Legal Decisions[1]

Income Tax

LD/67/97

Kottaram Agro Foods Pvt. Ltd.

Vs.

Assistant Commissioner of Income Tax

December 28, 2018

Auditor is not an 'accountant' under Rule 11UA for share valuation; FMV calculated vide valuation done by auditor rejected

Share valuation regarding determining fair market value [FMV] of shares was done by the chartered accountant who was the auditor of the assessee company for the purpose of Section 44AB. The AO had adopted the valuation of shares at ₹ 100 per share as on 31.03.2012 as against the value of ₹400 per share as on 31.03.2014 as per the valuation report submitted by the assessee. AO stated that valuation report submitted by the assessee had to be ignored because the same was not as per Rule 11UA. AO held that FMV was to be taken at Net Asset Value [NAV] as certified by an eligible 'accountant' in 2012. CIT(A) affirmed AO's order, aggrieved by which the assessee preferred an appeal before ITAT Bangalore.

ITAT noted that for the purposes of sub-rule (2) of Rule 11UA, the auditor could not be an accountant as per Rule 11UA (2). It was observed that the assessee had submitted two valuation reports one in 2012 and another in 2013. The first report as per which valuation of share was arrived at ₹ 100 was signed by an independent accountant, whereas the second certificate where a value of ₹ 400 was arrived at was signed by the auditor of the assessee. ITAT held that AO was correct in adopting valuation of ₹ 100 and tax the excess receipt of ₹ 300 per share received by the assessee.

Additionally in subsequent assessment year 2015-16, there was no report of any chartered accountant who could be considered as an accountant and the AO had therefore rightly worked out the fair market value of share at ₹ 714.38, which was based on NAV. ITAT thus held that addition done by the AO regarding amount received in excess of valuation which was acceptable by the AO, under section 56(2)(viib) was correct, and there was no need for any interference in the order of CIT (A). ITAT thus ruled in favour of the Revenue.

LD/67/98

Bank of Baroda

Vs.

Deputy Commissioner of Income Tax

December 20, 2018

Analogy used regarding interest-levy under section 140A while payment of taxes to be used while making adjustment for refunds and calculating interest on refund under section 244A

The CIT (A) had directed AO to pass a speaking order and grant correct interest under section 244A. The AO had determined the original refund amount at ₹200.87 crores and calculated an interest of ₹ 56 crores. Against the refund actually determined by the AO, only a partial refund was actually granted to the assessee of ₹148.78 crores, comprising of tax portion of ₹ 120.06 and interest portion of ₹ 28.71 crores. Further subsequently while calculating the interest on refunds, the AO calculated interest on the refund originally determined at ₹200.87 crores minus the tax portion of the refund already granted to the assessee at ₹120.06 crores. As per assessee, there was no need to segregate refund into tax portion and interest portion at later stage so as to calculate interest. Aggrieved, the assessee preferred an appeal before Mumbai ITAT.

ITAT noted that when AO had calculated interest of 56 crores under section 244A on the refund of ₹200.87 crores, the assessee became entitled for entire refund of ₹257.11 crores. Since only a sum of ₹148.78 crores was actually granted to the assessee, the remaining sum of ₹108.33 crores became due to the assessee by the revenue. As per ITAT, this remaining amount of ₹108.33 crores automatically partakes the character of principal/tax portion of amounts payable by the revenue to the assessee on which interest is eligible.

ITAT relied on coordinate bench ruling in Union Bank of India [(2016) 72 taxmann.com 348]

[1]*Contributed by CA. Sahil Garud, CA. Mandar Telang, Indirect Taxes Committee, Disciplinary Directorate and ICAI's Editorial Board Secretariat.*
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where the Tribunal observed that the issue was whether while granting the refund in pursuance to the appeal effect order, whether the amount of refund granted earlier should be adjusted first against the interest component of the earlier refund and thereafter the balance amount should be adjusted against the principal component of tax in the refund granted earlier order OR vice-versa. Tribunal had further observed that no specific provision had been brought in by the statute with respect to adjustment of refund issued earlier for computing the amount of interest payable and the law was silent on this issue.

Coordinate bench had further observed that this issue needs to be decided by the principles of what is fair and just and not necessarily as per strict rule of law and that revenue was not expected to follow double standards while dealing with the tax payers. It was observed that since the statute itself has already prescribed a particular method of adjustment in explanation to Section 140A(1), then justice, fairness, equity and good conscience demands that same method should be followed while making adjustment for refund of taxes, especially when no contrary provision has been provided. Tribunal had therefore ordered that to re-compute the amount of interest under section 244A by first adjusting the amount of refund already granted towards the interest component and balance left if any shall be adjusted towards the tax component.

