Legal Decisions[1]

Income Tax

LD/67/126

TUV Rheinland NIFE Academy Pvt. Ltd.
Vs.
Income Tax Officer, Bengaluru
27/02/2019

DCF valuations discarded and NAV method approved for share valuation for Section 56(2)(viib) by ITAT since the projections were not realistic.

The assessee is a company engaged in the business of providing vocational training through direct training centres, franchise centres and information centres in many cities across the country. It is a subsidiary of TUV Rheinland (I) Pvt. Ltd. [parent company], which holds the entire share capital of the assessee company.

The assessee allotted 5,00,000 shares of the face value of ₹ 100/- to its parent company at a premium of ₹ 479/- per share which was worked out as per Discounted Cash Flow (DCF) method. Thereby, the total amount of consideration received was ₹ 28.95 crores out of which an amount of ₹ 23.95 crores was towards share premium. The AO observed that Valuation report had relied only on values certified by the Management of the assessee company which were prepared to justify the high premium and therefore AO rejected the said valuation report.

AO computed the value of the shares under NAV Method and determined the fair market value (FMV) of the shares at ₹ 84.20 per share as against ₹ 479/- per share determined by the assessee. The difference in the two amounts aggregating to ₹ 19.74 crores was added to the income as "excess share premium" under section 56(2)(viib) of the Act. CIT(A) ruled in favour of AO aggrieved by which the assessee preferred appeal before ITAT.

ITAT observed that the provisions of law do not make an exception to shares issued to the Promoter Company / parent company. It provides for taxing of any excess share premium over the FMV of the shares, irrespective of the character or position of the person to whom such shares are issued. Merely because the recipient of the shares is the parent company of the assessee, does not give the assessee freedom to value the shares at any price. ITAT clarified that the AO has not disregarded the use of DCF Method for valuation and had just held that the parameters taken by the assessee in adopting the DCF Method were defective. ITAT relied on Delhi ITAT ruling in *Agro Portfolio Pvt. Ltd [ITA No. 2189/Del/2018]* wherein it was held that AO has the power to examine and verify the correctness or the reasonableness of the valuation adopted by the assessee. ITAT observed that the assessee had failed to furnish the details regarding the basis for the projections made by the assessee.

ITAT further noted that the receipt of share premium cannot be treated as a capital receipt since it was received in post-amendment period i.e. after Finance Act 2013 pursuant to which the excess share premium was deemed income in hands of company under section 56(2)(viib).

ITAT thus ruled in favour of the Revenue.

LD/67/127

National Small Industries Corp Ltd.
Vs.
Deputy Commissioner of Income Tax
25/02/2019

Provision of Non-allowability of CSR expenses as business expense after Finance Act 2014 held to be prospective; CSR expense incurred before April 2015 allowed.

During the course of assessment proceedings, it was observed that assessee had incurred ₹ 89.74 lakhs under the head of "Corporate Social Responsibility" and had claimed it as expense. The assessee had incurred CSR expenses towards education of children of underprivileged labour employed in unorganised cottage industries in small cities. The activities qualified for deduction under section 35AC and 80G. The AO disallowed these expenses on the ground that no CSR expenses are deductible as per amendment to Section 37(1) inserted by Finance Act 2014. The CIT(A) ruled in favour of the Revenue, aggrieved by which the assessee appealed before Delhi ITAT.

ITAT observed that assessee is a public sector undertaking which was established to promote and develop skill India through cottage and small

[1]*Contributed by CA. Sahil Garud, CA. Mandar Telang, GST & 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.*

industries. It has been submitted that in order to promote skill amongst poor class of the society, assessee established technical centres at various places and also carved out purposeful technical training programmes through NGOs which were involved in such activities at various places. These expenses were in the nature of donations which were eligible for exemption under section 80 G and a few were allowed under section 35AC.

ITAT stated that amendment in the Section 37 inserted w.e.f 01/04/15 was prospective in nature. ITAT held that amendment to Section 37, could not be treated as disadvantage to the assessee in the period prior to amendment. Further ITAT observed that it is a disabling provision, as set out in Explanation 2 to Section 37(1), and refers to such Corporate Social Responsibility expenses under section 135 of Companies Act, 2013 and as such cannot have application for period not covered by this Statutory Provision which itself came into existence in 2013. ITAT placed reliance on Supreme Court ruling in *CIT vs. Vatika Townships Pvt. Ltd. [(2014) 367 ITR 466].*

ITAT thus ruled in favour of the assessee.

LD/67/128

Cimex Land and Housing Pvt. Ltd. Corp Ltd.
Vs.
Income Tax Officer, Delhi
25/02/2019

Share allotment date is relevant for invoking Section 56(2)(viib) and not share application date.

The assessee is a private limited company. During the assessment proceedings for AY 2015-16, it noted that the assessee had received share application money in previous AYs 2012-2014, however had allotted the shares only in AY 2015-16. When the assessee was called upon to justify the share premium of ₹ 790/- per share, the assessee contended that the provisions of Section 56(2)(viib) were not applicable since the said provisions were inserted w.e.f. 01.04.2013 and the share application money was received prior to this amendment. As per the AO, since the shares were allotted in FY 14-15, i.e. AY 15-16, provisions of Section 56(2)(viib) were applicable and valuation ought to have been made as per Rule 11UA. The AO therefore made an addition of ₹ 6.32 crores to the income of the assessee. The CIT(A) upheld the order of AO, aggrieved by which the assessee preferred an appeal before Delhi ITAT.

