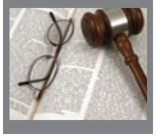
Legal Decisions[1]

DIRECT TAXES



Income Tax

LD/65/71

Siemens Public Communication Networks Pvt. Ltd.
vs.
CIT, Bangalore and Anr
7th December, 2016

Voluntary contribution received by a loss making Indian subsidiary of a non-resident company from its parent, aimed at protecting its Indian investments, shall be construed as capital receipt

The assessee is an Indian company which is engaged in the business of manufacturing Digital Electronic switching systems, computer software and also software services. It had filed ROI for AYs 1999-2000, 2000-2001 and 2001-2002 declaring losses.

The subvention received by the Assessee Company from its parent Company in Germany in a situation where the Assessee Company was making losses was treated to be a revenue receipt by the Assessing Officer. Though the First Appellate Authority, i.e., Commissioner of Income Tax (Appeals) and the learned Income Tax Appellate Tribunal (Tribunal) had reversed the said finding and held the said receipts to be capital receipts, the High Court had restored the view taken by the Assessing Officer. Aggrieved by the order of the High Court, the Assessee filed appeals before the Supreme Court.

The Supreme Court observed that the question of law that was presented before the High Court, namely, whether subvention was capital or revenue receipt, was answered by it by making reference to two decisions of the Supreme Court in *Sahney Steel & Press Works Ltd., Hyderabad versus Commissioner of Income Tax, A.P.I, Hyderabad [(1997) 7 SCC 764 = 2002TIOL11SCIT* and *Commissioner of Income Tax, Madras versus Ponni Sugars and Chemicals Limited [(2008) 9 SCC 337]*. The Supreme Court noted that the High Court had held the view expressed by the Supreme Court that unless the grant-in-aid received by an Assessee is utilised for acquisition of an asset, the same must be understood to be in the nature of a revenue receipt to be a principle of law applicable to all situations. The Supreme Court held that this view taken by the High Court tends to overlook the fact that in both the above stated cases, the subsidies received were in the nature of grant-in-aid from public funds and not by way of voluntary contribution by the parent Company as in the present cases. The above apart, the voluntary payments made by the parent Company to its loss making Indian company can also be understood to be payments made in order to protect the capital investment of the Assessee Company. Accordingly, the Supreme Court held that the payments made to the Assessee Company by the parent Company for Assessment Years in question cannot be held to be revenue receipts. The Supreme Court also relied upon the view taken by the Delhi High Court in a recent pronouncement in *Commissioner of Income Tax versus Handicrafts and Handlooms Export Corporation of India Ltd. [(2014) 49 Taxmann.com 488 (Delhi)* in this regard.

Accordingly, the Supreme Court allowed the present appeals setting aside the order of the High Court.

LD/65/72

Ashok Prappan Sharma
vs.
Commissioner of Income Tax
24th November, 2016

Comparable sales cannot be overlooked for determination of cost of acquisition even if such sales are slightly subsequent in point of time relevant u/s 55(2) for the purpose of determining capital gains

The assessee is an individual and was made liable to income-tax on capital gains accruing from land acquisition compensation and sale of land. The AO and First Appellate Authority (FAA) took into account the declaration made in the wealth tax return with respect to the said plot of land as the cost of acquisition. Some instances of comparable sales showing higher value at which such transactions were made were also laid before the AO. The same were not accepted as such sales were subsequent in point of time whereas u/s 55(2) the crucial date for determination of the cost of acquisition is 1st April, 1974. ITAT observed that comparable sales cannot be ignored and determined the cost of acquisition by slightly reducing the value. Upon appeal, the High Court reversed the said finding, aggrieved by which the assessee went before the SC.

[1] Contributed by CA. Sahil Garud, Indirect Taxes Committee, CA. Mandar Telang and ICAI's Editorial Board Secretariat.
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SC observed that a declaration in the return filed by the Assessee under the Wealth Tax Act would certainly be a relevant fact for determination of the cost of acquisition which u/s 55(2) of the Act is to be determined by a determination of fair market value. Equally relevant for the purposes of aforesaid determination would be the comparable sales though slightly subsequent in point of time for which appropriate adjustments can be made as had been made by the learned Tribunal (from ₹70/- per square yard to ₹50/- per square yard). Comparable sales, if otherwise genuine and proved, cannot be shunted out from the process of consideration of relevant materials. The same had been taken into account by the learned Tribunal which is the last fact finding authority under the Act.

SC observed that was an on-going process under the Land Acquisition Act, 1894 for determination of compensation for a part of the land belonging to the Assessee which was acquired [39 acres (approx.)]. The Reference Court enhanced the compensation to ₹40/- per square yard. The above fact, though subsequent, would not again be altogether irrelevant for the purposes of consideration of the entitlement of the Assessee. However, as the determination of the cost of acquisition by the learned Tribunal was on the basis of the comparable sales and not the compensation awarded under the Land Acquisition Act, 1894 (the order awarding higher compensation was subsequent to the order of the learned Tribunal) and the basis adopted was open for the learned Tribunal to consider, SC took the view that in the facts of the present case the High Court ought not to have interfered with the order of the learned Tribunal.

SC thus reversed HC's order and restored ITAT's order.

LD/65/73

Paras Organics P. Ltd.

vs.

