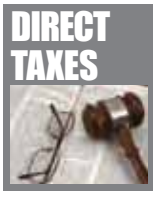
Legal Decisions[1]



LD/67/111

Principal Commissioner of Income Tax

Vs.

M/s Oracle (OFSS) BPO Services Limited

17/01/ 2019

Additional claim of deduction under section 10A filed by way of revised computation to be allowed

The assessee is engaged in the business of 'Providing Processing Outsourcing' Services and had claimed a deduction under section 10A of the Act. For AY 09-10, assessee claimed deduction of 17.87 crores under section 10A and thus filed a Nil return of income. During the assessment proceedings, the assessee filed revised computation making some suo-moto disallowance of ₹ 2.14 crores and an allowance of 33.25 lakhs and recomputed deduction under section 10A. The Assessing Officer treated the disallowances made by the assessee as Income from Other Sources and levied tax thereon. ITAT ruled in favour of the assessee, aggrieved by which the Revenue filed an appeal before the Delhi High Court.

The Revenue contended that the revised computation should not have been accepted itself.

High Court observed that the Revenue had not disputed the correctness of the revised computation made by the assessee. Suo-moto disallowance made would primarily result in enhanced business income which anyway would be exempt under section 10A. Therefore, even if the assessee had not filed the revised computation and an enhancement or disallowance had been made by the Assessing Officer in the course of the assessment proceedings, such disallowance was revenue neutral.

High Court distinguished reliance of Revenue in judgement in case of *Goetze India [(2006) 284 ITR 323 (SC)].* High Court referred to ruling in case of *E-Funds International [(2015) 379 ITR 292 (Delhi)]* wherein it was held that Goetze (India) Ltd. would not apply if the assessee had not made a "new claim" but had asked for re-computation of deduction. High Court also held that Section 80A(5) which states that 'no deduction shall be later allowed to the assessee if not claimed in return of income', was not applicable in the instant case since there was no "new claim" made by the assessee.

High Court observed that the language of Section 80A(5) does not state that the deduction once claimed under a particular section cannot be corrected and modified before the Assessing Officer and therefore the High Court would not read in the amended provision, a stipulation barring and restricting the assessee from revising the computation/claim for deduction made in accordance with Section 80A (5) of the Act.

High Court thus ruled in favour of the assessee.

LD/67/112

Orchid Infrastructure Developers Pvt. Ltd.

Vs.

Union of India & Ors

17/01/2019

Interest under section 234B(2A) held to be applicable to pending applications before the Settlement Commission of past years, as on the date of insertion of Section i.e. 01/06/2015.

The Settlement Commission had passed the final order under section 245D directing levy of interest under section 234B(2A) on income enhanced. As per the assessee, since the settlement application was made by it before the date of enactment of Section 234B(2A) which was 01/06/2015, interest was not leviable. A writ petition in this regard was filed by assessee before the Delhi High Court.

The assessee submitted Section 234B(2A) was not retrospective and that the applications for settlement were governed by the Income Tax Act as it was on the date when the applications were filed. Assessee stated that insertion of subsection

[1]*Contributed by CA. Sahil Garud, CA. Mandar Telang, Indirect Taxes Committee, Disciplinary Directorate and ICAI's Editorial Board Secretariat.*
Readers are invited to send their comments on the selection of cases and their utility at eboard@icai.in. For full judgement, write to eboard@icai.in.

(2A) to Section 234B was substantive and not procedural in nature and such insertion cannot be said to be declaratory or clarificatory.

High Court analysed various rulings wherein it was held that the question of whether the amendments would be retrospective, as to cover and affect the pending proceedings, should be answered with reference to the Statute enacted. High Court further analysed the provisions of Section 234B(2A) and observed as follows:

Clause (a) of the said sub-section states that where an application under sub-section 245C for any assessment year has been made, the assessee shall be liable to pay simple interest at the rate specified for every month or part of the month comprised in the period commencing on 1st day of April of the assessment year and ending with the date of making such application. This refers to the application that has been made. It would apply to all applications that have been made.

Clause (b) states that whereas as a result of order of the Settlement Commission in sub-section (4) to Section 245 D the amount of total income disclosed in the application under sub-section (1) to Section 245C is increased, the assessee would be liable to pay simple interest for every month or part of the month comprised in the period commencing from 1st day of April of such assessment year and ending with the date of the order on the amount by which the tax on the total income determined on the basis of such order exceeds the tax on the total income disclosed in the application filed under sub-section (1) to Section 245C of the Act. The provision clearly uses the present tense i.e. where application under sub-section (1) to Section 245C of the assessment year has been made.

High Court, therefore, stated that clause (a) was clearly intended to cover cases where application was pending and orders had not been passed when sub-section (2A) to Section 234B was enacted. Clause (b) referred to the date of order i.e. as a result of sub-section (4) to Section 245D of the Act, which should be after insertion of sub-section (2A) to Section 234B of the Act.

High Court held that amendment of inserting sub-section (2A) would apply to all pending proceedings in which the orders under Section 245 D(4) are passed after sub-section (2A) was introduced and made part of the Statute. As per High Court, the legislative intention was clear so as to include pending proceedings within the ambit of sub-section (2A). High Court thus held that sub-section (2A) to Section 234B was applicable to all proceedings in which orders are pending and /or in which orders under section 245 D (4) are passed on or after 01/06/2015.