ITAT perused provisions of Section 56(2)(viib) and noted that the provision refers to consideration for issue of shares received in any previous year. ITAT observed that the entire share allotment was done during the year under consideration, therefore, it cannot be said that the assessee was not liable to justify the share premium supported by the valuation report as mentioned under Rule 11UA. ITAT remarked that share valuation report ought to have been by the assessee before the Assessing Officer.

ITAT observed that share application was received in earlier assessment years but since in those assessment years shares were not allotted, therefore, the share premium could not have been examined by the Assessing Officer under section 56(2)(viib) of the Act. Since the entire transaction has crystallised during the year under consideration which also includes the share premium of ₹ 790/- per share, it needs to be examined during the year under consideration only, i.e. in AY 15-16. ITAT therefore held that assessee must justify the share premium as per relevant income tax rules.

ITAT therefore directed the AO to examine the justification of share premium as per the procedure prescribed under Rule 11U and 11UA and decide the issues afresh.

ITAT thus ruled in favour of the Revenue.

LD/67/129

Mrs. Kannammal
Vs.
Income Tax Officer, Tirupur
13/02/2019

AO must examine 'trinity factors' viz. the existence of a prima facie case, financial stringency, etc. before passing order regarding stay of demand matters.

The assessee is a housewife. For AY 16-17, the assessee filed her return of income showing taxable income ₹ 6.23 lakhs and claimed an exemption of ₹ 10.19 crore. The AO denied the exemption and brought the complete amount of ₹ 10.26 crore to tax. Assessee stated that this was a 'high pitched

assessment' and so sought a complete stay of recovery pursuant to appeal being filed before CIT(A). The AO rejected the stay petition and demanded the disputed amount immediately, aggrieved by which the assessee preferred a writ petition before Madras High Court. Assessee stated that as per Instruction No. 96 [F.No.1/6/69/-ITCC] dated 21.08.1969 issued by CBDT, no recovery should be effected of a disputed demand where the determination of tax in an assessment is substantially higher than the returned income; and that this instruction was binding on all Income Tax Authorities under section 119.

High Court stated that the parameters to be taken into account in considering the grant of stay of disputed demand were well settled, which were the existence of a prima facie case, financial stringency and the balance of convenience. 'Financial stringency' would include within its ambit the question of 'irreparable injury' and 'undue hardship' as well. High Court therefore stated that only upon an application of the three factors as aforesaid that the assessing officer can exercise discretion for the grant or rejection, wholly or in part, of a request for stay of disputed demand.

High Court states that the Circulars and Instructions were in the nature of guidelines issued to assist the assessing authorities in the matter of grant of stay and could not substitute or override the basic tenets to be followed in the consideration and disposal of stay petitions. The existence of a prima facie case as provided in the Circulars themselves, the "financial stringency faced by an assessee and the balance of convenience in the matter constitute the 'trinity', so to say, and are indispensable in consideration of a stay petition by the authority. Further the CBDT instruction regarding payment of 20% of disputed demand had also granted ample discretion to the authority to either increase or decrease the quantum demanded, based on the three vital factors to be taken into consideration.

High Court observed that the AO had merely rejected the stay petition by way of a non-speaking order. As per High Court, though the assessee may not have invoked the three parameters for the grant of stay, it was incumbent upon the AO to examine the existence of a prima facie case as well as call upon the assessee to demonstrate financial stringency and arrive at the balance of convenience in the matter.

Ruling in favour of the assessee, High Court directed the AO to pass fresh orders on the stay application filed by the assessee after hearing the assessee, within a period of four weeks from date of receipt of a copy of this order.

LD/67/130

Commissioner of Income Tax, Kolkata

Vs.

Jagannath Gupta Family Trust

01/02/2019

CIT cancelled registration under section 12A alleging bogus donations, which was quashed by the High Court; High Court ruling that one bogus donation would not establish that the activities of the trust are not genuine, further quashed by the Supreme Court.

The assessee is a registered Trust under section 12AA and also approved under section 80G(5)(vi), and created with an avowed object of charitable purposes of medical relief, education, any other causes of public utility etc. During a survey under section 133A it was noticed that a donation entry of ₹ 37 Lakhs shown to be received by assessee was bogus and sham. The CIT(Exemption) noted that the donor did not actually donate such amount and that such entry was shown by receiving the amount in cash from the assessee by receiving commission. The CIT(E) alleged that the activities of the assessee trust are neither genuine nor as per the objects of the trust, further alleging that the transaction in question was only a money laundering, and therefore the CIT(E) proceeded to cancel the registration of the assessee-trust under section 12AA(3).

ITAT noted that though the statement of the donor was made basis for initiating proceedings for cancellation of registration of assessee, the assessee was not given an opportunity to cross-examine the representative. ITAT this set aside the order of CIT(E) and remanded the matter for fresh consideration by primary authority. On assessee's appeal before the High Court, the High Court quashed the order of cancellation of registration noting that a particular donation may be bogus or fictitious and, the assessee may be assessed to tax therefore and other steps can be taken but the single donation which is allegedly bogus, would not establish that the activities of

the trust are not genuine and not being carried out in accordance with the objects of the trust. High Court also held that if it is also held that if there are multiple bogus transactions of similar kind, it may lead to reasonable assessment for the Competent Authority to hold that the trust is engaged in such activities which can be said to be not genuine or not in conformity with the objects of the trust.