Union of India

18th November, 2016

Where the documents being relied upon by assessee in the rectification application were not brought to the notice of the Tribunal during the hearing of appeal, and the order was concluded without any objection, then such rectification application does not deserve to be entertained

The assessee's grievance in the instant case is that the impugned order of the ITAT did not deal with the assessee's application for rectification. The application for rectification before the Tribunal made a grievance that one order dated 26.10.2015 incorrectly records that the assessee was unable to substantiate its claim with documentary evidence. The ITAT rejected assessee's application for rectification by its order dated 17.06.2016.

HC observed that order dated 26.10.2015 states that it was pronounced in open Court in the presence of the learned representative from both sides at the conclusion of hearing on 26.10.2015. The above fact is not disputed in the rectification application. Therefore, if any facts were being incorrectly recorded, the objection to the same could have been raised for consideration of the Tribunal at the time i.e. when the order was dictated.

HC observed that further the portion of the order with which the petitioners have made a grievance and which was reproduced in the rectification application clearly records that the assessee was unable to substantiate its claim with documentary evidence. It does not state that no documentary evidence was filed before the Tribunal after negativing the submission of the assessee petitioner that no sufficient opportunity to lead its evidence was given by the lower authorities to the petitioner. It only concludes that the documentary evidence relied upon before it does not substantiate the claim of the petitioner. One more fact which is to be noted is that from the order on record, it is not at all clear whether or not any emphasis was placed during the course of the hearing on the document which formed a part of the paper book which the petitioner now seeks to rely upon. This is evident from the fact that the person who appeared on the hearing leading to the order dated 26.10.2015 is not the person who appeared at the time of the hearing of the rectification application on 17.06.2016. Further the rectification application itself deposes to certain facts which allegedly transpired during the hearing of the appeal and those facts have been deposed by the Managing Director of the petitioner company even without indicating that he was present at the hearing.

HC further observed that attention of ITAT was not invited on concerned page nos. 33 and 34 to the paper book submitted during the hearing of the appeal. HC remarked that assessee was only attempting a review of the order by ITAT so as to ensure that the ITAT takes a look at the documents which were part of the record and may not have been emphasised by the petitioner during the course of the hearing. All this must be considered in the context of the Tribunal recording in its order that the primary submissions of the petitioner were inadequate opportunity to present its case before the lower authorities. This fact has not in terms been disputed in the rectification application.

Thus, the HC decided not to interfere with the impugned order of ITAT dated 17.06.2016 which rejected the assessee's application for rectification.

LD/65/74

Commissioner of Income Tax, Chennai
vs.
Shriram City Union Finance Ltd.
15th November, 2016

Interest charged by a public company in relation to bad debts, which are not regulated by the guidelines framed by National Housing Bank, cannot be taxed u/s 43D

The Revenue had preferred the present appeal challenging the order, whereby the ITAT had held that additional finance charges could be shown for Income Tax purposes on receipt basis, though the assessee has accounted for the same in the regular accounts on accrual basis and therefore were not includible in the taxable business income, ignoring the special provisions contained in Section 43D.

HC observed that Section 43D of the Income-tax Act is attracted to cases of Public Financial Institutions, Scheduled Banks, State Financial Corporations, State Industrial Investment Corporations or Public Companies, which charge interest in relation to bad or doubtful debts. HC perused Section 4A of the Indian Companies Act 1956 to note that the assessee was not a Schedule Bank or the State Financial Corporation or State Industrial Investment Corporation nor a Public Financial Institution, and thus Section 43D(a) did not apply to the assessee. As per clause (b) to Section 43D, in case of a public company, the income by way of interest in relation to bad or doubtful debts, having regard to the guidelines issued by the National Housing Bank in relation to such debts shall be chargeable to tax. However, HC observed that though the assessee is a Public Company, the debts or doubtful debts are not of those types which have been considered to be regulated by the guidelines framed by the National Housing Bank and that there is agreement on both sides on this factual count. As a result, even clause

(b) of Section 43D of the Income-tax Act, 1961, is not attracted. HC accordingly dismissed the appeal.

LD/65/75

Steelco Gujarat Ltd.
vs.
Income Tax Officer
10th November, 2016

Interest earned on fixed deposits directly linked for opening of Letter of Credit (LC) towards import of plant and machinery is a capital receipt, which would go to reduce cost of asset; any income earned on such deposit is incidental to the acquisition of the plant and machinery

The company has a foreign currency account with State Bank of India, Tokyo with the approval of Reserve Bank, in which, the contribution from NRI promoters were credited for the payments required towards import of major plant and machinery from Japan. The company opened LC for import of plant and machinery, for which a lien was created for the equivalent amount of LC deposited in this account. The company earned interest on the said fixed deposit, which was placed for opening of LC for import of plant and machinery, in foreign currency, which was converted into rupees, either at the time of settlement of import transactions or on the date of balance sheet, whichever is earlier.

The company claimed that such interest earned was not at all taxable as the same cannot be included as income from other source. The company had earned the interest on the deposit which was required to be placed for opening of LC for import of plant and machinery, without which the LC could not have been opened.

The AO did not accept the contention of the company, and added the interest as *income from other sources*.