LD/67/113

HSBC Bank (Mauritius) Limited, Mumbai

Vs.

Deputy Commissioner of Income Tax

14/01/ 2019

Reassessment quashed since the relevant aspect was already checked in detail by the Assessing Officer in original assessment.

The assessee is a Banking Company registered under the laws of Mauritius. For AY 2011-12, the assessee had filed a Nil return of income and showing an interest income of ₹ 238.01 crore which was claimed to be exempt. The same included interest on securities of ₹ 94.57 crores and interest income on ECB [external commercial borrowings] of ₹ 143 crore. As per the assessee, the interest income as not taxable as per Article 11 of India-Mauritius DTAA. The Assessing Officer finally passed the assessment order where he rejected exemption claimed of interest on securities, however allowed the exemption of interest earned on ECBs.

Subsequently, the Assessing Officer re-opened the assessment by issuing notice under section 148 beyond the period of four years from the end of relevant assessment year on the ground that in the assessee's own case for earlier AY 2009-10 interest income on ECB was disallowed as the assessee failed to satisfy the criteria of beneficial ownership and the same was confirmed by the CIT(A). Aggrieved, the assessee filed Writ Petition before the Bombay High Court.

High Court observed that entire claim had come up for consideration before the Assessing Officer during the original scrutiny assessment wherein the assessee had given detailed responses regarding taxability of interest income on ECB. High Court held that the Assessing Officer had

minutely examined the issue and only after detailed examination, the Assessing Officer accepted the assessee's claim that the assessee was entitled to the benefit of DTAA thus making the interest income on ECBs as exempt, and that the assessee was carrying on bonafide banking activities in Mauritius. High Court rejected the Assessing Officer's reopening of assessment stating that it was a mere change of opinion and that there was no failure on the part of the assessee to disclose all material facts. High Court thus set-aside the re-opening initiated against the assessee.

LD/67/114

Ankita A. Choksey

Vs.

Income Tax Officer 19(1)(1) & Ors

10/01/ 2019

Reopening based on incorrect facts quashed by High Court; Processing of return under section 143(1) does not give freedom to Assessing Officer for initiating re-assessment.

The assessee held 10% shares in one Samuel Dracup and Sons India Private Limited (Samuel Dracup). On 18/10/2010 the Samuel Dracup decided to voluntarily wind up and liquidate its business and also decided that the assets remaining after paying off the liabilities, would be distributed between its shareholders in proportion to their shareholding. In December 2010, the company executed a sale deed, for ₹ 3.79 crore and transferred the immovable property being a flat in Mumbai in favour of the assessee and her mother to the extent of their shareholding i.e. 10% and 90% respectively. In June 2011, the Court ordered the dissolution of the Company and the assessee filed her return of income wherein the receipt of 10% interest in the said flat was disclosed. The return of income was processed under section 143(1).

On 27th March 2018, Assessing Officer issued notice under section 148 seeking to reopen the assessment on the ground that as per Revenue's database, assessee had received consideration to the tune of ₹ 3.79 Cr. from the sale of immovable property of the Company and was not offered for tax and not reflected in the books of account. Since no assessment was made under section 143(3) and return was processed under section 143(1), provisions of clause (b) of explanation 2 of Section 147were applicable. As per assessee all facts were disclosed in her return and flat was not further sold by her so reopening of assessment was invalid. A writ petition was filed before Bombay High Court by the assesse.

Revenue contended that since there was no assessment made under section 143(3), there was no occasion to examine the claim made by the assessee.

High Court stated that existence of 'reason to believe' was precondition for reopening whether the return was processed under section 143(1) or assessed under section 143(3). Further, the reasons to believe that income chargeable to tax has escaped assessment must be on correct facts. High Court clarified that if the reasons are not correct and assessee has raised objection on the same, then the order on objection must deal with it and establish that the facts stated by it in its reasons as recorded are correct. As per the High Court, mere fact that the return has been processed under section 143(1) of the Act, did not give a carte blanc to the Assessing Officer to issue a reopening notice.

High Court observed that that the reopening was on fundamentally wrong facts and also the order disposing-off the objections of assessee did not deal with factual position asserted by the assessee. High Court therefore quashed the impugned notice under section 148, and ruled in favour of the assessee.

LD/67/115

Assistant Commissioner of Income Tax

Vs.

M/s Veritas India Ltd.

10/01/2019

Non-resident is not liable to prove the source of source, with respect to addition made under section 68.

The assessee is engaged in the business of trading in industrial gas cylinders, metals and machineries. During assessment proceedings, the Assessing Officer noted that assessee had received funds

YES.
IT'S
TRUE.

Online Accounting Software for CA & Accounting firms who manage accounting for multiple companies.

giddh
Accounting Software

@₹499/year

- Branch Accounting
- Job Work
- GST Filing
- GST Reconciliation
- Financial Reports
- Multi User Access

www.giddh.com

Contact us at +91-8818888764, +91-8818888768 or sales@giddh.com

from certain companies from issue of shares to them. It was observed that assessee had initially issued 4,25,000 share warrants companies which were entitled to subscribe for equivalent number of equity shares. Accordingly on 27.03.2010, the companies surrendered share warrants and subscribed to equivalent shares at a price of ₹ 1250/- per equity share (₹ 1240/- being the share premium of ₹ 10 face value share).