Aggrieved, the Revenue appealed before the Supreme Court.

Supreme Court noted that the High Court had allowed writ petition mainly on the ground that one bogus donation would not establish, that the activities of the trust are not genuine. Supreme Court held that such a reason assigned by the High Court is erroneous and runs contrary to the plain language of Section 12AA(3) of the Act. As per the Supreme Court, in view of the serious allegations made against the assessee trust, it is a matter for consideration of the issue, after giving opportunity as pleaded by the assessee but the High Court has committed error in entertaining the appeal against the remand order passed by the appellate-authority, and in quashing the order of cancellation of registration.

Therefore, ruling in favour of the Revenue, Supreme Court quashed High Court's order but however made it clear that no opinion was expressed by the Supreme Court on merits. Supreme Court directed the CIT(E) to consider all the issues on its own merit, uninfluenced by the observations made by the Appellate Authority, the High Court or in this order by this Court.

LD/67/131

Agarwal Enterprises

Vs.

Deputy Commissioner of Income Tax

24/01/2019

CIT cancelled registration under section 12A alleging bogus donations, which was quashed by High Court; High Court ruling that one bogus donation would not establish that the activities of the trust are not genuine, further quashed by Supreme Court.

During the search conducted on assessee, cash of ₹ 35 lakhs was seized. A return of income declaring a total income of ₹ 39.15 lakh, including the cash of ₹ 35 lakhs seized was filed for AY 15-16, and refund of ₹ 27.50 lakhs was claimed considering seized cash. The AO did not accept assessee's treatment of adjusting cash seized of ₹ 35 lakhs as advance tax and raised an independent demand of ₹ 9.18 lakhs under section 156. Subsequently, the AO passed an order imposing penalty of ₹ 3.50 lakhs (being 10% of the undisclosed income of ₹ 35 lakhs) under section 271AAB, in response to which, the assessee requested the AO to set-off the penalty out of the available seized cash of ₹ 35 lakhs. An order under section 132B(3) was passed directing refund /release of the balance amount of ₹ 31.50 lakhs from the seized cash of ₹ 35 lakhs to the assessee. The receipt of this release / refund was without payment of any interest under section 244A. AO held that since ₹ 35 lakhs was not a refund of tax and/or penalty paid by the assessee, no interest was payable thereunder. Aggrieved, the assessee filed writ petition before the Bombay High Court.

High Court observed that in terms of Section 132(B)(4) of the Act, the occasion to pay the interest on the money seized under section 132 would only arise when an assessment has been made under section 153(A) or Chapter XIVB whereas, in the present case, the assessment was done under section 143(3) and not under section 153A. Thus on a plain and strict reading of Section 132B(4), no interest can be granted under section 132B(4), as it only provides for grant of interest by fixing the termination date for it as the date of completion of the assessment under section 153A or Chapter XIVB. High Court remarked that interest under section 244(A)(1)(b) of the Act can only be of the excess amounts paid as tax or penalty, which is being refunded. In this case, the amount of ₹ 35 lakhs was seized by the Revenue and it was not a case of payment by the Petitioner of tax or penalty.

However, High Court observed that the assessee had shown ₹ 35 lakhs being the seized cash, as advance tax in its return of income. While passing the Assessment Order the AO did not adjust the seized cash as advance tax paid on behalf of the assessee but directed the assessee to pay additional tax of ₹ 9.18 lakhs (inclusive of interest), consequent to the Assessment Order, which demand was paid by the assessee.

High Court noted that this non-adjustment by the AO of the amount being offered as advance tax by the assessee was unjustified and without reasons. High Court noted that assessee was called upon to pay the interest on the demand raised which would not have happened if the assessee's contention that ₹ 35 lakhs be treated as advance tax paid to the Revenue, was accepted. Therefore, High Court held that the character of the seized cash underwent a change to becoming an advance tax, more particularly so as for the subject AY, it has been accepted as income. However, High Court held that interest on advance tax would not be payable under section 244A(1)(a) as the payment is not by any of these modes of Advance Tax/TDS under section 199, therefore, Section 244A(1)(a) will not have any application. However, High Court noted that Section 244A(1)(b) would cover interest on any amounts retained by the Revenue, without justification. High Court noted that on the date the demand notice under section 156, there was an excess amount with the Revenue which the assessee was claiming to be tax. Therefore, in terms of the Explanation to Section 244A(1) (b) the amount of ₹ 35 lakhs was the excess tax (on change of its character from seized amount to tax paid), the assessee is entitled to interest on ₹ 35 lakhs from the date of passing of assessment order.

High Court therefore directed the AO to pay interest at 6% per annum on 35 lakhs from date of passing assessment order upto the date when penalty of 3.5 lakhs was adjusted from it, and on ₹ 31.5 lakhs from date of such adjustment to the date final amount was paid to the assessee.

High Court thus ruled in favour of the assessee.

LD/67/132

The Commissioner of Income Tax

Vs.