For the issue in hand, the Tribunal considered the Hon'ble Supreme Court's decisions in the cases of *Commissioner of Income Tax vs. Karnal Cooperative Sugar Mills Ltd.* and *Commissioner of Income Tax vs. Autokast Ltd*. The Tribunal opined that the decision of *Commissioner of Income Tax vs. Autokast Ltd.* shall be applicable in the current case as it is a three Judge Bench Judgement as against the decision in the case of *Commissioner of Income Tax vs. Karnal Cooperative Sugar Mills Ltd*, which is by two Judge Bench judgment, and thus, confirmed the decision of the AO.

However, the High Court took cognisance of the fact that the interest earned by the assessee was on the fixed deposit which was required for obtaining LC for purchase of plant and machinery, and opined that the decision of the Hon'ble Supreme Court in the case of *Karnal Cooperative Sugar Mills Ltd (supra)* shall be squarely applicable to the facts of the case on hand. In the case of *Karnal Cooperative Sugar Mills Ltd. (supra)*, the assessee earned the interest on deposit made to open the Letter of Credit for purchase of machinery required for setting up of its plant, where the Hon'ble Supreme Court held that such interest was a capital receipt which would go capital shifted, which would go to reduce cost of asset and that deposit of money was directly linked with purchase of plant and machinery and therefore, any income earned on such deposit is incidental to the acquisition of the assets for setting up of plant and machinery.

The High Court distinguished the Hon'ble Supreme Court's three bench judgment in the case of *Autokast Ltd (supra)* on facts of the case, as in that case the assessee had borrowed certain amount from IDBI and had deposited the same in the banks till it was used either in purchase of plant and machinery and/or installing them or in running establishment.

The High Court held that the learned Tribunal had committed error in holding that the interest income earned on the amount of deposit kept with the bank for the purpose of opening letter of credit used for the purpose of plant and machinery would be taxable as *income from other source*, and allowed the appeal of the company.

Transfer Pricing

LD/65/76

ICC India P. Ltd.
vs.
Income Tax Officer
24th November, 2016

Delhi HC rules that the matter shall be considered on merits by ITAT itself, instead of remanding to AO/TPO, since the matter pertained to the period of about 15 years ago and all necessary evidences were made available before the ITAT by the assessee.

The assessse's grievance in this appeal is that the ITAT while considering its appeal with respect to the exclusion of two comparables on the ground that they were related parties, firstly made observations which would impact on the merits of the case and secondly, remitted the matter instead of examining the materials–all of which was before it.

In the impugned order of the ITAT, the ITAT had remarked that *"...though the CIT(A) adopted the same parity of reasoning while deleting the two comparables chosen by TPO, he had not referred to any evidence on the record in support of the conclusion drawn that these comparables had related party transactions exceeding 15%, nor the Authorised Representative of the respondent assessee company could establish this fact conclusively before us. No relief can be granted based on mere reliance on the legal proposition without supporting evidence on record. Therefore, we are of the considered opinion that the interest of justice would be met, if the matter is restored to the file of the Assessing Officer for the verification of this issue..."*

ITAT thus remitted the issue back to the AO and directed him that if it was found on verification that the ratio of related party transactions is more than 15%, then these comparables should be excluded.

Before the HC, the assessee argued that remitting the matter for fresh assessment by TPO would be time consuming having regard to the fact that the issue pertains to AY 2002-03. However, the Revenue argued that the remand was justified since assessee did not dispute the filter of 15% pertaining to related parties' transactions.

HC noted the assessee's submission that there was sufficient evidence to establish the assessee's claim that the excluded transactions had to be considered in the TP (Exercise). HC therefore stated that *"So in the circumstances given that this pertains to assessments concluded for a period of about 15 years or so, interest of justice lie in the ITAT exercising the jurisdiction itself in examining all the materials before it."*

Thus, HC modified ITAT's order and directed the ITAT to afresh consider the matter on merits with respect to the related party transactions instead of remanding to AO/TPO, further adding that nothing stated in the original ITAT order shall prejudice either party.

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LD/65/77

M/s Indian Additives Limited

vs.

Asst. Commissioner of Income Tax

18th October, 2016

Fact of non-reporting of international transaction in Form 3CEB alone to be relevant for levy of penalty u/s 271AA; fact that no TP-adjustment was made on unreported transaction is not relevant; matter remitted to AO for limited purpose of determining whether any part of the purchase transactions from AE/s remained unreported per Form 3CEB.

During assessment proceedings for AY 2007-08, a TP adjustment was made in respect of purchase transactions made by the assessee from its AE. Subsequently, penalty proceedings were initiated u/s 271AA on the ground that the assessee failed to report an international transaction in the nature of purchases of ₹11.87 crore in its Form 3CEB. The AO rejected the assessee's argument that since no TP-adjustment was made on it by TPO, no penalty u/s 271AA ought to be levied. AO thus levied penalty of 2% of the value of the international transaction, which was confirmed by the CIT(A) also.

Before ITAT, the assessee contended that it had wrongly conceded to the non-reporting in Form 3CEB in the earlier proceedings, and it furnished reconciliation towards the same.

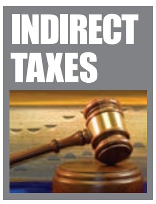
ITAT analysed the provisions of Section 271AA, 92D and 92E. ITAT observed that the fact of non-reporting of international transaction alone is relevant for levy of penalty u/s 271AA and that whether such non-reporting led to any adjustment to the income in assessment, which is a subsequent event not relevant.