Assessing Officer noted that the assessee has received funds aggregating to ₹ 50.00 crores from two foreign companies which were registered in British Virgin Islands (BVI). Further, assessee's application to the FIPB division of Govt. of India for approving this receipt of ₹ 50.00 crores was rejected. Assessing Officer observed that the foreign companies have provided only a certificate of incorporation and no financial statements/ bank account statements were available with the assessee to establish creditworthiness of the foreign companies. Further the promoters of the assessee-company had also introduced share capital in the immediately preceding financial year at a premium of only ₹ 190/- per share as as against ₹ 1240/- charged from foreign investors. Further, Assessing Officer also noted that there was a close relationship between the ultimate owners of the investor companies and the director of the assessee company and the Assessing Officer thus concluded that funds have been routed to the assessee company by way of layered transactions through companies incorporated in BVI. Based on documents submitted by the assessee, Assessing Officer concluded that though the assessee had established identity of investors and also submitted documents to establish creditworthiness, however the assessee has failed to establish genuineness of transactions, as the remittances have not been linked to the investments made in the assessee company. Assessing Officer thus made an addition of 50 crores under section 68, in the hands of assessee. CIT(A) deleted addition made by the Assessing Officer, aggrieved by which the Revenue filed an appeal before ITAT Mumbai.

ITAT observed that the assessee had furnished financial statements of both the investor companies which the Assessing Officer had failed to examine and the same reflects that these companies had enough resources to make investment in assessee-company, thus proving the creditworthiness. Further, the movement of funds had taken place through banking channels only and that the ultimate investors had also written letters directly to the Assessing Officer confirming the transactions. ITAT observed that assessee had furnished bank certificates and also certificate from a firm of Accountants certifying the movement of funds through banking channels. Thus as per ITAT, there was no reason to suspect the genuineness of the transactions.

ITAT rejected revenue's contention that financial statements of ultimate investors were not submitted, and stated that since the immediate investors were foreign companies whose creditworthiness was proven, the same was not required. Further, the rejection of application by FIPB was held to be not relevant for the purposes of Section 68. ITAT held that since assessee had proved the three main ingredients of Section 68 viz. the identity of the investors, the creditworthiness of the investors and genuineness of transactions, no addition could be made.

Thus, ITAT ruled in favour of the assessee and upheld the deletion of addition made under section 68.

LD/67/116

Biswajit Das

Vs.

Union of India & Ors

20/12/ 2018

Constitutional validity of Section 234E upheld by Delhi High Court

The assessee had filed a writ petition challenging the constitutional validity of Section 234E and also seeks quashing of the fee imposed under section 234E by the Revenue. As per assessee, the levy under section 234E is incorrectly and illegally described as 'fee' since it is levied mandatorily and automatically, without actually being in the nature of fee as understood in law. Further, assessee contended that such fee is confiscatory, oppressive and violative of Articles 14, 19(1)(g) and 20 of the Constitution of India, as it encumbers small business owners or small business employees with crippling amounts of 'fee' which is unreasonable,

excessive and arbitrary, apart from being a tool for harassment of bona fide tax payers. The amount imposed under section 234 E which is in the nature of 'penalty' and as per assessee, penalty cannot be imposed in a mandatory and automatic manner, without exercise of discretion and without being in proportion to the gravity of the omission being penalised. Assessee referred to Supreme Court ruling in case of *Dewan Chand Builders [(2012) 1 SCC 101]* to fortify his case.

As per High Court, though an element of quid pro quo for service rendered was necessary for an imposition to be a 'fee', it may not be possible or even necessary that such element of quid pro quo be established with arithmetic exactitude. As per High Court levy of fees should be co-related to the expenses incurred by the Government in rendering the services. High Court stated that the assessee has placed an incorrect connotation on what amounts to a 'service' as a quid pro quo for the payment of a fee.

High Court stated that accepting a tax deducted statement at a belated stage which is contingent upon the payer remitting a per diem amount to avail the facility of the Government accepting his TDS statement beyond the stipulated period would amount to a benefit, service or facility afforded by the Government to the payer. High Court relied on Bombay High Court ruling in *Rashmikant Kundalia [(2015) SCC Online Bom 336]* wherein it has been held that there is an obligation on to process Income Tax Returns within a specified date, which the Department cannot do until information of the tax deducted at source is furnished by the deductor within the prescribed time; and Delay in processing of Income Tax Returns leads to cascading delay in claiming of tax refund, wherever due; and also places a liability on the Government to pay interest for delayed refunds, where due; and a possible cash flow crunch for business entities.

Bombay High Court had stated upon payment of the fee prescribed under section 234E, the late filing of a TDS return/statement is regularised, which is but a privilege and a special service to the person who deducts tax but files the TDS return beyond the prescribed time prescribed.

Legal Update

High Court stated that describing the levy under section 234E as 'fee' would not invalidate the imposition made and that calling levy under section 234E a 'fee' cannot be the sole basis of judging the true nature or validity of the levy. High Court stated that fee imposed under section 234E is for all intents and purposes a 'late fee' payable for accepting the TDS statement/return at a belated point in time.