In the instant case ITAT ruled that the action of the AO was against the spirit of the provisions of the scheme of taxation. ITAT noted that regarding the payment of taxes as per the provisions of Section 140A, any part payment of taxes paid by the assessee would first be appropriated towards the interest portion thereon and thereafter remaining would get adjusted towards the tax portion, and this same analogy would equally apply when the refund was to be granted to the assessee with interest under section 244A.

ITAT held that the assessee would be entitled for interest on the unpaid refunds and thereby directed AO to re-compute the interest on refund under section 244A as per the plea of the assessee and in accordance with the principles laid down by the co-ordinate bench. ITAT thus ruled in favour of the assessee.

LD/67/99

Amarjeet Thapar

Vs.

The Income Tax Officer and Ors.

December 14, 2018

AO debarred from making reassessment where AO alleged that income had escaped assessment due to incorrect claim of indexed cost of acquisition.

The assessee had purchased the house in FY 1992-93 by paying earnest money, the said property was acquired by the Appropriate Authority (AA) under Income-tax Act. The assessee had challenged the acquisition before the Bombay High Court and the Court had set-aside the acquisition and directed the assessee by order dated June 2007, to pay sum of ₹ 56 lakh to AA being the amount of AA had paid to transferor on the said acquisition. The Income-tax Department handed over the possession in November 2009 to the assessee.

During AY 12-13, the said property was sold by the assessee and capital gains were computed by treating the date of acquisition as 30.10.1992 i.e. the date of agreement to sale. Return of assesse was accepted under section 143(1). The case of the assessee was re-opened under section 147. As per the AO, the assessee had incorrectly computed indexed cost of acquisition by taking the date of acquisition of the property as 30.10.1992 instead of correct date of 4.6.2007 i.e the date of judgement of the High Court. Aggrieved by the act of reopening of assessment, the assessee filed a Writ Petition before the Bombay High Court.

High Court observed that though the assessing officer would enjoy greater latitude in reopening of the assessment since the return filed by the assessee was accepted without scrutiny, however the requirement that the assessing officer must have reason to believe that income chargeable to tax has escaped assessment, must be satisfied.

High Court noted that the assessee had entered into an agreement for the purchase of the property in the year 1992 and the sale deed could not be executed only because the appropriate authority refused to grant no objection certificate and instead, ordered compulsory acquisition thereof. It further noted that by virtue of the High Court order declaring acquisition as illegal and *ab initio* void, the sale deed

was ordered to be executed in favour of the assessee. High Court accepted the assessee's contention that by virtue of High Court order declaring the acquisition by AA as *void-ab-initio,* the transfer of the property in question would relate back to the original date of agreement to sale. Relying on Supreme Court ruling in *Sanjeev Lal & Ors [(2015) 5 SCC 775.]*, the High Court held that the assessee was thus, entitled to claim the benefit of cost indexation from the original date of agreement to sale and the entire basis of the department in the reasons recorded in order to dispute the assessee's computation of the capital gain, therefore, is rendered invalid.

Therefore, High Court set-aside the impugned re-assessment notice.

LD/67/100

Nordic Maritime Pte Ltd.

Vs.

Commissioner of Income Tax

December 11, 2018

Section 263 proceedings upheld for the assessee being a Singaporean company for its contract with Cairn India for providing seismic vessel for oil exploration for 102 days

The assessee is a company incorporated in Singapore and is engaged in the business of rendering offshore geophysical services to international oil and gas industry. It has been awarded a contract by Cairn India Limited for collecting seismic data as well as gravity and magnetic data for exploration of oil. The contract period was from February, 2014 to June, 2014 and as per the terms of the contract, the assessee was supposed to provide a seismic vessel and associated boats along with required persons. Although the assessee had shown gross revenue of ₹ 100.33 crores but it had claimed the same to be not taxable in India in view of the India-Singapore Treaty. As per the assessee, only when a tax resident of Singapore provided services and facilities for a period of more than 183 days, it can have a permanent establishment [PE] in India as per Article 5(5) of the India-Singapore DTAA. Since the contract period was 102 days, there was no PE of assessee in India as per the assessee. The AO had accepted assessee's contention.

Subsequently, the CIT issued a notice under section 263 opining that the seismic vessel itself constituted a 'fixed place Permanent Establishment' within the meaning of Article 5(1) of the subject Treaty and therefore, as per Article 7 of the subject Treaty, the receipts were taxable in India as business income. As per the CIT, it was absolutely erroneous on part of the AO to resort to Article 5 (5) which prescribed the mandatory stay of 183 days and therefore held that the AO had wrongly come to the conclusion that the assessee did not have PE in India for the provision of 3D Marine Seismic Data Acquisition Services. CIT stated that since the assessee owned seismic vessel and associated boats in India which was itself a PE, the duration of assessee operations in India was irrelevant. CIT thus opined that the revenue of ₹ 100.33 crores had not been brought to tax.