ITAT observed that there was no mention of the purchase transactions, stated as unreported in Form 3CEB – which constitutes the default being sought to be penalised, either in the assessment order or in the penalty order, or even the appellate order. Further, ITAT stated that even the name of the AE from whom the purchases were made or statement that no comparability analysis *qua* the international transaction was carried out, was also missing from assessment order and penalty order.

ITAT remarked that *"In fact, the first thing that the assessee would ask, in case of uncertainty, is for being supplied the details of the unreported international transactions. The assessee's volte-face has not been explained."* Further, while it was an admitted position that no TP adjustment was made qua relevant purchases, the AO in his order has stated that downward adjustment of ₹7.52 crore was made qua the purchases.

ITAT observed that the transaction of purchase of the product for ₹2.41 crore, which is stated to be in fact reported twice, once as forming part of the transactions for ₹2.81 crore being purchases from AE/s, and another as part of purchase of raw materials, proprietary in nature, both of which stand reduced from the aggregate transactions of ₹17.09 crore in the reconciliation statement to arrive at the figure of ₹11.87 crore Now, it is purchases to the extent of ₹11.87 crore, and not those reduced from the total purchases that are stated to be unreported. ITAT remarked that 'reconciliation', rather than clarifying, further confounds what ought to be a simple matter of reporting or, non-reporting of some purchase transactions.

ITAT restored the matter back to the AO for limited purpose of determining whether any part of the purchase transactions from AE/s remain unreported as per Form 3CEB furnished for the year, as in fact admitted to be inadvertently so by the assessee in the penalty and the appellate proceedings. Thus, ITAT directed AO to decide on the levy of penalty based on his definite findings of facts, issued after hearing the assessee.



Service Tax

LD/65/78

Commissioner of Service Tax

vs.

Jet Airways (I) Ltd

Mumbai

25th November, 2016

SC affirmed CESTAT ruling holding that excess baggage charges collected by airliners are integral to main service of 'transporting passengers by air', not liable to service tax separately as 'transportation of goods by air'; Extended limitation period not invokable since there was no suppression as the airliners had duly disclosed the concerned receipts of excess baggage in their books of account.

There was a difference of opinion between Member (Technical) and Member (Judicial) on the issue of whether service tax was separately liable on excess baggage charges collected by the airlines.

The Judicial Member (JM) had held that the main service provided by airliner was *"transportation of passenger by air"* u/s 65(105)(zzzo) of the Finance Act and excess baggage charges are integral part of such service. He had therefore held that assessees were not required to pay any service tax on excess baggage charges.

However, the Member (Technical) had held the assessee as liable to service tax under *"transportation of goods by air"* service category in terms of Section 65(105)(zzn). He held that activity of carriage of excess baggage was distinct and separately identifiable and that only free baggage allowed with passenger could be called 'incidental' to service of transporting passengers by air.

The third member of CESTAT found that carrying of baggage by the airlines was incidental to the service of *"transportation of passengers by air"* and the same was classifiable u/s 65(105)(zzn) and that there was no separate contract in the facts of the case for transport of goods (excess baggage). Further, in the case of agreement of transport of passengers by air, there was no element of transport of unaccompanied goods. Thus, agreeing with the Member (Judicial), the third member held that the excess baggage charge collected by assessees was integral part of the service provided for *"transport of passengers by air"*.

Further, since the assessees had duly disclosed the receipts from passengers towards excess baggage in their books of account, maintained in the ordinary course of business, there was no concealment/ suppression. The third member noted that there was no deliberate defiance of the provisions of law or non-compliance with the provisions of Service Tax and therefore the penalties were also set aside. Further, the Third Member had also held that the extended period of limitation was not invokable.

Aggrieved against this order of CESTAT [i.e. majority view of the members of CESTAT], the Revenue approached the SC. The SC however dismissed the appeal for lack of merit.

LD/65/79

Gujarat State Fertilizers and Chemicals Ltd

vs.

Commissioner of Central Excise

22nd November, 2016

Sharing of expenses towards incineration and maintenance of storage/handling tank installed for receiving Hydro Cynic Acid ('HCN'), does not constitute 'service'; SC did not find it necessary to deal with question whether such receipt of HCN through pipeline amounts to "Storage and Warehousing Service" u/s 65(105)(zza) of Finance Act.

The assessee and Gujarat Alkalies & Chemical Ltd. ('GACL') are two public sector undertakings of the State of Gujarat. The assessee collected 'incineration charges' from GACL and as per revenue, the said amount charged by GSFC to GACL amounted to providing 'Storage and Warehousing Services'.

The assessee stated that though GSFC and GACL were receiving Hydro Cynic Acid ('HCN') from Reliance Industries Ltd. ('RIL') through common pipeline, which was partially utilised in their factory for manufacturing the product and was shared in the ratio of 60:40, since incineration process was also required to be undertaken, the charges, incurred on the said process, were shared in the ratio of 50:50. An agreement between assessee and GACL was also entered and thus there was no service.

A demand was confirmed by Revenue for 'service tax' along with interest and also a penalty u/s 78. The Commissioner (Appeals) as well as the CESTAT affirmed the original order of Revenue.

The assessee explained the process and modus operandi of process of receiving the Hydro Cynic Acid through pipeline and sharing of the incineration charges.