Shri Adichunchanagiri Shikshana Trust

07/01/2019

Disallowance under section 40(a)(ia) for default in TDS cannot be invoked in the hands of assessee-trust before 01.04.2019.

The assessee Trust has got registered under section 12A of the Act on 17.07.1974 and is running various educational institutions throughout the State of Karnataka. During the financial year 2006-07, the Trust was also running a hospital

by the name and style of "BGS Appolo Hospital" at Mysuru, in collaboration with M/s. Appolo Hospital Enterprises Limited (AHEL), Chennai. It was observed that hospital had not done TDS as required under the TDS provisions in respect of 40% of payments made to the doctors under section 194J of the Act. Therefore, an amount of ₹ 65.32 lakhs was disallowed under section 40(a)(ia). Further, for the same reason, amount of ₹ 45.69 lakhs was disallowed on account of operation management service charges. CIT(A) affirmed AO's order. ITAT held that Section 40(a)(ia) cannot be invoked for disallowing the expenses on which tax has not been deducted at source.

Aggrieved Revenue filed an appeal before Karnataka High Court.

Referring to amendment in Finance Act, 2018 High Court held that it clearly indicates that the same would stand applicable only from 01.04.2019. High Court, therefore, held that ITAT was justified in holding the said issue in favour of the Assessee and against the revenue.

Separately, High Court perused amendment in Section 11(6) of the Act regarding restricting depreciation deduction where cost of assets has already been allowed as application of income, and held that the same was also prospective in nature and applicable only from AY 2015-16. High Court upheld ITAT order which relied on Bombay High Court ruling in society of the sisters of St. Anne [146 ITR 28] and held that the depreciation is to be deducted, to arrive at an income available to charitable or religious purposes.

High Court thus ruled in favour of the assessee.

GST

LD/67/133

Optival Health Solutions Pvt. Ltd. and Anr.
Vs.
UOI (CAL, HC)
07/02/2019

Hon'ble High Court permitted the petitioner to revise GST TRAN-2 holding that, TRAN-2 is merely an admission of facts, and even in the absence of specific Rule, any person filing it should be entitled to revise/rectify the same. The verification of grounds for revision can be examined by the Department in the course of assessment.

Facts:

The Petitioner had filed the Tran 1 form within time. It had filed the Tran 2 form within time. However, the petitioners had noticed that, there were certain mistakes in the Tran 2 form. The petitioner wanted to correct the same. However, the present scheme of things does not allow rectification or revision of the Tran 2 form. The petitioners therefore sought for a direction upon the Department to allow them to revise/rectify their Form GST TRAN 2 electronically or manually.

Held:

Hon'ble High Court noted that, although the Rules of 2017 were subsequently amended to provide for revision/rectification of TRAN 1 form by insertion of Rule 120 A, similar provisions have not been incorporated in the Rules of 2017 for rectification/revision of TRAN 2. Since the Rules of 2017 do not contemplate revision of Form GST TRAN 2, the common portal available under the Act and Rules of 2017, does not provide for revision of Form GST TRAN 2 in the electronic manner. The petitioners are therefore unable to file a revised declaration under Form GST TRAN 2 electronically. Relying upon *Alwaye Sugar Agency vs. Asst. Commr. (Assmnt) 2018 (10) GSTL 228 (Ker.)* and *Commercial Taxes Special Circle, Aluva) and Infra Innovations vs. Union of India) 2018 (18) G.S.T.L. 28 (Ker.) GC*, the Hon'ble High Court held that, although Taxing statutes are to be strictly construed, such interpretation should not lead to a reckless or a mindless mechanical application of the statute. Hon'ble Court held that, the Form GST TRAN 2, at best, is an admission of the person filing the same with regard to the contents of the document. Admission is a strong evidence against the person making it. However, law contemplates that, the person making such admission has the opportunity to explain the same. A person making an admission, is entitled to prove that, the admission was made by mistake or was untrue. If a person making the admission is able to substantiate with cogent evidence that

the admission was a mistake or was untrue, then such facts have to be taken into consideration for the purpose of deciding the evidentiary value of the admission and the relevancy thereof. In other words, the law permits a person making an admission, the liberty of explaining the same, if he so chooses. However, neither the Act of 2017 nor the Rules of 2017 can be read to mean that the same excludes the right of a person making an admission, to forfeit the opportunity to explain it. Neither the Act of 2017 nor the Rules of 2017 forfeits the right of a person making an admission to substantiate that, such admission was made by mistake or was untrue. Hon'ble High Court, therefore, held that a person filing Form GST TRAN 2, therefore, should be afforded an opportunity to explain the Form GST TRAN 2, in the event where such person chooses to do so. Moreover, Form GST TRAN 2 will be taken into consideration for the purpose of assessment. In the assessment proceedings, the person filing the Form GST TRAN 2 would be at liberty to establish by cogent evidence that the figures filed therein are incorrect or untrue. The Assessing Officer will be obliged to take into consideration such a stand while pronouncing upon the assessment. Therefore, when such a person is seeking to correct Form GST TRAN 2 on its own, an opportunity should be afforded to such person to correct the same. The authorities may retain the original GST TRAN 2 Form for their assessment purpose and can confront the person seeking to revise the GST TRAN 2 with the Form GST TRAN 2 as originally filed and require explanation from the person filing a revised From GST TRAN 2 as to why such revision was required and whether such revisions are justified or not. Such an enquiry can be held in the assessment proceedings. There is no ground as to why a person filing Form GST TRAN 2 should not be allowed to revise Form GST TRAN 2 after its initial filing.