The assessee filed a writ petition before Uttarakhand High Court against a show-cause notice under section 263 of the CIT. High Court observed that instead of giving his explanation to the Commissioner which the assessee ought to have done, the assessee had filed the present writ petition before this Court, that too after a period of one year. Further, High Court stated that the twin conditions required for exercising revisionary powers, i.e order being erroneous and prejudicial to Revenue, were also satisfied. High Court therefore held that no interference was called by the Court.

High Court thus ruled in favour of the Revenue.

LD/67/101

Principal Commissioner of Income Tax

Vs.

The Executor of Estate of Late Smt. Manjula A. Shah

December 11, 2018

Amount actually received on assignment of development rights to be used for capital gains calculation and not stamp duty valuation under section 50C.

During the course of regular assessment proceedings for AY 05-06 in case of assessee, AO noted that assessee had entered into a Memorandum of Understanding (MOU) with one Mahavir Builders, so as to assign them development rights in respect of the immovable property for a consideration of ₹ 2.51 crores. However, the MOU could not be converted into a formal development agreement

till September, 2004 and at the time of execution of the agreement, the stamp duty authority assessed the value of the property for the purpose of stamp duty collection at ₹4.63 crore. AO invoked Section 50C and computed capital gain. CIT(A) ruled in favour of the assessee noting that though MOU was executed in the year 2001, the formal development agreement executed in September 2004 on the same terms and conditions as the MOU. It was observed that the valuation made by the stamp duty officer was on larger piece of land, admeasuring 7644 sq. meters whereas the assessee had sold only 3872 sq. meters out of such larger area. ITAT also ruled in favour of the assessee.

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

High Court noted that ITAT had held that assessee sold development rights of the land as owned by the assessee and hence, can be taxed only on the gain which is oozing out from the sale consideration, thus, no adverse inference can be drawn by invoking Section 50C. Further, ITAT had noted that no evidence was produced by the Revenue at any stage that the assessee actually received the value which was adopted by the stamp valuation authority and that the development agreement clearly mentioned that the assessee was not the owner of TDR. High Court stated that there were two significant factors for not adopting valuation of the stamp authority for the purpose of collecting capital gain tax in the hands of the assessee. Firstly, there was a gap of nearly 3 years between the date of execution of the MOU and the execution of a formal development agreement and secondly the stamp valuation of ₹4.63 crores was for a larger area of 7644 sq. meters whereas assessee had assigned the development rights only with respect to 3872 sq. meters.

High Court, therefore, held that no error was committed by the ITAT and thus ruled in favour of the assessee.

LD/67/102

M. K. Agrotech Private Limited
Vs.
Additional Commissioner of Income Tax
November 29, 2018

No disallowance under section 40A(3) for payment made to vendors by non-crossed bank drafts when transaction was proved to be genuine and payees account was credited

The assessee is a Company engaged in the manufacturing of refined oils, solvent oils and de-mealed meals. During the assessment proceedings for AY 05-06, AO disallowed payments made to Challakere parties under section 40A(3). CIT (A) held that there was no case for holding that the purchases were bogus. However, it upheld the disallowance on payments made to Challakere parties as per the AO. ITAT also ruled in favour of the Revenue, aggrieved by which the assessee filed an appeal before the Karnataka High Court.

Before the High Court, the assessee argued that even though the drafts were not crossed, the end sources had been provided by him. Further, a bank report was also furnished which clearly indicated that drafts had been received by the purchasers. High Court noted that admittedly the condition of making payment by crossed draft was not complied. High Court, however, observed that all the purchases made to the vendors were supported by valid documents such as the registered dealer invoice along with valid transit/ receipt documents, freight charges paid, weightment slips, etc. of the supplier, whose genuineness were also undisputed by the AO. Moreover, letters were also issued by the Bankers which would indicate that the payments made to the suppliers are credited to their respective bank accounts. Therefore, all the purchases made were supported by valid dealer invoices. CIT had also recorded a finding that the parties were all existent and all vendors had filed their sales tax returns, except one party where the turnover was very small as compared to the purchases claimed by assessee. High Court thus concluded that the purchases were genuine and the disallowance was made only due to violation of Section 40A(3).

High Court stated that the main purpose of crossing a demand draft is to ensure that the payment is cleared by means of a bank account and it ensures that the payee receives the payment through bank channels. In the present case, both the objectives had been proved, as per the High Court. High Court held that since Bank report indicated that payees had received the said amounts with the concerned drafts, the finding of the ITAT that an unsatisfactory answer given by the assessee regarding making payment by uncrossed drafts, was insignificant and futile.

High Court thus ruled in favour of the assessee.

LD/67/103

Rajendra Kumar Sehgal

Vs.

The Income Tax Officer, Delhi

November 19, 2018

Reassessment notice was issued in the name of the deceased and no notice was issued to the legal representative; Reassessment proceedings on legal representative quashed.