The assessee referred to the definition of 'storage' contained in various dictionaries. Assessee contended that the expression 'store' contained an element of continuity of creating a stock and using that stock on a future date and in the present case none of the ingredients were present. Assessee relied on SC ruling in case of *Bijaya Kumar Agarwala v. State of Orrisa–[(1996) 5 SCC 1]* and *Indian Oil Corporation v. AP Industrial Infrastructure Corporation Ltd. [(2015) SCC online SC 1290]*. Assessee also contended that no services of 'Storage and Warehousing' were provided to GACL. The expenses which were incurred on the maintenance of the said storage/holding tank were simply shared between the parties in equal ratio and, therefore, it could not be said that any service of storage and warehousing was provided by GSFC to GACL.

SC observed that admittedly HCN was received through pipeline from Reliance Industries Ltd. by GSFC and GACL and then shared in the ratio of 60:40, respectively. Since HCN was received through a common pipeline in order to save the expenditure, in order to enable GACL to receive the HCN through common pipeline, arrangement/agreement was entered into both the parties and thus handling facilities were installed in the premises of GSFC and handling expenditure were shared equally by both the parties and the same was mentioned in the agreement.

SC observed that the handling portion and maintenance including incineration facilities were in the nature of joint venture between GSFC and GACL. The payment which is made by GACL to GSFC is the share of GACL which is payable to GSFC. SC stated that by no stretch of imagination, it can be treated as common 'service' provided by GSFC to GACL for which it is charging GACL. SC further remarked that it did not find it necessary to go into question as to whether receiving of HCN through the said common pipeline in the tank which was setup by the GFSC and GACL amount to 'storage' or not.

Thus SC set-aside the orders of lower authorities and ruled in favor of assessee.

LD/65/80

Mandahana Exports vs. CCE, Kolhapur

Mumbai – CESTAT

22nd November, 2016

Reimbursement of expenses for common facilities like security expenses, repairs and maintenance, generator expenses, sanitary, drinking, street light expenses etc. cannot be subject to service tax under the category of renting of immovable property service.

The appellants were using their vacant factory premises for renting to various parties. The appellant was recovering a rent of ₹9,500/- from each party for every month and paying service tax on the same under the agreement with the lessee. Under the same agreement, the appellant was also providing certain common facilities like (a) Security Guard (b) Emergency Electricity Generator (c) Common sanitary block for workers (d) Repairs & Maintenance of factory building (e) Vehicle expenses and collecting actual expenses for the same. Department confirmed service tax demand on the amount collected for providing the aforesaid facilities under the category of renting of immovable property service, on the ground that, charges for the same are collected under the common agreement.

After perusing the agreement, the Tribunal held that only ₹9,500/- per month is paid for the purpose of renting of the premises. The other amounts are paid as reimbursement for services listed above. These services by no stretch of the imagination can be held as renting of immovable property service and hence demand under the said head cannot be confirmed.

LD/65/81

M/s Fortune Park Hotels Ltd.
vs.
CST, Delhi Tribunal
Delhi
03rd November, 2016

Where owner of the hotel collecting service charges under 'hotel operating agreement' has also collected from the operator, separately and on actual basis, reimbursement of salary paid by him to its employees deputed at the hotel for looking into day-to-day affairs of the hotel, such reimbursement shall not form part of value. Further, where the issue involved is a bona-fide issue of interpretation of legal points which were the subject matter of various decisions, invocation of extended period is unjustified.

The appellant is in the business of operating hotels under its various brands. Any entrepreneur interested in running a hotel under Fortune banner signs an "Operating Agreement" with the appellant. Appellant charges 'operating fees' under the aforesaid operating agreement. Besides, the appellant sends its senior manager on 'secondment' (deputation) to such hotels, who are involved in the actual operation and running of the hotel. Such employees are not employed by the hotel and they continue to be in the employment of the Appellant. Though, they continue to be on the rolls of the Appellant company, but in fact they work for the hotel in the actual day-to-day operation and running of the hotel. The 'salaries' and 'expenses' of such officers are continued to be paid by the Appellant but the same are reimbursed by the hotel on actual basis (without any markup). There is no dispute in the present case with regard to the operating fee paid under operating and running the hotel. The dispute is only confined to the salary and expenses of such officers reimbursed by the hotel to the Appellant.

The Tribunal held that in as much as in the present case, the salary of the employees sent by the appellant to their hotels is paid by the appellant directly to the employee and the same is being reimbursed by the hotel without any markup; in terms of the law declared by the Delhi High Court in the case of *Intercontinental Consultants and Technocrats Pvt. Ltd. vs. UOI 2013 (29) STR 9 (Delhi)*; such reimbursable expenses collected by the service provider from the service recipient cannot be held to be a part of the value of the services being provided by the appellant. The Tribunal also held that the issue involved is a *bonafide* issue of interpretation of legal points which were the subject matter of various decisions. As such it cannot be said that there was any suppression or misstatement with any *malafide* intention to evade duty on the part of the appellant, thus justifying invocation of longer period of limitation.

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LD/65/82

M/s Bhoruka Aluminium Ltd.
vs.
CCE&ST
Bangalore CESTAT

Where entire demand along with interest is paid in the course of inquiry or audit, in the absence of any material on record to prove that there was a suppression and concealment, show cause notice cannot be issued and penalty cannot be imposed.

