugned demand and allowed the appeal.

Customs

LD/67/95

M/s Harisiddh Shipping Agency
Vs.
Union of India & Ors.
November 22, 2018

Department's action of placing assessee's name under 'Alert' list thereby preventing future clearances of Bill of entry, held as impermissible.

The petitioner firm is registered as Customs broker. The petitioner has prayed for direction to the respondents to remove "Alert" inserted against the petitioner in its electronic system. The petitioner has also challenged several show cause notices issued by the Customs Authorities calling upon the petitioner why certain late fine charges with penalty should not be recovered from the petitioner. As per Revenue, the assessee, in order to avoid late payment charges, filed "Regular Bill of Entry" but showed the same in system as "Advance Bill of Entry". As a result, Custom's system treated these as advance and assessment was completed accordingly.

Revenue placed assessee's name in its electronic system under "Alert" and subsequently issued as many as 18 show cause notices (SCNs) in the month of May 2018 imposing certain late fine charges under section 46 of Customs Act, 1962 along with penalty under section 117. Assessee filed writ petition praying for the reversal of "Alert" and has also challenged the Show cause Notices issued against him.

High Court stated that the assessee needed to respond to the show cause notices and cooperate in the process and High Court held that there was no ground to quash these notices in exercise of writ jurisdiction. High Court observed that the action of department in placing assessee's name in the 'Alert' was on account of unpaid late fine charges which is the subject matter of show cause notices and secondly, consequences on account of name of agency being placed in the 'Alert' list would be that all future clearances of such agency would not be made unless the amount demanded by the department is paid up. High Court noted that the Revenue sought recovery of amount coercively by blocking the assessee's future clearances and stated that there cannot be recovery coercively made even before the demand is confirmed. High Court therefore directed the Revenue to delete assessee's name from "Alert" list.

High Court thus dismissed the writ petition stating that the Adjudicating Authority shall decide issues independently, based on the material that may be brought on record.

Transfer Pricing

LD/67/96

Firmenich Aromatics Production (India) Pvt. Ltd.
Vs.
Assistant Commissioner of Income Tax
November 13, 2018

Export transaction to AEs cannot be compared with domestic sales to unrelated entities due to huge differences in volume, geographical markets, etc.; TPO's CUP method rejected and assessee's TNMM method accepted.

The assessee is engaged in the business of manufacturing of aromatic ingredients, natural and synthetic perfumery, flavouring and derivatives. For AY 2013-14, the assessee entered into various international transactions like import or raw material, export of finished goods, reimbursement of expenses, availing

recurrent and specific services, etc. TPO rejected TNMM [transactional net margin method] method applied by the assessee and determined Arm's length price. TPO made adjustment on export of finished goods of ₹141.13 crore and of payment for software charges of ₹9.88 crore. The same was confirmed by DRP, aggrieved by which the assessee filed appeal before ITAT.

Out of total sales to AE [associated enterprise], the TPO made adjustment only on the common products sold to AEs and non-AEs. The sales to AE of common products amounted to ₹ 136.08 crores, i.e. only 30% of the products were sold to AEs and non-AEs. Thus, assessee claimed that for 70% of exports, TPO had accepted TNMM as the most appropriate method. The assessee claimed that all the transactions of sale of goods were interconnected and, hence, the same ought to be benchmarked on the basis of same method. The assessee also contended that CUP was not the most appropriate method in view of differences between the transactions with AE and non-AEs.

ITAT held that the transactions of sales to AE and non-AE were not comparable for reason of market differences where the prices could be different in different markets due to factor like purchasing power, market sensitivity and local competitions etc. Further, the assessee had sold products to third parties who were in the last step of the entire value chain vis-à-vis group companies who were in the second last step of the value chain. Further there were differences in the volume also where ITAT noted that the quantities sold to Non-AEs were significantly lower as compared with sales made to AEs and the difference was almost 11 times, and thus variance in prices was understandable.

ITAT observed that the market risk, business risk, inventory risk and capacity utilisation risk and credit risk in case of transactions with AE's were significantly lower as compared to the transactions with third parties.

ITAT held that TPO erred in simply comparing the prices of common products sold to both AEs and Non-AEs without appreciating that the two transactions were not comparable owing to various differential factors. As per ITAT, considering the risk differences, the higher prices charged to third parties than the prices charged to AEs was acceptable. ITAT held that TPO failed to adjust for the differences while benchmarking the transactions in order to ensure like-by-like comparison. Thus CUP was not held to be an appropriate method.

