Legal Update

Legal Decisions[1]

Income Tax

LD/68/18, [ITA Nos.1062 to 1068/PUN/2017] Sava Healthcare Ltd. vs. Assistant Commissioner of Income Tax, 27/06/2019

TPO lacked jurisdiction under section 92CA to decide the place of effective management of assessee's business affairs.

Pune ITAT quashed TPO's action of determining control and management of affairs of assessee business entities. TPO had also rejected TNMM based benchmarking done by the assessee and instead used Profit Split Method vide which 70% of the world profits were added in the hands of the assessee. TPO had held that all the brain and functions of the group are situated in India and that AEs in Dubai and Mauritius were not doing any functions. Assessee argued that the issue of deciding the control and management of affairs of assessee is a 'status of residence' to be decided in the hands of assessee and such decision of 'status of residence' is not in the realm of determining ALP of international transactions. ITAT held that no powers under section 92CA have been bestowed on TPO to decide the situs of control and management of affairs of assessee's business and that it is the Assessing Officer who has to come to a finding in this regard. Since the assessee had raised a jurisdictional issue on whether concerned transaction was an international transaction, which was not answered by any of the authorities, ITAT held that the entire TP proceedings were in violation of Section 92CA(1) and thus illegal.

LD/68/19 , [ITA No.1493/Kol/2015] Appejay Surendra Corporate Services Pvt. Ltd. vs. Deputy Commissioner of Income Tax, 26/06/2019

'Break up' value approach used by Assessing Officer for determining Fair market value of group company's shares sold, rejected by ITAT

Long term capital loss from sale of unquoted shares of assessee's group-company, allowed to be set-off against long term capital gains. Assessee had sold certain shares of group-company to another group concern at the same price at which it was purchased and long term capital loss arose due to indexation of cost. The AO calculated break-up value of shares at ₹ 1170/- which was more than 100 times of its book value and held that share transfer was a colourable device and the long term capital loss claim was thus disallowed. ITAT held that Revenue ought not have applied the break-up value method for determining the fair market value (FMV) of shares in the year of sale. ITAT also observed that purchase transaction was accepted to be genuine by Revenue four years back even though the break up value that time was much higher. ITAT noted that pursuant to restructuring in the whole group, the shares were transferred to Apeejay Family Trust and noted that the break-up value could be resorted to in exceptional circumstances.

LD/68/20, [ITA No.2316/Ahd/2014], Deputy Commissionerof Income Tax vs. Vishal Engineering and Galvanizers Services, 25/06/2019

Conversion of firm into a company is not a case of 'distribution' of property under section 45(4).

Assets were revalued upon conversion of assessee-firm into a company and capital gains addition under section 45(4) was made by the Assessing Officer. The revalued amount was distributed to the partners' capital accounts in their profit sharing ratio (PSR) after which the assessee got converted into a private limited company and shares were allotted to the partners of the erstwhile firm in their PSR. Distinction between 'vesting of the property' and 'distribution of the property' drawn by ITAT. Upon conversion of firm into Company the properties vest in the company as they exist, whereas, distribution on dissolution presupposes division, realisation, encashment of assets and appropriation of the realised amount. Condition under section 45(4) about transfer by way of distribution of capital assets is not satisfied, as held by ITAT.

LD/68/21, [Writ Petition No. 1230 OF 2019 (Bombay)] Swastic Safe Deposit and Investments Ltd. vs. Assistant Commissioner of Income Tax, 25.06.2019

Non-disclosure of receipts doesn't necessarily imply 'income escapement'

Re-assessment notice quashed holding that mere non-disclosure of receipt would not automatically imply escapement of income. Certain shares of

[1]*Contributed by CA. Sahil Garud, CA. Mandar Telang, GST & Indirect Taxes Committee, Disciplinary Directorate and ICAI's Editorial Board Secretariat. For details please visit Editorial Board webpage at https://resource.cdn.icai.org/55564eboard44941.pdf*
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.

Piramal Healthcare were sold by one company which had amalgamated with assessee. AO had issued re-assessment notice holding that non-disclosure of sale consideration receipt by assessee in its return amounted to 'escapement of income'. High Court noted that the shares were held by the amalgamating co. for a period of 12 months and so stated that though there was non-disclosure, if the documents on record establish that the receipt did not give rise to any taxable income, it would not be open for the AO to reopen the assessment. High Court also observed that assessee had accounted for the profit arising on the sale of shares in his calculation of MAT (Minimum Alternate Tax).

LD/68/22, [(ITA No.807 to 810/KOL/2018)], West Bengal Housing Infrastructure Development Corporation Ltd. vs. Deputy Commissioner of Income Tax, 17/06/2019

Deduction under section 80IA(4) denied on income from sale of flats and lands to assessee a State Corporation

Assessee's claim of deduction under section 80IA(4)(i) on income from sale of flats and land with respect to its New Town project; Assessee held to be not engaged in developing 'infrastructure facility'. ITAT held that assessee's New Town project was not an integral part of highway project in terms of Explanation (b) to Section 80IA(4)(i). Definition of 'housing or other activities' should not be read isolated from an integral part of the highway project. Assessee's claim held to be against the spirit of Section 80IA since the intent behind Section 80IA was to encourage private investment in infrastructure projects.