The appellant manufacturer had availed the services of foreign company for maintenance and repair of capital goods installed in his factory in India but no payment of service tax was made under reverse charge mechanism. After visit at appellant's factory, the department issued letter to the appellant for making payment of service tax, which amount was paid by it. The appellant availed CENVAT credit of the said amount which was not disputed by the department. However, subsequently, a show cause notice was issued to the appellant for levy of penalty u/s 76, 77 and 78 of the Finance Act. All the penalties were confirmed in order in original and order in appeal before Commissioner (Appeals). Appellant disputed the same relying upon provisions of Section 73(3).

After perusing the provisions of Sections 73, 76 and 78, the Hon'ble Tribunal held that, provisions of Section 73(3) are very clear as it says that if tax is paid along with interest before issuance of the show cause notice, then in that case, show cause notice shall not be issued. The Tribunal held that the appellant was under bona-fide belief that he is not liable to pay service tax but during the audit, when the audit party informed him that he is liable to pay service tax, he immediately paid the entire service tax along with interest. Further, except mere allegation of suppression, the Department did not bring any material on record to prove that there was suppression and concealment of facts to evade payment of tax. Accordingly, penalty u/s 78 was held as unjustifiable and penalty order was set aside.

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LD/65/83

Principal Commissioner of Central Excise vs. Advinus Therapeutics Ltd. Pune

Tribunal explained scope of Rule 4 of Place of Provision of Service Rules, 2012. Held that, Rule 4 may be seen as an exception to the general rule and the intent in Rule 4 is to remedy out some specific situations that would, otherwise, have enabled escapement from tax or leviability to tax where Rule 3 may not serve to confer jurisdiction. It is, therefore, not by the specific word or phrase in Rule 4(1) of Place of Provision of Service Rules, 2012 that the taxability is to be determined but from the mischief effect intended to be plugged. Rule 4(1) is intended to be resorted when services are rendered on goods without altering its form that in which it was made available to the service provider. If the goods cease to exist in the form in which it has been supplied, it cannot be said that services have been provided in respect of goods even if it cannot be denied that services have been rendered on the goods. Consequently, the provisions of Rule 4(1) are not attracted.

The Assessee is 100% EOU rendering 'scientific or technical consultancy service'. They entered into an agreement with Japanese Company for generation of candidate compounds for pharmaceutical products on certain drug targets and with a US company for research and drug development using information supplied by the client. The assessee filed refund claim of CENVAT credit on input and input services under Rule 5 of the CENVAT Credit Rules. The refund claims were rejected by the adjudicating authority. The first appellate authority allowed the appeals filed by assessee.

Before Tribunal, the Revenue contended that, as regards the activities undertaken by the Assessee, by virtue of Rule 4(1) of the Place of Provision of Service Rules, 2012, the place of supply is in India and hence it cannot be a case of export to allow refund.

Tribunal noted that, decision in the case of *CCE vs Sai Life Sciences Ltd. 2016 (42) STR 882 (Mum- Tri)* has accorded a primacy to the principle that exports are not liable to be taxed. Referring to the contention of the Revenue that, notwithstanding agreements with overseas client and payment in convertible foreign currency, Place of Provisions of Service Rules, 2012 should determine whether exports have occurred for the purposes of refund of CENVAT Credit, Tribunal expressed concerns that, if such a contention is accepted then, it would circumscribe and limit Rule 5 of CENVAT Credit Rules, 2004 and jeopardise the privilege of exporters as it would place the consideration received thereof notwithstanding its receipt from an overseas entity in convertible foreign currency, within the ambit of taxation. Tribunal also framed for itself, a question that, if an interpretation of Place of Provision of Service Rules, 2012 can create a jurisdiction to tax and whether it should be allowed to prevail over the principle that taxes are not be exported with goods or services. However, it refrained to answer the same stating that, Tribunal is not called upon to determine the mode and manner in which the tax on export of service can be escaped.

Tribunal observed that, the assessee, prior to 1st July 2012, was eligible for all benefits as the service rendered by them was treated as export with the recipient of the service being outside the country. It also noted that, Revenue has not made any submission of legislative intent to deprive a provider of 'scientific or technical consultancy service' in the erstwhile regime of its status as exporter of service owing to change in the regime. It expressed a view that, with the most palpable manifestation of export of invisibles (i.e. services) being the receipt of convertible foreign exchange from a recipient of service located outside the country, that services are taxable at the destination, the scope of Rule 4 must necessarily be scrutinised to ascertain if there was, indeed, legislative intent to deny acknowledgement as exporter to a certain category of service providers. Tribunal noted that, in the present case, the recipient of service is located outside India and that the consideration is received in foreign convertible currency. Yet, Revenue insists that performance of service is in India and hence is not export.

Tribunal held that, a service is not necessarily, a single, discrete, identifiable activity; On the contrary, it is a series of invisibles that cater to the needs of a recipient; It is upon the consumption of the service by the recipient that service is deemed to have become taxable. Tribunal further opined that, the tax was intended as a levy on activities that would otherwise be performed by the recipient for itself. In other words, the hiving out or outsourcing of what was being done within the enterprise, was intended to be subject to the levy. In the matter of service rendered by respondent, this activity could, but for commercial viability, will be executed by the recipient within its own organisation or the territory in which it exists. The satisfaction of the customer occurs upon an outcome which is possessed by the recipient. Hence, even if some of the activities are carried out in India, by no stretch can it be asserted that the fulfillment of the activity is in India. Therefore, the inescapable conclusion is that the location of the actual performance of the service is outside India and, even with the special and specific provision of Rule 4 of Place of Provision of Services, 2012, the performance of service being rendered outside India would render it to be an export.