The appellant had filed a writ petition seeking direction to quash a notice issued under section 148 to the deceased assessee, Late Smt. Rukmani Sehgal. Smt. Rukmini Sehgal had filed income tax returns for AY 10-11 which was processed in routine manner. In January 2015 Smt. Rukmani Sehgal died and the legal representative of the deceased, sought reasons for reopening the assessment. As per the AO, the deceased had shown some transactions which led to a claim for losses brought forward, pertaining to one Varun Capital Services Limited. The appellant protested that this was not correct subsequent to which AO issued a clarification that the entity from which the deceased had received the amounts and claimed losses was different, and that the original "reason to believe" contained a typographical error. Aggrieved, petitioner filed a writ petition against the Delhi High Court.

Before the High Court, the petitioner contended that the Act does not provide any mechanism for issuing and carrying on reassessment in respect of a dead person, if the reassessment notice is issued against a deceased. Revenue submitted that the error in issuing the notice to a non-existent person or entity is capable of correction and by reason of Section 292B, the notice is not invalid.

High Court analysed provisions of Section 159 as per which a legal representative shall be liable to pay any sum which the deceased would have been liable to pay if he had not died. High Court referred to ruling in case of *Vipin Walia [(2016) 382 ITR 19]* wherein it was observed that Section 159(2)(b) envisages any proceeding which could have been taken against the deceased if he had survived, thereby permitting a proceeding to be taken against the legal representatives of the deceased assessee even if it had not taken while the assessee was alive. High Court in the instant case rejected Revenue's argument that the "defect" was curable, in regard to the issuance of notice

to a deceased individual. High Court stated that when notice was issued in the deceased assessee's name, it is inconceivable that she could have participated in the reassessment proceedings to be estopped from contending that she did not receive it. As per the High Court, the plain language of Section 292BB precludes its application, contrary to the revenue's argument.

High Court observed that the 'reasons to believe' were premised upon a transaction with one Varun Capital Services Ltd., regarding which the revenue later attempted to "correct" the "error" by changing the name of the entity. Such correction was neither innocuous nor innocent and was clearly aimed at improving what was a fatally defective reasons to believe and mask the reality, to wit, that the revenue authorities utterly failed to apply their minds to the facts and circumstances of the case. Relying on ruling in *Hotel Blue Moon [(2010) 321 ITR 362],* High Court held that the fatality attached to the completed reassessment in the absence of a notice under section 143(2), rendered the assessment void.

High Court thus quashed the reassessment proceedings ruled in favour of assessee.

GST

LD/67/104

M/S ETC Networks Ltd.

Vs.

Commissioner of Customs, Central Excise and Service Tax Mumbai

(CESTAT-MUM)

November 29, 2018

Even if services of organisation and management of event outside India, provided by foreign service provider to Indian service recipients results in increase in customer base of such Indian service recipients, it cannot be construed as operational assistance for marketing of Indian service recipient's business. Tribunal held that such services would constitute 'event management services' and not 'business support services'.

Facts:

Appellant engaged a foreign entity to organise events outside India and paid the consideration in foreign currency. Department alleged that such events organised outside India was a part of marketing strategy of appellant in promoting their channel and enlarge subscriber base, thus services received by them from organiser located outside India were 'business support services' and chargeable to service tax under reverse charge mechanism (RCM). While rebutting department's contention, appellant submitted that the entity located outside India was vested with organisation and management of event for appellant and they are not concerned with the benefit accruing to the appellant out of the said event. Thus, appellant submitted that services provided by them were 'event management services' and the same being rendered outside India, there wouldn't be any service tax liability.

Held:

Hon'ble Tribunal noted that neither in the agreement nor in the invoices, the object or purpose of the event reveals the role of the organiser was to promote the business or marketing of the appellant's channel. The organiser has carried out their job of organising the event as per the agreement and the outcome of the event, whether increased customer base of the appellant or otherwise, is not their concern. Tribunal held that there is no merit in the contention of revenue that by organising the event for the appellant, the organiser has rendered any operational assistance for marketing of their channel; it might have some effect on the increasing the viewer base of the appellant's channel, but it cannot be construed that the organiser has provided operational assistance in marketing of the channel of the appellant, since no such terms and conditions figured in the agreement nor in the proposal form. Therefore, it was held that since the appellant has received 'event management services' which were performed outside India, impugned order demanding service tax liability under RCM is liable to be set aside.

LD/67/105

M/S Hyundai Motor India Ltd.

Vs.

Commissioner of GST and Central Excise, Chennai Outer Commissionerate

(CESTAT-MAD)

September 17, 2018

Tribunal held that the sale of goodwill included in sale of business division, would not be

liable to service tax under the category of 'intellectual property services'.