Accordingly, Hon'ble High Court directed the authorities to allow the petitioner to file a revised Form GST TRAN 2, either electronically or manually, in accordance with law within four weeks from the date of communication of this order.

LD/67/134

Phalanx Labs Pvt. Ltd
Vs.
CCT Vishakhapattanam GST
(CESTAT-HYD)
06/09/2018

Tribunal allowed Cenvat credit of service tax paid on labour charges for fixing and erection of equipments, buffing work, fixation and erection of equipment work, insulation work etc. for the activity undertaken by the service providers in the factory premises

Facts:

Appellant paid labour charges for fixing and erection of equipment, provision of pipe line work, installation and insulation work, fixing and errection of equipments and various other activities which are related to the machines installed in the factory premises of the appellant. While adjudicating show cause notice questioning admissibility of Cenvat credit on such services, the adjudicating authority considered such activity as works contract and confirmed impugned demand. The first appellate authority confirmed the demand on the ground that services received by the appellant are not coextensively used in the manufacture of final products and relied upon the decision of Hon'ble AP. High Court in case of *Rayalaseema Hi-Strength Hype Limited [2012(278)E.L.T 167 (AP)],* wherein it was held that unless the goods are used in the manufacture of capital goods, Cenvat credit cannot be claimed even on the repair and maintenance as for manufacture and the repair and maintenance of the plant cannot be constituents in the process of manufacture of final products. Being aggrieved, appellant filed present appeal.

Held:

Tribunal noted that services received by the appellant were in respect of capital goods and not for laying foundation or making structures for support of capital goods, which are covered under exclusion clause in A(b) of Rule 2(l) of CCR, 2004. As regards findings of first appellate authority that these services were not used

coextensively for manufacture of final products, Tribunal held that such findings are contrary to factual position in as much as the appellant being the manufacturer of bulk drugs, requires installation of various plant and machinery which would contribute towards manufacture of final products. Tribunal noted that the definition of input service clearly mandates for availing Cenvat credit of service tax paid on services which were used by manufactures directly or indirectly, in or in relation to manufacture and clearance of final products. Thus the Tribunal held that it cannot be said that the services rendered by service providers on various activities were in respect of equipments which are not used for manufacturing final products. Further the Tribunal distinguished from decision in Rayalseema Hi-Strength Hype Limited (Supra), as the issue involved in said case pertained to eligibility to avail Cenvat credit on input but not input services and the definition entitles the appellant to avail Cenvat credit. Accordingly, the Tribunal set aside impugned demand and allowed present appeals.

Service Tax

LD/67/135

Union of India & Ors.
Vs.
Coastal Container Transporters Association & Ors.
26/02/2019

Supreme Court held that High Court could not have entertained writ petition of Transporters Association regarding classification of service as 'cargo handing service' (CHS) or 'goods transport agency' (GTA).

This civil appeal has been filed by Revenue against the order of Gujarat High Court, wherein the High Court had quashed the show-cause notices issued in exercise of power under section 73(1) of the Finance Act, 1994. The issue pertained to classification of services as 'cargo handing service' (CHS) or 'goods transport agency' (GTA) service in case of association of transporters.

The assessee is Coastal Container Transporters Association whose members are engaged in the transportation of goods entrusted by the customers. The Revenue had proposed to demand service tax from the assessee under the category of CHS, whereas as per the assessee, the service fell under the category of GTA. To fortify its case, assessee relied on circulars of CBEC.

Revenue contended that assessee, with a view to evade payment of service tax, have split the whole transactions into three parts, i.e., from the place of consignor to Kandla/Mundra Port by road, from Kandla/ Mundra Port to Kochi/ Tuticorin Ports by sea route and from Kochi/ Tuticorin Ports to the place of the consignee by road. As per revenue, if assessee were registered under the category of CHS, no abatement would have been admissible.

High Court overruled the objection of maintainability of the petition and has recorded a finding that the services rendered by the members of the respondent-association are classifiable under GTA but not under CHS. High Court held that the notices impugned in the writ petition, are contrary to the binding circulars issued by the CBEC and relied upon by the assessee, in and so assessee was entitled to invoke the writ jurisdiction of the Court.

Supreme Court observed that High Court ought not to have entertained writ petition against the show cause notices of Revenue more-so when against the final orders appeal lied to this Court. Supreme Court stated that instant case is neither a case of lack of jurisdiction nor any violation of principles of natural justice is alleged so as to entertain the writ petition at the stage of notice.

Supreme Court stated that the classifiability of service rendered by a particular assessee is to be considered with reference to facts of each case depending upon nature of service rendered and the contract entered into and that there cannot be any general declaration. Supreme Court stated that the judgement of this Court in the case of *Deputy Commissioner Central Excise*

& Anr. vs. Sushil and Company [(2016) 13 SCC 223] cannot be applied to the facts of this case as relied upon by the assessee. Supreme Court approved Revenue's reliance upon its judgement in the case of *Union of India & Anr. vs. Guwahati Carbon Ltd. [(2012) 11 SCC 651]* and *Malladi Drugs & Pharma Ltd. vs. Union of India [2004 (166) ELT 153 (S.C.)]*.