High Court observed that constitutional vires of Section 234E was upheld in rulings by *Rajasthan High Court Dunlod Shikshan Sansthan [(2015) 235 Taxman 446 (Raj)], Karnataka High Court in Lakshminirman Bangalore Pvt. Ltd.[2015 SCC OnLine Kar 7315*] and *Kerala High Court in Sree Narayana Guru Smaraka Sangam Upper Primary Supreme Courthool [2016 SCC OnLine Ker 30216].*

High Court, therefore, held that the provisions of Section 234E are not ultra vires the provisions of the Constitution. High Court thus ruled in favour of the Revenue.

Service Tax

LD/67/117

Meinhardt Singapore Pte Ltd.

Vs.

Commissioner of Service Tax, New Delhi

21/01/ 2019

Irrespective of any constraints faced by the assessee, assessee was duty bound to remit service tax amount collected; Imposition of penalty upheld

The assessee, registered under service tax, did not pay the entire service tax liability but discharged a part thereof and failed to pay the amounts due in time for the period from financial year 2006-07 to 2008-09 (April to September) due to some internal difficulties. Assessee claimed that amounts were not available with it at the relevant time. The assessee paid the tax dues in January 2009. Department levied a penalty for such late payment of service tax alleging suppression of material facts, under section 73(4) r/w Section 78 of the Finance Act, 1994. CESTAT ruled in favour of the Revenue.

High Court held that the order was justified and warranted in the circumstances stating that whatever be the constraint, the assessee was faced with, it was duty bound to remit amounts collected by it towards service tax, in a planned manner and as required by law. High Court clarified that depositing the amount on adhoc basis due to operation of centralised system was not a legitimate excuse. High Court noted that the assessee was duty bound to comply with the terms of the Finance Act and withheld the amounts collected from the clients as tax liability. A delay in deposit of amounts spanned over a period of two and half years amounted to misreporting of true and correct facts.

High Court referred to provisions of Section 78 and Section 73(4) of the Act and stated that there was no manner of choice and it is matter of course and the only mitigating factor for penalty would be to deposit the reduced amounts within 15 or 30 days of receipt of notice. In instant case, the reduced penalty amounts were not deposited by the assessee as per statutory requirement. High Court further stated that though the amounts were paid in the interregnum period, at a later stage, pursuant to the permission granted by this Court on account of pre-deposit order made by the CESTAT, that did not in any manner mitigate the assessee's liability.

High Court thus ruled in favour of the Revenue and upheld the penalty.

LD/67/118

M/s Dell International Services India Pvt. Ltd.

Vs.

Commissioner of Central Tax

(CESTAT, BANG)

13/12/2018

Tribunal held that mandatory pre-deposit required under section 35 of Central Excise Act, 1944 r.w. Section 85of Finance Act, 1994 can be made by making reversal of CGST credit in Electronic Credit Ledger.

Facts:

In response to defect memo issued by Tribunal registry raising objection regarding payment of mandatory pre-deposit of 7.5%/ 10% for filing of appeal, appellant submitted that the such pre-deposit is paid by them by making reversal of CGST (Central Goods and Service Tax) Credit in Electronic Credit Ledger, as also indicated in column 4B(2) of Form GSTR-3B. In this regard,

appellant relied upon Circular No. 58/32/2018-GST dated 04.09.2018 and also Circular No. 42/16/2018-GST dated 13.04.2018, stating that the arrears of Central Excise duty, Service Tax or wrongly availed cenvat credit under the existing law is permissible to be paid through the utilisation of amounts available in the electronic credit ledger.

Held:

Since in terms of aforesaid circulars the appellant was duly permissible to make payment of mandatory pre-deposit through CGST credit, Hon'ble Tribunal directed registry to admit present appeal and list the same for final disposal.

LD/67/119

M/s AKZO Nobal India Ltd.

Vs.

CCE&ST-Ludhiana

(CESTAT-CHD)

01/11/2018

Tribunal held that in case where machines installed at premises of dealers of assessee undertakes the processes so as to make assessee's product marketable, the repairs and maintenance of such machines be regarded as 'input service' consumed till place of removal and assessee is entitled to claim cenvat credit of the same.

Facts:

The appellant, manufacturer of paints, installed Automatic Dispensing Machines, at the premises of its dealers, to mix the colour and white paint to obtain specific colour of the paint. The Cenvat credit availed by the appellant in respect of repairs and maintenance of said machines, was sought to be denied by the Revenue on the ground that since such machines are installed beyond the place of removal, Cenvat credit would not be available to appellant in terms of Rule 2(l) of Cenvat Credit Rules, 2004.

Held:

Hon'ble Tribunal noted that such Automatic Dispensing Machines are used to obtain the desired mix of colours, the goods manufactured by appellant are not marketable and consequently,

not excisable. Since any activity/services availed by the assessee till the product become excisable is entitled for input services credit in terms of Rule 2 (l) of Cenvat Credit Rules, 2004 and the said rule provides that any service directly or indirectly availed in relation to manufacture of final product is an input service, Tribunal held that the services availed by appellant before the stage at which paints manufactured by it becomes marketable would be regarded as eligible input services. Therefore, impugned order was set aside by allowing appeal with consequential relief.