Facts:

Appellant sold one of its business division as a going concern by entering into 'Business Transfer Agreement' with buyer and charged lumpsum consideration. Further, a separate Trade Mark Licensing Agreement was executed as per which the buyer was required to pay certain percentage of their annual domestic sales to the appellant as fee for trademark license granted to them for a period of 10 years. The buyer, in their books of accounts recorded, certain amount as 'goodwill' i.e. amount paid to appellant as consideration towards vendors and dealer network and goodwill based on valuation carried out by independent valuator. Department alleged that appellant would be liable to pay service tax under the category of 'intellectual property services' in respect of goodwill transferred to the buyer. Further, for the purpose of valuation, department considered the fees charged by the appellant towards trademark license to be value of goodwill and not the value recorded by the buyer in his books of accounts. Appellant submitted that the goodwill is not intellectual property right (IPR) and also, service tax liability arises only in case of IPR recognised under any other law in force in India.

Held:

Hon'ble Tribunal noted that though goodwill may be in the nature of intangible right, there is no law which recognises it as an intellectual property right. In fact, goodwill is attached to an ongoing business whereas IPR is not always so. Goodwill of a company may include the value of IPR held by him but not the vice versa. Further, Tribunal held that valuation of goodwill as adopted by the department is without any basis. Consequently, the impugned demand of service tax was dropped by setting aside impugned order.

LD/67/106

Philips Electronics India Ltd.
Vs.
Commissioner of Service Tax, Chennai
(CESTAT-MAD)
August 07, 2018

Tribunal held that payments made towards share of cost of maintenance of information technology infrastructure shared amongst

group entities, cannot be regarded as consideration for providing services of 'information technology and database access retrieval services'.

Facts:

Appellant entered into several agreements with their overseas group entity in Netherlands, in terms of which the said entity provided the computer infrastructure by way of internet connectivity and associated services for the appellant to manage its various information technology requirements such as email services or accessibility of owned data or information or communication among its various entities across the country and outside. Department alleged that appellant received 'online information and database access or retrieval services' (hereinafter referred as OIDAR services), and thus, liable to pay service tax under reverse charge mechanism on consideration charged to foreign entities.

Held:

Hon'ble Tribunal noted that the entity in Netherlands provided IT infrastructure services to all its associated entities located worldwide. Tribunal observed that for a service to fall under classification of OIDAR services, the services provided should facilitate not only online information but also database access or retrieval. It was noted that in present case, the infrastructure services provided by the entity in Netherlands is nothing but a spider web group which connects entity in Netherlands to all its locations worldwide through WAN of internet protocol. For such services, appellant makes payment to Netherlands entity on the basis of invoice raised towards maintenance of portal/server, license fees, server software maintenance cost, infrastructure for global platform, hiring of web space for storing data, management and maintenance of web portal, license cost for access for wireless WAN environment, directory services for listing etc. Some of these services which can be availed by the appellant locations and its employees are of the nature of Calendaring and Scheduling Directory, Philips e-mail, file back-up etc. Therefore, Tribunal held that all the infrastructure services received by the appellant are only in the nature of providing intra connectivity between appellant's locations worldwide and the payments made are obviously then for sharing of the maintenance costs between appellant's units and not as fees for supply of online information or retrieval of data from the portal. Accordingly, by holding that impugned infrastructure services provided by the appellant cannot be brought within the fold of OIDAR services, tribunal set aside impugned demand and allowed present appeal.

LD/67/107

Commissioner of Service Tax-VII Mumbai

Vs.

Reliance Communication Infrastructure Ltd.

(CESTAT-MUM)

May 11, 2018

Tribunal held that amounts received on account of sale/assignment of receivables cannot be said to be chargeable to service tax as consideration for providing taxable services on account of which such receivables has accrued, because such assignment of receivables does not contemplate provision of taxable service by assignor to its customers.

Facts:

Respondent entered into assignment agreement with assignees wherein respondents, for a consideration of ₹ 297 crores, unconditionally and irrevocably sold, transferred and assigned, the title, the right and interest in their receivables amounting to ₹ 1,212 crores in favour of the assignees. The amount of ₹ 297 crores was reflected by respondents in their books of accounts as "Other Operating Income' arisen on account of assignment of debts. These amounts were to be received by respondents from their customer for the services provided by them and were inclusive of service tax. Department alleged that said transition between respondent assessee and assignees was liable to service tax under category of 'Online Information and Data Retrieval'.

Held:

Tribunal noted that the outstanding receivables in the books of accounts of respondent pertained to

sale of goods or services provided by them to their customers. These amounts which were shown as receivables to the extent of ₹ 1,212 crores in the books of accounts have been assigned by the respondent to the assignees for a consideration of ₹ 297 crores. Tribunal noted that the transaction per se between the respondents and assignee for which a consideration of ₹ 297 crores has been received is not in respect of telecom services provided by the respondents to its customers, however, department sought to levy the tax on the transaction of assignment of the receivables by the respondents to the assignee, in garb of services provided by the respondents to its customer. It was held that the transaction between the respondents and assignee is one of the assignment/ sale of receivables for a consideration and not one of providing the taxable service under the category of "Online Information and Data Retrieval" services and though such receivables may have arisen on account of some taxable services provided by the respondent to their customers, but the sale of assignment of the said receivables cannot be said to be in respect of the provisions of the said taxable services. Thus, appeal filed by the Revenue was dismissed.