Supreme Court ruled in favour of the Revenue and gave liberty to the Revenue to consider the case on merits and pass appropriate orders, uninfluenced by any of the observations made by the Supreme Court.

LD/67/136

ICICI Bank Ltd
Vs.
Commissioner of Service Tax
(CESTAT-MUM)
12/02/2019

Premium paid by banks to Deposit Insurance and credit Guarantee Corporation (DICGC) for insuring the deposits of the customers does not qualify to be 'input service' in terms of Rule 2(l) of CCR, 2004, after 01.07.2012. Rule 6(3B) of CCR, 2004 cannot be used for extending the benefit of ineligible credit and thus allowing reversal of 50% of eligible and ineligible credit availed by the appellants during the month

Facts:

As per the norms of RBI, the appellant banks got registered with DICGC and were required to insure its deposits through DICGC to protect the interest of small depositors. The short question for consideration in present appeals was whether the appellant banks would be entitled to take credit of service tax paid on deposit insurance premium paid to DICGC, after 01.07.2012. The department's case mainly based on three grounds namely: (i) the insurance service is for the benefit of the depositors and not for the bank. DIGCC has not insured the Bank and thus the bank cannot be treated as an insured person. (ii) Deposit insurance premium is linked only to deposits accepted by banks and has no nexus with any other service provided by banks so it cannot be termed as 'input service' used for rendition of any output service. (iii) The appellant did not charge any consideration for the acceptance of the deposit, so it is a transaction in money only and outside the purview of service tax.

While rebutting allegations made by the Revenue, appellant banks inter alia submitted that deposit insurance is an input service by virtue of it being directly linked to the activity of accepting deposits from which a bank earns various charges and on which service tax liability have been discharged. Rule 2(l) of CCR, 2004 provides that input service means any service used by provider of output service for providing input service. Appellant further submitted that such insurance is statutory obligation as the RBI has power to cancel the license of Banks in case of non-compliance, thus, said service of DICGC is not only commercially expedient but also mandatory in nature. Appellant also submitted that the contractual relationship exists between Bank and DICGC and not between the customer and DICGC and the banks are debarred from recovering the cost of insurance premium from the depositors. Thus, the depositors cannot be regarded as recipient of services.

Held:

While deciding the issue, Tribunal observed that in terms of definition of 'input service' under Rule 2(l) of CCR, 2004, all or any of the services that suffers service tax in the hand of service providers, cannot be said to be 'input service' so as to be eligible for credit i.e. it cannot be said that all the services/activities which are required for promoting or running business cannot be considered as 'input service'. Further, Tribunal took a view that with omission of expression 'activities relating to business' from definition of 'input service' w.e.f. 01.04.2011, all the activities which contribute to the commencement and continuation of banking business may not be relevant for bringing the same within the fold of definition of 'input service'. The Cenvat credit of input services could be allowed only when it falls within the scope of definition of input service.

In present case, Tribunal held that banks are not receiving any consideration for deposits taken by them from the depositors, and in the absence of any consideration from the depositors to the bank for the activity of accepting deposits, the same cannot be considered as a service in terms of Section 65B(44). As the consideration received by appellant banks in extending deposits, loans or advances, being out of service tax net, do not fall within the definition of "service" and if they fall within the definition of service, they are excluded from the scheme of output service by virtue of negative list prescribed in Section 66D. Consequently, the Cenvat credit in respect of services that go exclusively for taking such deposits is not admissible.

It was also held that even though deposit is an activity relating to banking business, it's not a taxable service under the Finance Act, 1994 as consideration for such service is exempted. Therefore, Tribunal upheld the impugned demand of disallowance of Cenvat credit on deposit insurance to appellant banks.

As regards interpretation of Rule 6(3B) of the Cenvat Credit Rules, Hon'ble Tribunal held that, this rule in no way creates an additional entitlement to the credit over and above as available in terms of Rule 3 and hence, the said Rule cannot be used for extending the benefit of ineligible credit and thus allowing reversal of 50% of eligible and ineligible credit availed by the appellants during the month. In other words, Rule 6(3B) does not create an additional mechanism for allowing credit of those service taxes paid which do not qualify to be eligible credit in terms of Rule 2 and 3 of the Cenvat credit Rules, 2004. Since the issue involved question of interpretation of law, penalties were set aside.

LD/67/137

Ericsson India Pvt. Ltd

Vs.

Commissioner of Customs, Central Excise and Service Tax, Hyderabad-II

(CESTAT-MAD)

11/01/2019

When branch office availed Cenvat credit on the basis of valid ISD invoices issued by head office, correctness of availment of such ISD credit in light of Rule 6 of CCR, 2004 cannot be challenged against branch office and since branch office was not engaged in providing any exempted services, ISD credit given by Head office, engaged in providing taxable as well as exempted services, cannot be denied to branch office.