As regards the scope of Rule 4, Tribunal held that, the special provision, which may be seen as an exception to the general Rule 3, deals with services in respect of goods as well as those provided to individuals. Naturally, the services that require the physical presence of the person is taxed where the consumer receives the service and not at his location which as per Rule 2 (i)(iv) would be his usual place or residence. It further held that, *the intent in Rule 4 to remedy out some specific situations that would, otherwise, have enabled escapement from tax or leviability to tax where Rule 3 of Place of Provision of Service Rule, 2012 may not serve to confer jurisdiction becomes increasingly obvious*. Accordingly, it can be inferred that the location of performance of service in respect of goods is not an abstract, absolute expression for fastening tax liability on services that involve goods in some way; for that, Rule 3 would have suffered. A contingency that is not amenable to Rule 3 has been foreseen and remedied by Rule 4. *It is, therefore, not by the specific word or phrase in Rule 4(1) of Place of Provision of Service Rules, 2012 that the taxability is to be determined but from the mischief effect intended to be plugged.*

As regards the activities covered in Rule 4, Tribunal held that, it is obviously not intended to tax any activity rendered on goods as to alter its form because that would be covered by excise on manufacture or be afforded privileges available to merchandise trade. The provision itself excludes goods imported temporarily for repairs but that does not, *ipso facto*, exempt goods imported temporarily for repairs from taxability which would, by default, be predicated by the intent in Rule 3. Consequently, a recipient in India would be liable to tax on such temporary imports for repairs while service to a recipient located abroad would not be taxable.

Not intended to tax the activity of altering goods supplied by the recipient of service or for repairs on goods, Rule 4(1) of Place of Provision of Service Rules, 2012 would appear, by elimination of possibilities, to relate to goods that require some activity to the performed without altering its form. *Thus, Rule 4(1) is intended to be resorted when services are rendered on goods without altering its form that in which it was made available to the service provider*. This is the harmonious construct that can be placed on the applicability of Rule 4 in the context of tax on services and the general principle that taxes are not exported with services or goods.

As regards specific transactions entered into by the assessee, Tribunal held that, the goods supplied to the respondent, minor though the proportion may be, are subject to alteration in the course of research. It is not asserted anywhere that these goods, in its altered or unaltered form, are sent back to the service ecipient. *If the goods cease to exist in the form in which it has been supplied, it cannot be said that services have been provided in respect of goods even if it cannot be denied that services have been rendered on the goods. Consequently, the provisions of Rule 4(1) are not attracted.*

Tribunal accordingly amplified its earlier decision in the case of *CCE vs Sai Life Sciences (supra)* that it is contrary to law to isolate an expression in a rule to deny the general principle built into all indirect tax statutes for exempting export of services from levy and held that the respondents to be entitled to refund of accumulated CENVAT credit.

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Excise

LD/65/84
TVS Electronics Ltd.
vs.
Asst. Commissioner of Central Excise
26th October, 2016

Excise duty refund pursuant to post clearance turnover discounts offered by manufacturer to dealers by way of credit notes shall be available, subject to establishment of nil unjust enrichment; Reliance placed upon SC ruling in Addision & Company Ltd.

The assessee is engaged in the manufacture of keyboards, printers and other parts. It follows the regular *modus operandi*, wherein clearances are effected from factory to branch office at a declared price. The pricing at the time of actual sale from the branch office however could vary from that of the factory price and a provisional assessment was made at the time of clearance from factory in view of the uncertain value of the goods at the relevant point of time. The price variations arise on account of two factors-firstly, a subsequent return on account of various market exigencies and secondly, distributors discount issued on the basis of performance. The discount is issued by way of credit note and the actual price of sale could thus be determined only at the time when the sales are effected from the branches to the distributors.

For the period of 01.04.2006 to 31.03.2007, the provisional assessment made in respect of clearances effected to the branch/regional office was finalised. The Revenue noted as a finding of fact that the monthly/quarterly/annual discount is passed on to the distributors (buyer) by virtue of a post-sale credit note issued by the assessee-appellant. Thus, the clearances effected at factory valued at a sum of ₹10,43,86,149/- upon which, excise duty of ₹1,70,68,445/- including basic excise duty cess at 2% and cess at 1% was remitted. Taking into account the credit notes issued, the value of clearances effected from the Branch/ Regional Office to dealers was valued at a sum of ₹10,64,89,434/- upon which an amount of ₹1,74,09,009/- being basic excise duty plus cess was required to be paid. The difference in pricing arose after taking into account the upward and downward price revision which would include the component of discount by way of credit notes.

Adjudicating Authority computed the excess payment of excise duty by the assessee at a figure of ₹9.50 lakh. Thus, admittedly there is no dispute that the assessee had remitted excess excise duty which has been duly quantified and determined to be refundable. However, the claim of refund was rejected on the ground of possible unjust enrichment. The refund was ordered to be paid over to the Consumer Welfare Fund insofar as the assessee was not entitled to the same. The Commissioner (Appeals) and CESTAT both ruled in favor of revenue.

HC observed that the instant issue was covered by SC ruling dated 29.08.2016 in case of *Commissioner of Central Excise, Madras vs. Addison and Company Limited*.