LD/68/23, [WP(MD)No.12595 of 2018 (Madras High Court)], Karur Vysya Bank Ltd. vs. Principal Commissioner of Income Tax, 12/06/2019

Tax though wrongly paid can't be retained by the Revenue.

High Court held that Revenue was unjustified in retaining the tax paid by the assessee towards the FBT for a year when the matter was ruled in favour of the assesse by ITAT for the immediately preceding year. Assessee filed an application under section 264 for AY 2007-08 which was rejected by Pr. CIT on the grounds of delay and absence of a 'revisable order'. High Court held that application must have been treated as one for refund and processed under section 119 while agreeing that order under section 264 was unsustainable in absence of a revisable order. When the assessee was not liable to pay the tax in question, the Revenue had no business to retain it even if it was wrongly paid. High Court directed Revenue to pass the refund order.

LD/68/24, [Tax Case Appeal No.211 of 2019 (Madras High Court)], Bhagavathy Velan vs. Deputy Commissioner of Income Tax, 02/06/2019

Unpaid price of flat sold by company to director-shareholder, taxable as 'deemed dividend'

Flat was sold by a company to its director (assessee) and the portion of unpaid price of such flat was considered to be a deemed dividend by the Revenue under section 2(22)(e). High Court upheld ITAT's order holding that the transaction was to be treated like an advance to the Director falling within the ambit of Section 2(22)(e). Assessee's argument about maintainability of appeal before the ITAT owing to its low tax effect as per CBDT instruction was rejected by High Court. High Court remarked that once the Tribunal had pronounced upon the merits, the contention raised by the assessee on non-maintainability of appeal became infructuous. High Court further held that the instructions of CBDT are neither binding on the Court nor the Tribunal, nor the Board could direct the concerned Court or Tribunal to compel the litigant to withdraw such appeal.

Transfer Pricing

LD/68/25, [Income Tax Appeal No.30 of 2017 (Bombay High Court)], Principal Commissioner of Income Tax vs. Goldman Sachs (India) Securities Pvt. Ltd., 10/06/2019

Revenue's challenge to exclusion of comparables by ITAT, dismissed by the High Court

Assessee was engaged in investment advisory services for investment in Indian equities and strategic investments. ITAT order excluded 6 comparables in benchmarking process in case of assessee on the ground of significant related party transactions and functional differences, considering that these companies were engaged in

activities like advisory to mergers and acquisition, merchant banking, agency, etc. Revenue raised additional questions before the High Court challenging exclusion of 6 comparables. High Court rejected Revenue's challenge and noted that there was no error in ITAT's reasoning of the companies from final list of comparables.

LD/68/26, [Tax Case No.118 of 2018 (Madras High Court)], India Trimmings Pvt. Ltd. vs. Deputy Commissioner of Income Tax Pvt. Ltd., 10/06/2019

ITAT held that Dispute Resolution Panel (DRP) had no power to either to direct TPO to decide the percentage of risk adjustment to be calculated or to direct him to make further enquiries and decide the matter. Revenue was in appeal against the final assessment order passed under section 144C(13) r.w.s 143(3) and did not question DRP's jurisdiction. DRP reduced the variation proposed in draft assessment order, which translated into a final assessment order. This final order was questioned by the Revenue on merits. High Court held that ITAT was incurred in holding that DRP had exceeded its jurisdiction. As per the High Court, the ITAT ought to have adjudged the final assessment order on merits. Order of ITAT was thus set-aside by the High Court.

Service Tax

LD/68/27, [Service Tax Appeal No. 86619 of 2018 (CESTAT Mumbai)], Popular Caterers vs. Commissioner of CGST, 08.05.2019

Demand on 40% non-taxable component in 'catering service' quashed.

Demand was raised on 40% non-taxable component of 'outdoor catering' service. As per CESTAT, a pure sale, unassociated with delivery of goods and services together, is not to be considered as service and delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 366 of Constitution is not a 'service'. CESTAT stated that definition of service as contained in 65B(44) and exempted service in 66D were to be read conjointly and not in exclusion of each other. As per CESTAT, catering service includes both sale of food and service for consumption of food and therefore the other component of 40% of gross value received from catering services cannot be definitely considered as exempted services to make Rule 6(3) of CENVAT Credit Rules, 2004 applicable and to maintain separate records for availment of CENVAT credit on it including on processed food purchased as raw material. CESTAT also dismissed revenue's plea on maintainability of petition stating that only because the audit party had found some credit availed has inadmissible, suppression of fact is made out.