Facts:

The appellant i.e. branch office received Cenvat credit from its head office under input service distribution mechanism. The appellant is engaged in providing taxable services only, whereas the head office having ISD registration is engaged in providing taxable as well as exempted services. In terms of show cause proceedings initiated against appellant, department alleged that the credit availed by the appellant on some input services are not correct as they pertain to trading by their head office and thus, not permissible under Rule 6 of Cenvat credit Rules, 2004. The case pertains to the period April 2005 to March 2008 when there was restriction on utilisation of credit in excess of 20% of the service tax. Hence, department also alleged that the head office of appellant erred in transferring their input service credit as it should not have, at any point of time, exceeded 20% of the output service tax liability of the company.

Held:

Hon'ble Tribunal noted that it was undisputed that appellant was exclusively engaged in providing taxable services only and did not render any exempted service. Further allegations against transfer of Cenvat credit in excess of 20% is against Head Office and, there was nothing on record to show that appellant i.e. branch office utilised Cenvat credit in excess of 20% of their output liability. The Tribunal further held that, even if allegations of wrong availment of Cenvat credit by Head Office are true, demand, interest and penalty is imposable on head office. Tribunal categorically expressed a view that, although appellant and their head office are part of same legal entity, it is inconceivable to hold that the appellant branch office, who received credit from Head Office

through ISD invoices, has full knowledge of how the credit was availed by such head office and how it was transferred to their various branch offices across the country. Accordingly, holding that the appellant had legitimately taken credit on the basis of ISD invoices issued under Rule 9 of Cenvat credit Rules, impugned demand against appellant was set aside.

Excise

LD/67/138

Magadh Plas Pvt. Ltd.
Vs.
C.C.E. & S.T. Jaipur
18/02/2019

Duty exemption benefit no applicable to job worker for goods manufactured for unit availing area-based exemption, as there was no duty on the final goods cleared

The assessee was engaged in manufacture of plastic containers and also manufactured the same on job work basis for Divya Pharmacy Industrial Area, Haridwar, Uttarakhand who was availing area-based exemption under Notification No. 52/2003-CE dated June 10, 2013. The pharmacy had supplied raw materials i.e. plastic granules to the assessee for the said job work under the cover of miscellaneous invoices as different from the regular invoices under Central Excise Rules for clearance of assessee's own manufactured goods qua the said job work expenses. Revenue issued a show cause notice proposing recovery of central excise duty along with the interest and the proportionate penalties which was confirmed by the Commissioner, amounting to ₹ 77.82 lakhs. Aggrieved the assessee preferred appeal before CESTAT.

Assessee contended that they were regularly discharging excise liability for the goods manufactured by them and submitted that no duty was payable for the manufacture of plastic containers on job work basis out of the raw materials received from Divya Pharmacy. Further Cenvat credit was also not taken on the inputs and only job work expenses had been charged from the pharmacy against proper declarations and intimations to Revenue Department. Revenue submitted that exemption benefit was not available to the assessee as the pharmacy for whom job work was done was having the benefit of area-based exemption. Assessee contended that penalty is not imposable as there is no fraud, collusion or any wilful mis-statement or suppression of fact with intent to evade payment of duty.

CESTAT perused Notification No. 214/86 and noted that the said exemption to goods manufactured in the factory as a job work are subject to conditions specified in the Notification No. 214/86 which exempts the job worker from payment of duty subject to fulfilment of given conditions. One such condition states that such goods should be used by the principal manufacturer in the manufacture of goods which are cleared on payment of duty. Divya Pharmacy though was getting the plastic containers on job work basis from the assessee, but they were not clearing their final product with those plastic containers on payment of duty as they were availing the area-based exemption.

CESTAT observed that the assessee had manufactured plastic containers under job work chalans and cleared them under miscellaneous chalans only with an intent to evade the payment of duty as it was very much in the knowledge of the assessee that the unit of Divya Pharmacy was in access free zone and was available an area based exemption. As per CESTAT, no bonafide can be attributed to the assessee of not being aware of the condition of the Notification that the goods are to be cleared after payment of duty to avail the benefit. The only possibility for the non-payment was the intent to evade the duty. CESTAT held that the Revenue had not committed any error while imposing penalty and that the show cause notice could not be barred by time for the said reason.

CESTAT thus ruled in favour of the Revenue.

Transfer Pricing

LD/67/139

Fujitsu India P. Ltd.
Vs.
Deputy Commissioner of Income Tax
13.02.2019

Cost allocation based on headcount for benchmarking international transaction of receipt for online marketing support services, allowed.

The assessee received fees for rendering online market support services to its Associated Enterprise. TPO determined the ALP by applying Transactional Net Margin Method (TNMM) and made an addition of ₹ 2.63 crores. While arriving at ALP, the AO/TPO had to allocate certain common expenditure. The AO/TPO applied the first principle of apportionment, which resulted in proportionate allocation of common expenditure attributable to the concerned segments. After completion of this step a sum of ₹ 9.79 crores remained as un-allocable costs. For this, the assessee sought to use the "headcount" method for allocation as the allocation principle to ascribe the segment to which the expenses were to be considered. The assessee's argument with respect to application of the "headcount" basis was rejected by the TPO, DRP and later by the ITAT in the impugned order. Aggrieved, the assessee preferred an appeal before Delhi High Court.

