Legal Update

Legal Decisions[1]

Income Tax

LD/68/34, [Delhi High Court ITA 828/2005] Commissioner of Income Tax Vs. Rajiv Gupta, 31/07/2019

Rejection of books relating to unexplained 'cash sales' upheld by the Delhi High Court.

A search and seizure operation was carried on a third party in Calcutta which declared huge amount of silver under the Voluntary Disclosure of Income Scheme (VDIS). Simultaneously search was conducted on assessees where it was found that assessee had given accommodation entries to this third party group who had declared high quantities of silver in the VDIS declarations for the purposes of earning commission thereon. The Assessing officer had invoked Section 145(3) and rejected books of accounts of assessee since assessee was unable to furnish the complete information as to the names and addresses of the alleged buyers of silver items alongwith quantity and amount. High Court noted that assessee had failed to record the creditworthiness, identity and genuineness of the transactions of the providers of such cash. High Court therefore held that the Assessing Officer had correctly rejected the books of accounts of the assessee, after duly recording satisfaction thereof.

LD/68/35, Special Leave Petition No. 20058/2019], Rajan Bhatia Vs. Central Board of Direct Taxes, 29/07/2019

Delhi High Court order upheld constitutional validity of dividend income taxability under section 115BBDA; SLP filed against this order dismissed.

Delhi High Court had upheld constitutional validity of Section 115BBDA and proviso to Section 10(34) providing for taxation of dividend income where dividend income exceeds ₹10 lakhs; Petitioner's plea before Supreme Court that this provision does a discrimination since it is applicable only to resident taxpayers and it does not apply to domestic companies and non-residents, was rejected by the Supreme Court. In this regard High Court had noted that taxation regime applicable to non-residents need not be identical to that applicable to residents.

LD/68/36, [ITAT Kolkata I.T.A. No. 29/KOL/2015], Deputy Commissioner of Income Tax Vs. Turner Morrison Limited, 26/07/2019

Amount received by Parent company on liquidation of subsidiary company; held to be taxable as Capital Gains.

Assessee-Parent-Company had received amount on liquidation of a subsidiary company. Assessee had computed long term capital loss by reducing the indexed cost of shares held by it of its subsidiary company from the liquidation amount received; ITAT held that Section 46(1) was not applicable in assessee's case since there was no distribution of assets by the company in liquidation and rather assessee had received money as shareholder on the liquidation of a Company as per situation opined in Section 46(2). On the matter where assessee argued that since it had actually received money in prior year and it should have been taxed then, ITAT held that event of liquidation occurs on the date on which a company is winded up or the winding up process is complete. ITAT thus remanded the matter back to AO to compute capital gains as per its ruling.

LD/68/37, Income Tax Appeal No. 05 of 2010 Uttarakhand High Court

B.J. Services Company Middle East Limited Vs. Deputy Commissioner of Income Tax, 25/07/2019

Interest under section 234B held to be applicable to Non-resident Company

Assessee, a UK company argued that since its income in India was subject to TDS under section 195, Section 234B interest cannot be levied relying on coordinate bench ruling in Maersk Co. Ltd; High Court distinguished assessee's reliance on this ruling noting that it dealt with Section 234B interest levy on employee for short deduction of 'TDS under section192'. High Court held that considering two Sections viz 192 and 195 on equal footing would have absurd consequences. Assessee had income from interest on income tax refund itself, whereby TDS was done at 15% by the Department whereas assessee's income was taxable at 42%. High Court stated that consequence of accepting assessee's argument would mean that Income Tax department should collect interest for short-deduction of TDS on the interest amount paid on the income tax refund to the assessee from itself, which was absurd.

[1]*Contributed by CA. Sahil Garud, CA. Mandir 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.

LD/68/38, [ITA No. 4673 / Del / 2016; ITAT Delhi], Assistant Commissioner of Income Tax Vs. HAL Offshore Limited, 23/07/2019

Assessee had made payments to arbitrators for an out-of-court settlement without deduction of TDS. Revenue had disallowed these fees under section 40(a)(i). As per the assessee arbitrators were not rendering any service to the assessee company, and since their services were in the nature of court procedure for out of court settlement, TDS under section 194J was not applicable; ITAT noted that fees were paid to arbitrators who performed 'legal functions' of mediating the dispute, and thus the same were in nature of professional fees where TDS under section 194J was ought to have been deducted; ITAT thus confirmed the disallowance under section 40(a)(ia) and ruled the matter in favour of Revenue.