LD/68/ 28, (2019-TIOL-1976-CESTAT-DEL), M/s Khanna Contructions Vs. Commissioner of Customs, CGST and Central Excise, 23/05/2019

When the taxable service is exempted with retrospective effect, Tribunal held that the service tax paid earlier would be regarded as merely a deposit in excess and is not duty as such and thus, the provisions of section 11B(2) of CEA, 1944 i.e. unjust enrichment are inapplicable to claims filed for refund of such excess deposit.

LD/68/ 29, (2019-TIOL-1768-CESTAT-AHM), CCE&ST Vs. M/s Reliance Industries Ltd, 13/03/2019

As regards common credit pertaining to DTA unit and SEZ unit and distributed by DTA-ISD to SEZ unit, the refund claim filed by the SEZ unit cannot be rejected, if such invoice is filed within one year from the date of ISD invoice issued to SEZ unit by DTA unit.

LD/68/30, (2019-TIOL-1757-CESTAT-ALL), M/s Kush Construction Vs. GST NACIN, 20/02/2019

Tribunal set aside service tax demand raised by the department on difference between amounts reported in Form ST-3 and amounts shown in Form 26AS filed under Income Tax Act, 1961, without further examining the reasons for such differential or applicability of any exemption/ abatement notification.

LD/68/31, (2019-TIOL-1768-CESTAT-MAD), M/s Pricol Ltd. Vs. Commissioner of GST and Central Excise, 29/01/2019

The transfer/return of excess Input Service Distributor (ISD), credit by a unit to the ISD and redistribution of such credit by ISD to other units is not prohibited either under Rule 7 of CCR, 2004 or under any other provisions of service tax law.

LD/68/32, (2019-TIOL-1853-CESTAT-DEL), Ranjeet Sharma Vs. CCE&ST, 26/12/2018

For the purpose of determining threshold limit prescribed under small scale exemption, value of services shall be arrived at after allowing abatement. While computing the threshold limit of small scale exemption, the appellant considered the value of services after abatement, whereas department did not accept the same and raised impugned demand. The short question for consideration in present appeal was whether for determining eligibility to small scale exemption provided under service tax law, the full value of services or abated value of services shall be taken into consideration.

Tribunal noted that the issue is no more *res integra* in the light of decisions in *Shri Ashok Kumar Mishra vs. CCE &ST, Allahabad [Final Order No. 71841/2017-Cu(DB) dt. 01/12/2017], M/s. Aryavrat Housing Construction (P) Ltd. vs. CCE & ST, Bhopal [Final Order No. 50672-50673/2018 dt. 15.01.2018]* and *Alok Pratap Singh & others vs. CCE, Allahabad [Final Order No. 72407-72411/2018 dt. 5.10.2018],* wherein it has been held that the value of the services required to be computed for the purpose of small scale exemption benefit is the value arrived at after allowing the abatement.

Excise

LD/68/33, [Central Excise Appeal No. 81 of 2019 (Bombay High Court), Commissioner of Central Goods and Service Tax & Central Excise vs. Alfa Packaging, 18.06.2019

Though matter was pending before Supreme Court, Revenue must pay interest on refund sanctioned to assessee pursuant to High Court order.

Pursuant to the High Court ruling in the assessee's favour, CESTAT had held that the assessee was entitled to interest under section 11BB of the Central Excise Act, 1944 (Act) from expiry of 3 months from date of receipt of application for refund till the time of receipt of principal amount to the assessee. Revenue had denied this interest on refund on the ground that order of High Court was pending in further appeal before the Supreme Court. CESTAT ruled that a mere pendency of the appeal before the Supreme Court does not justify ignoring the statutory provisions of Section 11BB. High Court upheld this order of CESTAT.

Legal Update

Disciplinary Case

Conducting of tax audit of certain societies by Respondent in the name of Complainant's firm on the basis of forged documents – Denial by Complainant as to ever applying or having done audit of said societies - Non-submission of any reply/rebuttal of the allegations at any stage of the proceedings by the Respondent

Held:

The Committee, at the outset, condemned the conduct of the Respondent as despite having been given numerous opportunities he failed to give any reply/rebuttal of the allegations at any stage of the proceedings. As regards the allegation of obtaining 13 tax audits of the Societies in a Financial Year, in the name of the Complainant without his knowledge, it was noted that the Form 3CA bears the name of the Complainant firm as well as the stamp of the Respondent firm along with the signatures of one of the 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 signature of the partner of the Complainant firm was forged.

The Committee noted that the firm's seal used by the Respondent firm on the audit of Societies which were allotted to him for the F.Y. 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, the 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. Thus, on overall consideration, the committee is of the view that, although, the Respondent was of initially enquired for the professional and other misconduct under both First and Second Schedule but after conducting the enquiry, the Committee was of the opinion that the Respondent was guilty of other misconduct under the First Schedule only. Accordingly, the Committee ordered that the name of the Respondent be removed from the Register of Members for a period of three months.