With respect to the issue about adjustment on account of software charges, the facts were that the assessee had paid software charges to its AE since the AE had acquired and developed new internal software for all its entities worldwide. TPO determined ALP by following the same mechanism as was followed last year by considering the same man hours and salary and had made an adjustment of ₹ 9.88 crore.

ITAT noted that the assessee had submitted relevant documents like copy of the agreement, invoices raised, a certificate from independent Chartered Accountant Firm, details of users, etc. before TPO and so ITAT rejected TPO's allegation that the assessee had not furnished the necessary details. Further, TPO had not brought a single comparable on record to support his ALP determination. TPO's contention that the report was a qualified report, was rejected by ITAT noting that it was not furnished as an auditor's report, but was only submitted to support the cost attribution. The cost of the software was allocated to 40 group companies across the globe who were using the software and related services and assessee's share in cost allocation was only 2.3%.

ITAT deleted the TP adjustment noting that no contrary evidence was brought on record by the TPO. ITAT thus ruled in favour of the assessee. ■

Disciplinary Case

Summary of a disciplinary case, in the matter of:

ABC vs CA. XYZ

Facts of the case

1. Shri. ABC (hereinafter referred to as **"Complainant"**) has filed compliant in Form 'I' dated 4th August, 2011 against CA. XYZ (hereinafter referred to as the "**Respondent**"). The Complainant in his complaint has alleged as under:-
   - The Complainant entered into a partnership agreement with the Respondent and Mr. ZZZ under the firm name of M/s. XXX vide partnership deed dated 1st day of May, 2006.
   - Due to misunderstanding, the Complainant retired from the firm with effect from 31st March, 2009 and determined the amounts payable to him at ₹1,54,63,830/- and shall be paid on or before 31st October, 2009 vide retirement deed executed on 15th March, 2009.
   - Due to financial demand and due to reassessment of the terms and conditions stipulated in the retirement deed, the remaining balance to be paid to the Complainant was arrived at ₹ 1,05,00,000/- which has to be paid before 30th April, 2011.
   - In spite of pursuance the Respondent did not respond to the Complainant and the cheques given to him were dishonoured.
   - The Complainant also filed a suit against the Respondent under Negotiable Instrument Act for recovery of said amounts.

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

- The Board noted that out of three charges mentioned above, the Respondent as per the *prima facie* opinion of the Director (Discipline) which was accepted by the Board earlier was guilty of only first two charges.
- As regards the first charge, the Board observed that as per set precedents, under Clause (4) of Part I of the First Schedule, the prohibition on entering into partnership with non-chartered accountants was confined to the practice of the profession of Chartered Accountants.
- The Board noted that the Respondent was a partner in partnership firm, whose work was other than professional practice. Hence, the Respondent did not enter into partnership with non-chartered accountants for carrying out the work relating to the profession of the Chartered Accountancy. Accordingly, the Respondent is not guilty of this charge.
- As regards the second charge relating to professional misconduct under Clause (11) of Part I of the First Schedule, the Board noted that as per the partnership deed, the Respondent was the working partner and was having substantial interest in the partnership firm. It is an admitted fact that the Respondent had before becoming partner had not taken the permission of the Council. The Counsel for the Respondent during the course of hearing admitted that circumstances made the Respondent to believe that the permission is not required.
- The Board also noted that it is evident that the Respondent was actively involved in business as partner without the permission of the Council. As per Clause 12 of the partnership deed, the Respondent was entitled to salary of ₹ 5,000/- per month and bonus @12% of the salary. Further as per the Clause 8 of the same partnership deed, the Respondent along with one more partner was jointly operating the bank account of the firm. Moreover, the onus lied on the Respondent to show that he was not actively engaged in the business of the firm which he could not substantiate before the Board.
- On overall consideration of the same, the Board was of the view that there is clear cut ignorance of law by the Respondent and it cannot be taken as an excuse.

Thus, in the light of the above, the Board held the Respondent guilty of professional misconduct falling within the meaning of Clause (11) of Part I of the First Schedule to the Chartered Accountants Act, 1949(as amended). Thereafter, the Board afforded an opportunity of hearing to the Respondent. The Board observed that the Respondent accepted his mistake and requested that the technical flaw on his part shall be condoned. Upon the consideration of all the material on record, the Board noted that the misconduct of the Respondent does not qualify for the maximum sentence and ends of justice shall be met if a lighter punishment is awarded. Accordingly, the Board decided to reprimand the Respondent. ■