LD/68/39, [ITA No. 773/CHD/2018, ITAT Chandigarh], Shri. Pankil Garg Vs. Principal Commissioner of Income Tax], 17/07/2019

Gift by an HUF to its member held to be not taxable under section 56(2)(vii)

The Assessing Officer (AO) had held that gift received by assessee from his HUF was not taxable relying on certain rulings, pursuant to which the powers under section 263 were invoked by the Principal Commissioner; ITAT held that member of the 'HUF' has a pre-existing right in the family properties, and when an individual member receives any sum either during the subsistence of the 'HUF' or on partition of the 'HUF' in-lieu of his share in the joint family property, it cannot be considered as "a gift without consideration by the 'HUF' or by the other members of the 'HUF'"; However when an individual member throws his self-acquired property into common pool of 'HUF', it will constitute 'income' of the HUF, however, the same will be exempt owing to inclusion of 'member' in the definition of 'relative' for 'HUF'; ITAT stated that because of this reason HUF has not been included in the definition of relative in explanation to Section 56(2)(vii) as it was not required; ITAT held that AO's order was not erroneous and thus order under section 263 was quashed.

LD/68/40, [ITA No. 3381(Bang)/2018, ITAT Bangalore], Smt. P.K. Viaylakshmi Vs. The Income Tax Officer, 28/06/2019

Under a will, assessee (wife) was given "right to life interest" by her late husband in respect of his immovable properties without any power to mortgage, encumber or alienate the same and it was further mentioned that after assessee's death, his properties should go to his 2 nephews. Property was jointly sold by the assessee and her nephews and deduction under section 56EC was claimed by each one of them separately. Revenue held that only assessee was the owner of the property after her deceased husband and thus 54EC benefit was available only to her. ITAT observed that assessee relinquished her "right to life interest" in the immovable property while the two nephews transferred the right to title. As per ITAT each of them possessed a kind of right in the property which was transferred by virtue of sale deed and thus capital gains arose to all the three persons. ITAT noted that 'right to life interest' which was possessed by **assessee was a 'right in person',** which was relinquished. ITAT thus held Section 54EC benefit was available to assessee as well as to the two nephews separately.

Transfer Pricing

LD/68/41, [ITA 692/2019, Delhi High Court], Principal Commissioner of Income Vs. Nokia Siemens Network India Pvt. Ltd., 26/07/2019

ITAT had affirmed inclusion of certain comparable companies in manufacturing and installation segment, which was challenged by the Revenue on the ground of persistent losses. ITAT had noted that the finances of the three comparables from their respective annual reports showed a general trend in the industry, of either loss-making or declining revenues. High Court noted ITAT's observation that the comparable had similar functional profile. High Court held that ITAT's reasoning behind inclusion of concerned comparables was not perverse and thus dismissed Revenue's appeal.

LD/68/42, [ITA 532/2019, Delhi High Court], Avaya India Pvt. Ltd. Vs. Assistant Commissioner of Income Tax, 24/07/2019

Assessee is engaged in IT enabled services segment; Revenue had used TCS E-Serve Limited & TCS E-Serve International Limited as comparables for benchmarking assessee's transactions which was challenged by the assessee. High Court noted that not only the comparables have to be functionally similar but should have similar business environment and risks as the tested party. High Court observed that TCS was not a suitable comparable as per FAR analysis since it had huge turnover, assets employed,

intangibles and close connection with the Tata Group of Companies making a huge contribution to TCS towards brand equity, whereas Assessee was a captive service provider without much intangible and risks; High Court thus ruled in favour of the assessee and excluded TCS as a comparable.

GST

LD/68/43, [2019-TIOL-1656-AHM-GST], Shabnam Petrofils Pvt Ltd vs. Union of India & 1 other(s), 17/07/2019

HC struck down proviso prescribing lapsing of ITC accumulated up to 31.07.2018, in case of certain notified goods (mainly from textile industry) for which there were restriction on refund of unutilised accumulated ITC on account of inverted duty structure.

Service Tax

LD/68/44, [Central Excise Appeal No. 46 of 2019, Bombay High Court], Dilip Chhabria Design Pvt. Ltd. Vs. The Commissioner of Central Excise, Pune, 11/06/2019

Penalty for non-deposit of tax collected upheld inspite of financial difficulty of taxpayer.

Assessee had recovered amount from its customers and did not pay it to the Government; High Court stated that such non-payment was certainly with the intent to evade the service tax as there was no justification for keeping the amounts recovered from customer with itself and not passing it over to Government on whose behalf it is collected. Further Assessee had also misrepresented to its customer that the collected tax shall be paid over to the Government. As per High Court, malafide intention of assessee was also clear, and penalty under section 78(1) of the Finance Act 1994 was leviable. High Court opined that financial difficulties faced by the appellant can never justify the non-payment of tax to the Government.