LD/67/120

Kishore Kumar Compmay Pvt Ltd.

VS.

Commissioner of Central Excise and Central Tax

(CESTAT-BANG)

26/09/2018

When the Indian exporter receives export proceeds, including commission of agent in convertible foreign exchange, but makes payment of commission to the agent in Indian Rupees, such commission shall be construed as received in free foreign exchange only and not in INR and thus, services provided by agent to the foreign buyers for which commission is paid, would constitute 'export of services'.

Facts:

Appellant are acting as purchase agents, for overseas buyers of processed sea foods, looking after sourcing the seller, negotiating price on behalf of foreign buyer, checking the quality of the processed food and supervision of the packing and dispatch. They receive commission as a percentage of purchases. The principal takes a decision and places order and the appellants place the purchase order on respective Indian exporters. The foreign principal opens a Letter of Credit (L/C) in the name of appellant. The appellants then transfer the L/C to the exporter with an instruction to the Banker and the exporters that the amount of L/C includes the commission of the appellant. After export, the exporter transfers the commission to the appellants in INR. In some cases, the foreign buyer remits the commission to appellants in freely convertible foreign exchange. Department alleged that since appellant did not receive consideration in convertible foreign exchange, appellant cannot be said to be exempted from payment of service in respect of 'business auxiliary services' provided to foreign buyers.

Held:

Hon'ble Tribunal noted that since the services were rendered by the appellant to the beneficiaries located outside India, such services were required to be treated as 'export of services' for a harmonious construction of erstwhile legal provisions. It was also noted that the commission due to appellant was received by them either directly in foreign exchange from foreign clients or in Indian Rupees from Indian exporters from the export proceeds. Accordingly, relying on decisions in *National Engineering Industries Ltd. vs. CCE, 2009 (15) STR 68 (Tri.), ETA Travel Agency Pvt. Ltd. vs. CCE, Chennai, 2007 (7) STR 454 (Tri. Bang.) and Nipuna Services Ltd. vs. Commr. of C.Ex., Cus. & S.T. (A-II), Hyderabad, 2009 (14) STR 706 (Tri. Bang.),* Tribunal held that since the remittance is received by the appellants is nothing, but a portion of the export proceeds received by the exporter, though paid to the appellants in Indian Rupees, it is to be considered as receipt in foreign exchange only. Therefore, Tribunal allowed present appeals with consequential relief.

LD/67/121

National Internet Exchnage of Inida

Vs.

Commissioner of Service Tax, Delhi

(CESTAT-DEL)

27/07/2018

When the registry set up by Department of Information Technology for setting up and operating internet domain name registry in India, entered into 'Registrar Accreditation Agreements' with various registrars, who were appointed to register the domain names in the registry, Tribunal held that the charges collected by registry from such registrars for registration of domain name cannot be said to be chargeable to service tax under category of 'franchisee services'.

Facts:

The appellant is a M/s National Internet Exchange of India (NIXI for short) is a not for profit company registered under section 27 of the Companies Act, 1957 and is engaged in Domain Name Business in India i.e. for providing efficient interconnectivity of internet in India and for setting up of internet domain name operations and related activities. For the purpose, the appellant has been entrusted by the Department of Information and Technology under the Ministry of Communication and IT, Government of India vide its policy framework dated 28.10.2004, with the responsibility of setting up top level domain name (TLD) and for operating as registry for '.in' domain name in India. Appellant entered into 'registrar accreditation agreement' with various registrars to register the domain names and collected charges per domain name registered by the said accredited registrar per year as registration charges, transfer charges, renewal charges, etc. under the mandate of policy framework of Government of India to receive the same as accreditation fee. Department alleged that the appellant provided 'franchisee services' to such accredited registrars and thereby, demanded service tax on accreditation fees received by appellant.

Held:

Hon'ble Tribunal noted that in terms of Registrar Accreditation Agreement no right, power or authority to operate or manage '.in' registry was granted to registrar. Further, the agreement clarifies that except for the assigned role or purpose, no other use of the '.in' registry's name or website is licensed to the registrar by the appellant. The registrar is prohibited from assigning or sublicensing his services. The agreement also includes the supervisory authority of '.in' registry upon its registrars empowering appellant to even take the penal actions against registrars who otherwise are prohibited from selling WHOIS check (name available look out) data. Tribunal noted that the agreement makes it abundantly clear that the roles of appellant and the registrar are separately assigned to both parties and the Registrars are accredited for discharging such particular functions of the appellant for which they are accredited by the appellant. Accordingly, Tribunal noted that the registrars are the entities which contract with the registered name holders as well as the appellant-registry and collects registration data about registry name holders and submit the same to the appellant-registry for entering in the database maintained by the appellant-registry. Since the appellant-registry and registrars are independent entities operating on principal to principal basis, Tribunal held that appellant cannot be said to be providing 'franchisee services' to such registrars. It was also held that issue in present case is squarely covered by *Direct Internet Solutions Pvt. Ltd. vs. CST, Mumbai, - 2014-TIOL-1505-CESTAT-MUM* i.e. agreement between ICANN, the corresponding registry at international level. Consequently, the impugned demand was set aside.