VAT

LD/67/108

Ricoh India Ltd.
Vs.
The State of Maharashtra
December 20, 2018

Multi-function printer not an IT product and it should be classified under residual entry, taxable at 12.5%

Assessee was engaged in the business of importing and selling electronic and Information Technology (IT) products such as printers, computers, projectors, etc. With an intention of obtaining clarity with regard to the rates of tax applicable to the goods sold by the assessee in Maharashtra, the assessee made an application under section 56 of MVAT Act. The application involved issue regarding rate of tax on the sale and leasing of Multi-Function Printers, its spares and regarding inclusion of the refundable security deposit in the assessable-value on the leasing of Multi-Functions Printers.

The Revenue passed an order holding that rate of tax applicable on the sale/ lease of multi-functional printers would be 12.5% opposed to 4% claimed by the assessee. Further, it was also held that refundable security deposit taken from the customer at the time of leasing of multi-functional printers would be included in the sale price for discharging MVAT liability. Assessee's appeal before the Maharashtra Sales tax Tribunal (MSTT) was dismissed.

Before the Bombay High Court the assessee submitted that the printer is sold and marketed as a printer with additional capabilities such as copying, fax, and scanning, therefore any person can purchase multifunctional printer with additional capability rather than the buyer to invest in four separate machines viz printer, scanner, fax and copier. The Revenue submitted that Entry 56 of Schedule C appended to MVAT pertaining to IT products taxable at 4%, does not include the product in question. Revenue stated that in assessee's own case, Delhi High Court while construing a similar entry, has held that the multi-functional machines/printers will not fall under a specific sub-heading, but would fall under the subject heading, namely, 84.71 i.e. "others".

High Court stated that Note 5A to Chapter 84 of HSN Explanatory Notes defines expression "automatic data processing machine" to mean machines capable of storing the processing programme or programmes and at least data immediately necessary for execution of programme. Further, the High Court noted that, other Notes, namely, 5(B) and 5(C) to Chapter 84.71 of HSN Explanatory Notes are relied upon to urge that multi-function printers sold by assessee satisfy Chapter Note 5C and are hence units of ADP machines. Further, the bill of entry shows clearance under Heading 84716029, which covered 'other category'. High Court stated that when any commodities are described in heading or as the case may be sub-heading and the aforesaid description is different in any manner from the corresponding description in the Central Excise Tariff Act, 1985, then only those commodities described as aforesaid

will be covered by the scope of this notification and other commodities though covered by the corresponding description in the Central Excise Tariff will not be covered by the scope of this notification. High Court upheld the interpretation of MSTT stating it to be consistent with Entry C-56 and the notification.

High Court stated that while it is true that Central Excise Tariff Heading is referred in Notification under MVAT Act, but notes below same cannot be ignored. Revenue found that description given against heading notified for purpose of MVAT Act does not include "other" category and the description given against the notified entry is specific. It does not include digital multi-functional unit in it and that is why the product is not covered by Schedule Entry C- 56 and is taxable at 12.5%.

High Court noted that entry C-56 which refers to IT products also says the expression 'as maybe notified by the State Government from time to time'. Thus though multifunctional printers are classifiable under Entry 84.71 of the IT products notification as 'automatic data processing machine', but insofar as the subject notification is concerned, they have not been included. High Court, therefore, held that the product was to be classified at 12.5% rate as done by the Revenue.

High Court thus ruled in favour of the Revenue.

Excise

LD/67/109

Vaibhav Global Ltd.

Vs.

CGST & CE, Jaipur

December 04th, 2018

Refund claim filed under Rule 5 of CENVAT Credit Rules (CCR), in respect of accumulated CENVAT on inputs/input services used in manufacture of exported goods, allowed by CESTAT

The assessee was engaged in manufacturing and exports of gems and jewellery. The assessee had filed a refund claim under Rule 5 of CENVAT Credit Rules, 2000 r/w Notification No. 27/2012 CE dated June 18, 2012 in respect of CENVAT taken on input services used in the manufacture of the finished goods which were subsequently exported by the assessee. Revenue found that the appellant is engaged in manufacture of an excisable goods i.e. gems and jewellery falling under Chapter 71 of the first Schedule to the Central Excise Tariff Act, 1985 and cleared the same for DTA as well as exported the goods out of the country. However, the goods being exempted under Notification No. 12 of 17.03.2012, the appellant is denied eligibility to avail Cenvat credit on input services due to being exclusively used for exempted goods as per Rule 6(1) of CCR, 2004.