LD/68/45 , [2019-TIOL-2124-CESTAT-MUM], M/s Arcadia Shipping Ltd. Vs. The Commissioner of CGST & CX, 08/05/2019

Even prior to March 2016, 'ocean freight' cannot be regarded as 'exempt service', and no reversal under Rule 6(3) of CCR, 2004 is required for Cenvat Credit attributable to ocean freight.

LD/68/46 , [2019-TIOL-1547-HC-AHM-ST] The Principal Commissioner Vs. M/s Shreno Ltd., 12/04/2019

High Court upheld order of Tribunal that the assessee is not required to reverse 8%/10% proportionate Cenvat Credit under Rule 6(3) of CCR, 2004, as sale of immovable property after obtaining completion certificate is not exempt service at all.

LD/68/47, [2019-TIOL-2217-CESTAT-DEL], Siwal Infracon Pvt. Ltd vs. Commissioner of Central Excise and Service Tax, 03/12/2018

Tribunal held that no service tax liability would arise in case the amount of mobilisation advance is withdrawn subsequently as no service is provided.

Excise

LD/68/48, Excise Appeal No.2 of 2018, Bombay High Court Cipla Ltd. Vs. The Commissioner of Central Excise, Goa, 25/03/2019

During the course of audit, it was noticed that the assessee had availed credit of inputs to the extent used in manufacture of non-excisable products, which was subsequently reversed by the assessee. Revenue had levied interest under Rule 14 of Cenvat Credit Rules, 2004 with penalty under Rule 15, which was confirmed by CESTAT. Bombay High Court noted that even if the assessee had not utilised Cenvat Credit ultimately, however, since it had admittedly availed the credit on the entire inputs knowingly well that the entire inputs would not be used exclusively for excisable goods, it was liable to pay interest under Rule 14. High Court stated that amendment to Rule 14 whereby the words 'taken OR utilised' wrongly were substituted by the words 'taken AND utilised wrongly' were substituted, was applicable prospectively and not retrospectively; Notice of demand was issued much prior to date of amendment to Rule 14 and thus the benefit of such amendment was not available to the assessee; High Court thus upheld the demand of interest and penalty.

LD/68/49 , [2019-TIOL-2005-CESTAT-Bang] M/s V M G R Hotels and Resorts Pvt. Ltd vs. Commissioner of Central Tax and Central Excise, 09/05/2019

Tribunal relied upon decision of Hon'ble High Court in *CCE, Coimbatore vs. Flow Tec Power: 2006 (202) ELT 404;* wherein it was held that unjust enrichment is not applicable even when the refund amount is shown as expenses in the Profit & Loss account as the assessee has suffered the duty and not passed on to the customers and held that claim of refund amount in Profit & Loss as expense does not amount to unjust enrichment.

Disciplinary Case

Failure to report fraudulent transactions by concurrent auditor – Plea of systematic fraud unsustainable- Concurrent auditor cannot take shelter that neither internal auditor nor any previous auditor pointed out any irregularities

Held:

The Committee has condemned the Respondent's failure in reporting the fraudulent transactions in the Concurrent Auditor report. The Committee had gone through the guidelines and noted that the guideline relating to the periodicity of checking by the Concurrent Auditors clearly mentioned the areas to be covered by the Concurrent Audit. The Committee was also not satisfied with the submission of the Respondent that he had not been given passwords and on account of this, he was not able to verify all accounts individually. Accordingly, the Committee felt that in the afore-stated prevailing circumstances, the Respondent was immediately required to write to the Branch manager/Management but it appears that he had not written a single letter during the period of audit about the aforesaid irregularities to the Branch Manager/ Management. Moreover, in his report, he nowhere commented that he was not able to check/verify all accounts individually on account of non-availability of password. In addition to above, although the Respondent admitted that the Branch did not have proper internal controls, yet he did not take additional steps to check whether irregularities or fraud in the accounts were present or not. Accordingly, the Committee is of the view that the Respondent failed to check vouchers and verify all accounts individually as required of him as per the scope of work assigned to him and accordingly, failed to report about the irregular accounts and heavy returning of cheques. As per the guidelines, it is the duty of the Concurrent Auditor to scrutinise all the vouchers and comment on high value transactions. Therefore, the Committee is of the view that even though Kite flying operations were continuing in January 2008 in the branch during which the Respondent was not the Concurrent Auditor, it could have been detected if the Respondent had carried out his duties due diligently. Accordingly, the Committee holds the Respondent guilty of professional misconduct falling within the meaning of Clauses (7) & (8) of Part I of the Second to Chartered Accountants Act, 1949 {as amended). However, the case of the Respondent does not qualify for a maximum sentence as he had conducted concurrent audit only for a period of 1 month. Accordingly, the Committee ordered that the Respondent be reprimanded.