LD/67/122

M/s Allied Blenders and Distillers Pvt. Ltd.

Vs.

CCE&ST AURANGABAD

(CESTAT-MUM)

25/06/2018

Salaries paid to whole time directors of the company who are employees of the company, cannot be regarded as 'sitting fees paid to directors' and thus, not liable to service tax under reverse charge mechanism.

Facts:

The short question for consideration in present appeal was whether salaries paid by appellant-assessee to its whole-time directors, who are the employees of the company, can be regarded as sitting fees paid to directors and thereby liable to service tax under reverse charge mechanism in terms of *Notification No. 30/2012-Service Tax dated 20.06.2012.*

Held:

Hon'ble Tribunal observed that the amounts were paid by the appellant to the directors as salaries as evidenced by deduction of tax at source on salaries under Income Tax Act and issuance of Form-16, contribution to Employees Provident Fund as required under Employees Provident

Funds Act, 1952 and non-payment of sitting fees to any of the directors. Tribunal observed that the directors concerned with the management of the company, were declared to statutory authorities as employees of the company and complied with all the provisions of the respective Acts, Rules and Regulations indicating the director as employees of the company. It was also observed that department could not bring anything on record to show that the Directors, who were employees of the appellant received amount which cannot be said as 'salary' but fees paid for being Director of the company. Consequently, Tribunal held that impugned order demanding service tax under reverse charge mechanism on the salaries paid by appellant to its whole-time directors, is liable to be set aside and allowed the appeal.

CUSTOMS

LD/67/123

Commissioner of Customs

Vs.

M/s Atul Automations Pvt. Ltd

24/01/ 2019

Redemption of goods which were restricted and not prohibited, allowed though import was made in violation of Foreign Trade Policy.

The assessee imported Multi-Function Devices (Digital Photocopiers and Printers) (MFDs) in October-November 2016. These imports were detained by the customs authorities opining that the imports had been made in violation of the Foreign Trade Policy framed under Foreign Trade Act 1992 and the Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016. Redemption fine was imposed under section 125 of the Customs Act, 1962 and the consignment released for re-export only. Penalty was also imposed under section 112(a) along with penalty under section 114AA of the Customs Act as also penalty was imposed on the Directors. CESTAT held that MFDs did not constitute "waste" under Rule 3(1)(23) of the Waste Management Rules and had a utility life of 5 to 7 years, as certified by the Chartered Engineer thereby ordered release of the consignment under section 125 of the Customs Act as the assessee were held to have substantially complied with the requirements of Rule 13 of the Waste Management Rules.

High Court held that the MFDs were not prohibited but restricted items. The order for release of the goods was upheld subject to execution of a simple bond without sureties for 90% of the enhanced assessed value.

Supreme Court noted that the concerned goods are restricted items importable against authorisation under Clause 2.31 of the Foreign Trade Policy. As the assessee did not possess the necessary authorisation for their import, Supreme Court stated that the customs authorities therefore prima facie cannot be said to be unjustified in detaining the consignment. Supreme Court opined that there exists a fundamental distinction between what is prohibited and what is restricted. Supreme Court therefore upheld High Court's order that assessee was entitled to redemption of consignment on payment of market price at reassessed value by customs authorities with fine under section 112(a) of Customs Act, 1962.

Supreme Court noted High Court's reference to Section 11(8) and (9) r/w Rule 17(2) of the Foreign Trade (Regulation) Rules, 1993 which provides for confiscation of goods in the event of contravention of the Act, Rules or Orders, but which may be released on payment of redemption charges equivalent to the market value of the goods. Further, as per Section 125, discretion has been vested in the authority to levy fine in lieu of confiscation. Therefore, as per Supreme Court, a harmonious reading of the provisions of the Foreign Trade Act Customs Act will therefore not detract from the redemption of such restricted goods imported without authorisation upon payment of the market value.

Supreme Court further upheld classification of MFDs by High Court as "other wastes" under Rule 3(1)(23) of the Waste Management Rules considering that they had utility at the time of import. Supreme Court noted that assessee have been found to be substantially compliant and requirement for the country of origin certificate has been found to be vague by High Court whereas Form 6 has rightly been held to be not applicable to subject goods.

Supreme Court noted that Rule 15 of Waste Management Rules dealing with illegal traffic, provides that import of "other wastes" shall be deemed illegal if it is without permission from Central Government under the Rules and is required to be re-exported and Customs Act does not provide for re-export. Since MFDs have a utility period, the Extended Producer Responsibility would arise only after the utility period was over. Supreme Court dismissed appeal of Revenue finding no error in the penultimate direction to the assessee for deposit of bond without sureties for 90% of the enhanced valuation of the goods leaving it to the DGFT to decide whether confiscation needs to be ordered or release be granted on redemption at the market value, in which event the assessee shall be entitled to set off.

Accordingly, Supreme Court ruled in favour of the assessee.

LD/67/124

Commissioner of Customs

Vs.