Assessee stated that the refund claim was filed of accumulated cenvat on inputs/input services used for export under Rule 5 of CCR, 2004 read with Notification No. 27 dated 18.06.2012 and the Revenue wrongly considered the goods of the appellant as being excisable goods and that the appellant was not registered as the manufacturer thereof. Assessee submitted that being a manufacturer the services are eligible to be input services for the purpose of CENVAT credit availment and such credit can be utilised for payment of duty of other products. Nevertheless as per the assessee, it was entitled to refund under Rule 5 of CCR which does not provide any condition or pre-requisite that the person who exports taxable goods or services to claim refund of CENVAT credit on input services or input.

CESTAT observed that a conjoint reading of above Circular along with requirements of Rule 5 of CCR makes it clear that a manufacturer who clears a final product or an intermediate product for export without payment of duty under bond or letter of undertaking which is exported without the payment of service tax shall not be an exempted good and as such shall be allowed refund of Cenvat credit in view of Rule 5. CESTAT observed that Notification 12 of March 7, 2012 was not applicable in case of export of excisable goods.

Rejecting Revenue's stand about assessee being unregistered for manufacture of excisable goods, CESTAT observed that Rule 3 of CCR prescribes that CENVAT credit can be taken by a manufacturer or provider of service and there is no requirement of the registration at all. It was further noted by CESTAT that assessee was having centralised service tax registration for a 100% EOU unit and the other

DTA unit situated at Jaipur and in view of the said admission for the clearance of excisable goods for domestic area, assessee was well registered.

Regarding Revenues allegation of non-distribution of credit, CESTAT observed that the goods of the appellant are excluded from the scope of "exempted goods" Rule 7(b) of CCR, 2004 as has been relied upon by the Commissioner (Appeals) to reject the refund is not applicable.

CESTAT therefore quashed the Revenue's order rejecting refund claims and thus ruled in favour of the assessee.

Transfer Pricing

LD/67/110

Broadbridge Financial Solutions India Pvt. Ltd

Vs.

The Deputy Commissioner of Income Tax

November 29, 2018

Time frame to go for appeal as per Section 144C commences from the fresh order from the TPO irrespective of past rounds of appeal of the same assessment; Assessee can go to DRP after matter remanded is back from ITAT

Assessee, company engaged in the business of IT Services and IT Enabled Services. Regular assessment proceedings were initiated for AY 08-09 and a draft assessment order under section 144C(1) incorporating the TP-order on 14/12/2011 was passed. The final assessment order was passed on 12/10/2012 incorporating the directions from DRP. Assessee preferred an appeal before ITAT where it contended that assessee was into ITES services as well as IT activities and TPO/DRP had wrongly categorised the assessee as only ITES Company. Thereafter vide order dated 29/11/2013, ITAT remitted the matter back to TPO to consider the submissions of the assessee in re-characterisation of the category of the assessee and decide the issue afresh.

Subsequently on certain issues, the assessee preferred an appeal before the High Court on certain issues who remanded the matter back to the ITAT. Based on these directions of High Court, ITAT passed revised order on 20/03/2015. Subsequently, the TPO passed order giving effect to the ITAT's revised order on 30/01/2016, in which, the TPO has accepted the re-characterisation of the assessee and held that assessee is into IT as well as ITES segments. TPO carried out separate benchmarking analysis for IT and ITES segments and proposed TP adjustments individually to each segment. TPO proposed ALP adjustment in respect of ITES segment of ₹ 1.92 crores and of ₹ 4.83 crores for IT segment, vide his order dated 30/01/2016. Based on this order of TPO, AO passed second draft assessment order on 29/03/2016.

Aggrieved by this draft order, assessee again preferred an appeal before the DRP. DRP, however, rejected appeal of the assessee. As per DRP, when the AO passes an order giving effect to the ITAT Order, provisions of Section 144C are not applicable as Section 144C(l) provides that the Assessing Officer shall forward the draft assessment order "in the first instance". The term "first instance" means when the AO is passing the order for the first time for the relevant assessment year. Further DRP stated that Section 144C would be attracted only where a variation is proposed to the income returned by the assessee, and in the present case, the AO was not making any variation to the income returned and was only concerned with the re-computation of assessed income, pursuant to the order of ITAT. DRP, therefore, held that order passed by AO giving effect to specific directions of the ITAT, did not come under the purview of the provisions of Section 144C(1) of the Act.

Aggrieved, assessee filed an appeal before ITAT against the rejection of appeal by the DRP.

ITAT held that the first instance referred by the DRP is the first instance available to the assessee on an order passed by the TPO. When the TPO passed earlier order, for that particular order, the first instance was applied by the assessee to go for the subsequent appeal. When the TPO passed second order, the first instance in relation to that order is available with the assessee to proceed with the appeal proceedings since the TPO has passed fresh order after separate benchmarking analysis undertaken for IT and ITES segments. Therefore, the assessee cannot be denied its rights to appeal before higher forum and the time frame to go for appeal as per Section 144C commences from the fresh order from the TPO irrespective of past events relating to the same assessment.