On the aspect of unjust enrichment, the SC had observed that *sine qua non* for a claim of refund in terms of Section 11B of the Central Excise Act is the establishment by claimant that such duty in relation to which the refund has been claimed was paid by him and has not been passed on to any other person. SC had also interpreted the word 'buyer' in clause (e) to proviso to Section 11B(2) of the Act to mean any buyer not restricted to the first buyer. In such an event, the burden would be on the manufacturer to establish that the incidence of duty borne by him has not been passed on at any stage in the transaction, till the goods reach the hands of the end user. HC observed that this is a mandatory exercise that is to be undertaken by a manufacturer in order to establish nil unjust enrichment.

HC therefore remanded the matter back to the file of Adjudicating Authority, to determine the issue of refund after furnishing adequate opportunity to the assessee for establishing nil and undue enrichment in its hands. HC stated that such exercise is to be undertaken scrupulously to ensure that incidence of duty has, in fact, not been passed on at any stage till the stage of ultimate end user. *HC thus allowed the appeal of assessee.*

LD/65/85
Commissioner of Central Excise
vs.
Kanpur Plastic Pack Ltd.
Kanpur
27th September, 2016

Assessee's claim of excise duty refund on intermediate products (captively consumed) *cannot be rejected on ground of 'unjust enrichment' and 'time bar' u/s 11B of Central Excise Act.*

Assessee is engaged in manufacture of HDPE/ Polypropylene Tapes, fabrics and sacks–both laminated and unlaminated. The starting raw material HDPE/LDPE/PP Granules are extruded in the extrusion machines to make films and are slated to form tapes of required width. The tapes are further woven into fabrics and the fabrics thereafter, are stitched to make sacks and bags. The basic raw material for manufacture of HDPE/sacks and bags is plastic granules falling under Chapter 39 of Central Excise Tariff.

Assessee filed a classification list in August 1996, classifying the finished product under Chapter 54, 59 and 63 under protest. Later, on a judgment of Tribunal in some other matters, assessee sought revision of classification to Chapter 39 and accordingly, filed a revised classification list from July 1989, under various Chapter 39 headings. Revised classification was not approved by Assistant Collector who ordered to continue the classification of finished goods under various headings of Chapter 54, 59 and 63. The Appellate Authority also ruled in favor of Revenue. CESTAT set aside the appellate order and consequential relief was granted.

Based on CESTAT's order, assessee submitted an application before the Asst. Commissioner claiming refund of excise duty worth ₹1.85 crore (approx.) paid on tapes during 1986 and 1990. Assessee stated that CESTAT had held these tapes were classifiable under Chapter 39 and since the tapes were consumed for the manufacture of fabrics, which were again Chapter 39 products, the same were exempted from duty.

Since the application was unattended by Revenue, assessee filed writ petition before HC. HC disposed off the same with the direction to concerned authority to take a final decision within stipulated period. Pursuant thereto, Asst. Collector rejected the refund claim on the ground of being barred by 'time' as also 'unjust enrichment'. Assessee then approached the Appellate Authority and the matter was remanded back with following observations: *"a) the ground of rejection of refund claim i.e undue enrichment is not sustainable, as the duty was paid on intermediate products and the question of passing on of incidence of duty to the customers does not arise; and (b) in the instance case, duty has been under protest and hence limitation of six months does not apply as per the provisions of Section 11B of Excise Act."*

Thereafter, the Asst. Commissioner dropped the limitation aspect but w.r.t. 'unjust enrichment', it was held that "excise duty" u/s 12B of the Act includes duty paid on intermediate product and hence, the burden to prove that incidence of duty was not passed on to the customer, was on assessee. Once again, assessee approached the Appellate Authority who directed refund of ₹1.16 crore.

Aggrieved, the Revenue appealed before CESTAT. CESTAT ruled against the revenue observing that refund of credit of duty is admissible in terms of proviso (c) to Section 11B of the Act according to which, the bar of unjust enrichment does not apply to the refund of credit of duty paid on inputs. Revenue thereafter filed reference application u/s 35H(1) of the Act before the High Court.

HC observed that Appellate Authority's order which allowed refund holding that 'unjust enrichment' principle was inapplicable to intermediate products, had attained finality since Revenue did not challenge it in appeal. According to HC, once Appellate Commissioner had held so, Asst. Commissioner had no jurisdiction to reiterate and follow his overruled view of "unjust enrichment". Such approach of Asst. Commissioner despite having been answered by CCE(A) otherwise, which order had attained finality, was wholly unauthorised, beyond jurisdiction and illegal. It stated, Assistant Commissioner was wholly unjustified in denying refund on the ground of "unjust enrichment" since that was beyond his powers.

HC analysed provisions of Section 11B of Central Excise Act 1944. HC stated that so far as Section 11B(2) *proviso* (c) is concerned, we find that it stressed on the question of refund to be paid to Assessee instead of credit to the fund if amount is relatable to (a), (b) and (c). For the purpose of unjust enrichment, reliance placed by the Tribunal to Section 11B(2) *proviso* (c), in our view is not correct but Assessee in the case in hand could not have been denied refund on the ground of "unjust enrichment" since that was already decided in favour of Assessee by the appellate authority. HC thus held that the ultimate order of CESTAT was justified and warranted no interference. HC thus ruled in favour of the assessee. ■

No perfect democracy is possible without perfect nonviolence at the back of it. - Mahatma Gandhi