Shiva Khurana

14/01/ 2019

Where due diligence was made, custom house agent cannot be penalised where exports were found dubious and exporters were fictitious/non-existent

Assessee a custom house agent was issued a notice by the Revenue which stated that the export of goods facilitated by it was dubious and that the concerned parties, upon investigation and inquiry were found to be non-existent upon investigation and inquiry. A penalty of ₹ 50 lakhs under section 114 of Customs Act, 1962 was imposed on the assessee. Assessee submitted that it facilitated the consignments in question at the behest of one of its employees who had in the past too, brought clients. CESTAT ruled in favour of the assessee, aggrieved by which the Revenue filed an appeal with the High Court.

Revenue submitted that as per Regulation 13 of the Customs House Agent Regulation, 2004, the assessee should exercise due diligence and care and thus a duty was cast upon it to ensure that the documents submitted by it on behalf of its clients were reflected as genuine export transactions and were not sham, meant to be conduit for smuggling over-valued goods.

High Court observed that the reference to the verification of "antecedents and correctness of Importer Exporter Code (IEC) Number" and the identity of the concerned exporter/importer, in the opinion of this Court is to be read in the context of the agent's [assessee's] duty as a mere agent rather than as a Revenue official who is empowered to investigate and enquire into the veracity of the statement made orally or in a document. If one interprets Regulation 13(o) reasonably in the light of what the agent [assessee] is expected to do, in the normal course, the duty cast is merely to satisfy itself as to whether the importer or exporter in fact is reflected in the list of the authorised exporters or importers and possesses the Importer Exporter Code (IEC) Number. As to whether in reality, such exporters in the given case exist or have shifted or are irregular in their dealings in any manner (in relation to the particular transaction of export), can hardly be the subject matter of "due diligence" expected of such agent unless there are any factors which ought to have alerted it to make further inquiry.

High Court stated that in the absence of any indication that the assessee-custom-house-agent was complicit in the facts of a particular case, he cannot ordinarily be held liable. High Court thus ruled in favour of the assessee.

Transfer Pricing

LD/67/125

Principal Commissioner of Income Tax

Vs.

KSS Limited (formerly known as K Sera Sera Productions Ltd)

26/11/ 2018

Transaction of routing money through associated enterprise for specific purpose of acquisition of distributorship from a third party held to be not an international transaction.

Legal Update

Assessee was engaged in the business of production and distribution of films. It contacted Citi Gate Trade FZE to acquire the rights for distribution of three Hollywood films in India. As Citi Gate would not deal with the assessee directly, assessee used a UAE based company, its associated enterprise, as a conduit and entered into an agreement that envisaged the AE acquiring distribution rights for the assessee from Citi Gate. On the very next day, the AE entered into an agreement with Citi Gate accordingly. To operationalise the said arrangement, the assessee advanced certain amounts to the AE. The AE, in turn, immediately paid up such amounts to Citi Gate. However, eventually, the arrangement did not work out. Citi Gate, thereupon, refunded the advance to the assessee through its AE. In the process, however, some time was consumed and the repayment was made over a period of time. Revenue contended that by making interest free advances to the AE, the assessee transferred its profit and therefore, the transfer price regime would apply.

ITAT noted that the AE had entered into back to back contracts with the assessee and Citi Gate which envisaged that Citi Gate would grant, sale, assign and transfer to the AE as well as to the assessee all rights for sale, absolute and exclusive rights of distributorship. Further, AE was authorised to negotiate the price and other terms of the agreement with Citi Gate and AE would transfer the same to the assessee at the price at which it had acquired such rights from Citi Gate. ITAT further observed that the amount in question never remained with the AE as per the bank statements and was immediately transferred to Citi Gate. It was further noted that whenever the amount was refunded by the Citi Gate (upon cancellation of the arrangement), the same was also routed through the AE without any retention time by the AE. ITAT concluded that there was no diversion of income and therefore, the transfer pricing provisions would have no applicability.

ITAT held that in order to attract the provisions of Chapter X of the Act, there must be transaction or arrangement between two or more associated enterprises which gives rise to the income or benefit in the hands of at least one of them. In the present case, the advance was not given to the AE but to the third parties for the purpose of acquisition of rights of distributorship. Aggrieved by ITAT order, Revenue preferred an appeal before the Bombay High Court.

High Court held that ITAT findings of the facts were not in dispute and in absence of any perversity being pointed out, the said findings were final at the stage of the ITAT. High Court noted that as per the two back to back contracts, the assessee had released money in favour of the AE with a specific purpose of acquisition of distributorship of the films from Citi Gate and the AE never retained any amount either when the assessee released the same for payment to Citi Gate or when Citi Gate refunded the same to the assessee through AE.

High Court analysed provisions of Section 92 which deals with computation of income from international transaction having regard to arm's length price, Section 92A which pertains to meaning of associated enterprise and Section 92B pertains to meaning of international transaction. High Court noted clause (c) of Section 92B clarifies that capital financing including any type of long-term or short-term borrowings, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising in the course of business could be included within the expression "international transaction". High Court held that this explanation would not however cover the present situation, having regard to the nature of entire arrangement and the different transactions. The present case was a simple one where the money was routed through the AE by the assessee for the purpose of acquisition of distributorship and not a case of either financing or landing or advancing of any moneys. High Court observed that neither at the point of payment of money nor at the point of its refund, the AE retained the same for any significant period of time. High Court thus held that the transaction did not result into diversion of income of the assessee to its AE. Further, since High Court held that this transaction did not give rise to the international transaction, High Court held the rest of the issues as academic.