ITAT, therefore, directed the DRP to consider assessee's appeal in accordance with the law and thus allowed assessee's appeal. ■

Legal Update

Disciplinary Case

Summary of a disciplinary case, in the matter of:

Shri ABC vs. CA. XYZ

Facts of the case:

A Complaint in Form I was received from Shri. ABC (hereinafter referred to as the **'Complainant'**) Director of M/s LLL Private Limited, M/s PPP Private Limited and M/s KKK Private Limited (hereinafter referred to as the **'Complainant Companies'**) against CA. XYZ (hereinafter referred to as the **"Respondent"**). The charges alleged in the Complaint are as under:-

- The Respondent failed to disclose that his name has been removed from the Register of Members w.e.f. 01.10.2005 and he is not authorised to practice as a Chartered Accountant. The Respondent, however, continued to sign the audit report and conducted audit of Complainant Companies from 01.10.2005 till 26.09.2007.
- The Respondent further participated in illegal collection of people in the boardroom of the Complainant Companies on 31.08.2007 (scheduled date of a board meeting) where the Respondent was not invited and he was also a part of the conspiracy hatched by one of the three Directors of the Complainant Companies.
- The Respondent knowing well that in a Company having three directors, out of which two directors were absent and the quorum was not complete, advised the single director Shri DEF to fraudulently appoint two more additional directors on the board to grab majority control over the board of the Complainant Companies.
- The Respondent signed the illegal draft minutes of that meeting and also signed the final accounts and audit report of the Complainant Companies but did not mention his membership number knowingly.
- After the accounts were approved by the lawful board of the Complainant Companies, vide letter dated 08.09.2007, the Respondent was asked to submit his audit report under Section 215(3) of the Companies Act, which he refused as per his letter dated 12.09.2007 due to which the Complainant Companies could not hold their AGM. The Complainant Companies have reported the matter to

ROC and CLB has given an interim relief by putting the AGM fixed by the illegal board in abeyance.

The matter was enquired into by the Disciplinary Committee and the Committee, inter-alia, gave its findings as under:

- The Committee noted that Respondent's name was removed from the Register of Members w.e.f. 01.10.2005 on various occasions on account of non-payment of fees under section 20(i) (c) of the Chartered Accountants Act, 1949 and was later restored w.e.f. 26.09.2007. Thus, the Respondent thereby in the interregnum period was not entitled to hold the Certificate of Practice (COP) and as such was not entitled to carry out the audit and certification work.
- Admittedly the Respondent has carried out the work despite of being not entitled to carry out Auditing and certification of the audit of the Complainant Companies which is, however, in contravention of the provisions of Sections 8 and 24 of the Chartered Accountants Act, 1949.
- The Committee was not convinced with the contention of the Respondent that he was not aware of removal of his name from the Register of Members for the following reasons:
    a. The period of removal was for almost 2 years (from 01.10.2005 to 26.09.2007) which is more than sufficient period for any prudent auditor to realise that his name has been removed from the Register of Members;
    b. The Notification for removal of his name was published in the Gazette of India and a letter to this effect was also sent to the Respondent by ICAI.
- Further, the Respondent also did not disclose his membership number while signing the said audit reports as per the requirement of AAS-28, The Auditors Report on Financial Statements.
- The Committee observed that the Respondent failed to maintain the faith bestowed by the Society on the Chartered Accountants and the said act of the Respondent amounts to unbecoming of Chartered Accountant. Further, the Committee also noted that the Respondent has contravened the provisions of the Chartered Accountants Act and the Regulations framed thereunder. Further, as regards the second charge, the Committee is of the view that the Respondent has connived with one of the Directors of the Company to defraud the other Directors, the Committee noted that there existed some dispute amongst the Directors of the Companies and for the same they have also approached the Registrar of Companies.
- The Committee further observed that the Complainant failed to bring on record any documentary evidence to establish that the Respondent had illegally participated in the Board meeting in order to defraud the Other Directors. Moreover, the said allegation is on the part of the Directors of the Company and not on the part of the Respondent. Accordingly, the Committee is inclined to give benefit of doubt to the Respondent and holds him not guilty of professional misconduct with respect to this charge.

The Committee held that the Respondent is Guilty of 'Professional and Other Misconduct' falling within the meaning of Clause (2) of Part IV of First Schedule and Clause (1) of Part II of the Second to the Chartered Accountants Act, 1949 [as amended]. Thereafter, the Committee, after affording an opportunity of hearing to the Respondent and on consideration of the facts of the case ordered that the name of the Respondent be removed from the Register of Members for a period of three months.■