Before the High Court, assessee relied on Delhi High Court ruling in case of *EHTP India Pvt. Ltd. [(2013) 350 ITR 41(Del.)]* where it was broadly indicated that if headcount had been the basis for proportionate allocation of costs, there was no objection or illegality attached to it. The Court of course in that case was cognizant of the circumstances that the principle of headcount had been applied consistently in the past by the assessee. Revenue relied on ITAT order wherein it was held that headcount principle was irrational given the disparity of salaries of the employees of the different segments.

High Court also noticed that the principle of applying the headcount method has not been universally accepted and was in fact rejected by Delhi High Court in case of Continental Carriers. However, Court in that case also considered the fact that the assessee had not followed the consistent method; and that the issue of allocation of such expenditure was in a different context of deduction claimed under section 80(4). High Court observed that the headcount basis was an acceptable principle and known to law, which was also recognised by co-ordinate bench ruling in case of EHTP India. High Court noted that although the co-ordinate bench also considered the previous practice of the assessee, at the same time it did not in any manner frown upon the application of that principle.

High Court stated that the two possible choices, i.e. turnover method as well as the headcount method in the present case were not justified. Concededly, the expenditure incurred by the assessee was common for two different segments. The tax authorities broadly agreed that expenditure could be allocated on the basis of proportionate turnover of the concerned segment. Having done so, the alternative was open to accept one or the other principle. Therefore, the choice of the assessee in relying upon the headcount principle per se could not have been rejected. High Court thus ruled in favour of the assessee.

Separately on the issue of selection of comparables, High Court noted that ITAT has remitted the matter for consideration of one of the comparables i.e. for M/s Indus Technical and Financial Consultants Ltd. The reasoning of the ITAT was that the details on the website, could not be relied upon. High Court observed that it was argued that this comparable was included by the TPO relying upon the material available at that time from the internet. If such were the decision, the assessee could possibly also have relied upon material similar to such material. High Court did not pass any final decision on the merits and held that it was open to AO/TPO to take into consideration all the relevant material including credible material available with respect to the comparable in question.

Legal Update

Disciplinary Case

Summary of a disciplinary case, in the matter of:

Shri ABC vs CA. XYZ

Facts of the case:

CA. ABC of M/s. LMN & Co., Chartered Accountants (hereinafter referred to as the '**Complainant**'), in his Complaint, made the following allegations against CA. XYZ (hereinafter referred to as the '**Respondent**'):-

- The Respondent, partner of M/s KOP & Co., for the year 2005-06 has obtained Tax Audit assignments of 13 Societies of District Cooperative Central Bank in the name of the Complainant's firm and without knowledge of the Complainant. The Respondent prepared a letter head of the Complainant's firm on his computer, got prepared seal of his firm, which was stamped on audit reports and annexures, then the Respondent also affixed signatures of the Complainant's partner on Audit Reports and related documents.
- Thereafter, the Respondent submitted all these bogus signed Audit Reports and related documents to the Bank and concerned Income Tax Department. Then, he raised invoice under his signature and managed to obtain the payment from the bank in the name of his firm i.e. M/s KOP & Co. He also issued the receipts to the bank concerned, against the payment received.

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

- The Committee condemned the conduct of the Respondent as he failed to give any regard to the proceedings before Disciplinary Committee. The Respondent despite of notice failed to appear before the Committee and also not bothered to file any reply/rebuttal of the allegations at any stage of the proceedings.
- The crux of the complaint is that the Respondent had got the audit of 13 Societies in the name of the Complainant's firm on the basis of forged documents. The Committee noted that the Complainant got to know about the said modus operandi when M/s JQR & Associates wrote to the Complainant firm seeking NOC.
- As per the appointment letter, the Complainant was allotted audit of 13 Societies for the F.Y. 2005-06 however, he denied to have applied for and having done the audit.

- On perusal of the Tax Audit Reports i.e. Form 3CA, it has been noted that the audit reports bears the name of the Complainant firm as well as the stamp of the Respondent firm. Further, the signatures on the reports were of CA. XYZ, partner of the Complainant firm. The Committee was unable to comprehend as to how the audit report could bear the name and seal of two different Chartered Accountants firms whereas the audit was carried out by only one firm. Further, the Income tax returns of the said Societies also bore the seal of the Respondent firm. On perusal of the signature card available on record, it is evident that the signatures of CA. XYZ were forged.
- The Committee also noted that the firm seal used by the Respondent firm on the audit of Societies which were allotted to him for the F.Y. 2005-06 was actually the same which has been used in the alleged 13 Societies allotted to the Complainant firm, meaning thereby that the Respondent used the seal of the firm deliberately so that the money could be released in the name of his firm.
- Moreover, non-submissions of reply by the Respondent at any stage imply that he is in agreement with the allegations and he has nothing further to add in this matter.
- The said conduct of the Respondent has brought disrepute to the profession of the Chartered Accountancy and is unbecoming of a Chartered Accountant.

In view of the above, the Committee observed that the conduct of the Respondent has brought disrepute to the profession of the Chartered Accountancy and accordingly held the Respondent GUILTY of 'Other Misconduct' falling within the meaning of Clause (2) of Part IV of First Schedule to the Chartered Accountants Act, 1949. Pursuant thereto, the Committee, after affording an opportunity of hearing and on considering the facts of the case ordered that the name of the Respondent be removed from the Register of Members for a period of three (3) months. ■

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