High Court thus ruled in favour of the assessee.

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 the Director of M/s LMN Private Limited (hereinafter referred to as the **'Complainant'**) against CA. XYZ (hereinafter referred to as the **"Respondent"**). The allegations levelled in the Complaint are as under:-

- The Respondent submitted a wrong Tax Return prepared by him to the Tax Authorities without the approval of the Director(s) of M/s LMN Private Limited (hereinafter referred to as the '**Company**')
- The Respondent had charged ₹ 26,472/- (payment made by Cheque No.100457) for the preparation of Financial Reports and Income Tax Return for the Financial year 2008-2009 and ₹ 14,360/- (payment made by Cheque no.100461) for the Revised Income Tax Return.
- The Director had also requested the Respondent several times to produce the Tax Return submitted by him to the Tax Authority whether it was original or the revised one, but he was not providing any details about the Income Tax Return as well as ROC Return.
- The Director of the Company has issued a Cheque no. 100458 for ₹ 25000/- for the formation of a new Company in the month of November, 2009. The Respondent has not done anything and he was absconding and has also closed his mobile numbers. However, the Respondent has also not provided his actual residential address to the Company.
- The Respondent was in the possession of the certain documents i.e. PAN Card of the Company as well as that of two Directors; Stamp and Seal of Company; Director Identification Numbers (DIN) documents; Director Digital Signature documents; ROC Return (2008-2009); Tax Return (2008-2009); Loan Agreement; Expenditure Bills (2008-2009 and 2009-2010); Books of Accounts (2008-2009 and 2009-2010) and he was not returning the same.

  The matter was enquired into by the Disciplinary Committee and the Committee, *inter-alia*, gave its findings as under:
- The Committee condemns the conduct of both the Complainant and the Respondent as both failed to give any credentials to the enquiry being conducted by the Disciplinary Committee. The Complainant after filing the

complaint did not care to respond to any of the letters of the Disciplinary Directorate and the Disciplinary Committee and the Respondent was not traceable.

- The Committee further noted that the name of the Respondent has already been removed w.e.f. 1st October, 2008 from List of Members on account of non-payment of fees under section 20(i)(c) of the Chartered Accountants Act, 1949. 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.
- The Committee further noted that since the name of Respondent stands removed from aforesaid date, action for misconduct can be initiated against him only for certain period of the Financial year 2008-2009 i.e. upto September, 2008 and for rest of the period no action can be initiated by the Disciplinary Directorate.
- The Committee observed that the Respondent has used two different letter heads for raising the bills on 05.08.2008 and 30.09.2009 in the name of M/s KLM and M/s NDO respectively whereas the Respondent was neither partner nor proprietor of both the aforesaid firms. Thereby, the Respondent used manipulated/forged letter heads for raising the bills on the Company.
- The Committee further observed that despite the fact that his name has been removed from the list of member w.e.f. 1st October, 2008, the Respondent verified and certified the Financial Statement of the Company for the year ended on 31st March, 2009 as Chartered Accountant and thereby violated the provision of Sections 8 and 24 of the Chartered Accountants (Amendment) Act, 2006.
- The Committee as regard the charge relating to retaining of Company's documents noted that the Complainant has submitted the copies of emails wherein they have asked for various information/records from the Respondent but the Respondent has not replied to those emails. Further, on perusal of the bills raised by the Respondent, it is evident that the Respondent was doing the work of e-filing of ROC returns, Income Tax returns etc., and thus, he should have been in possession of the records of the Company. Non submission of reply by the Respondent in turn tantamount to confirmation to the allegations alleged against him.
- Further, the Committee as regard the charge of taking money and not doing the work which was assigned to him, noted that the Respondent was paid the money by the Company through cheques on 03.11.2009/07.11.2009 for ₹ 26472/-, ₹ 25000/- and ₹ 14360/- respectively. The Respondent did not furnish any reply. The Committee is of the view that since, the Respondent was looking after professional work relating to the Company and he having been paid money on account of formation of the Company, filing of Income Tax returns etc., the Respondent has failed to discharge his duties in a diligent manner as he did not carry out the task which was assigned to him by the Company with regard to formation of Company, filing of revised income Tax returns etc.

  In view of the above, the Committee opined that the Respondent failed to maintain the faith bestowed by the Society on the Chartered Accountants and the said act of the Respondent is unbecoming of a Chartered Accountant. Further, the Committee is of the view that the Respondent has contravened the provisions of the Chartered Accountants Act and Regulations framed thereunder and also failed to discharge his duties in a diligent manner. Accordingly, the Committee held the Respondent Guilty of 'Professional and Other Misconduct' falling within the meaning of Clause (2) of Part IV of First Supreme Courthedule and Clause (7) of Part I and Clause (1) of Part II of the Second Supreme Courthedule to the Chartered Accountants Act, 1949. Thereafter, the Committee upon an overall consideration and upon looking into the facts of the case is of the view that severe punishment needs to be awarded to the Respondent. Accordingly, the Committee ordered for the removal of the name of the Respondent from the Register of Members for a period of five (5) Years. ■