Legal Decisions[1]

Income Tax

LD/66/120
The Commissioner of Income Tax
vs.
NGC Networks (India) Pvt. Ltd.
29th January, 2018

Subsequent retro amendment can't result in Section 40(a)(i) disallowance

The assessee had paid channel placement fee of ₹7.18 crore to the cable operators during AY 2009-10. The assessee had deducted tax @ 2% u/s. 194C. As per the AO, the TDS had to be at the rate of 10% u/s 194J and not at the rate of 2% u/s 194C on the ground that the payment made was in the nature of royalty as defined in Explanation 6 to Section 9(1)(vi). The AO therefore disallowed the entire expenditure of ₹7.18 crore u/s. 40(a)(ia).

ITAT ruled in favour of assessee. ITAT followed the decision in case of *Channel Guide India Ltd.* [ITXA No. 1221/M/2006] wherein it was held that the assessee was not liable to deduct the tax at source, at higher rates only on account of subsequent amendment made in the Act, with retrospective effect from 1976. Aggrieved, the Revenue appealed before the HC.

HC observed that a party cannot be called upon to perform an impossible act i.e. to comply with a provision not in force at the relevant time but introduced later by retrospective amendment. HC relied upon the decision in the case of *Cello Plast* [(2012) 209 Taxmann 617] wherein the court had applied the legal maxim *'lex non cogit ad impossibilia'* (law does not compel a man to do what he cannot possibly perform).

HC noted that Explanation 6 to Section 9 (1)(vi) was introduced in 2012 w.e.f 1976. HC observed that the assessee could not have contemplated at the time of deduction of tax u/s. 194C that deduction of tax would be required u/s. 194J due to future retrospective amendment. HC also noted that Section 40(a)(ia) refers to Explanation 2 to Section 9(1)(vi) and not Explanation 6 to Section 9(1)(vi) for the meaning of royalty. Thus, HC held that the disallowance of expenditure u/s. 40(a)(ia) can only be if the payment is 'Royalty' in terms of Explanation 2 to Section 9(1)(vi). Since, the payment made for channel placement was not a royalty in terms of Explanation 2 to Section 9(1)(vi), no disallowance of expenditure can be made u/s. 40(a)(ia).

HC thus ruled in favour of assessee.

LD/66/121
Tata Teleservices (Maharashtra) Limited
vs.
The Dy. Commissioner of Income Tax
25th January, 2018

Bombay HC quashes order of TDS authorities cancelling Section 197 certificate of nil deduction of tax issued to assessee; Revenue's order of cancellation held as a non-speaking order.

The assessee is engaged in providing telecommunication services. The assessee filed loss returns for AY 2014-15 to 2016-17 aggregating to ₹1330 crore and claimed a refund of ₹121 crore. As per the assessee, since it would not be liable to pay corporate tax in the immediate future in view of likely loss for AY 2018-19 and huge carried forward losses, there ought to be no deduction of TDS under Chapter XVII on its income for services rendered. Therefore assessee applied for issuance of nil/lower withholding taxes certificate u/s. 197 to enable receipt of payments from various parties, without deduction of tax. Assessee further submitted that amount of ₹6.68 crore which was the outstanding tax demand for AY 2012-13 were on account of an issue which already stood concluded in favour of assessee. Revenue thereafter issued a certificate u/s. 197 in May 2017 directing TDS at nil rate by the various persons listed in the certificate. However in August 2017, Revenue issued a show cause as to why the issued certificate should not be cancelled in view of huge outstanding tax demand. Subsequently, the Revenue cancelled Section 197 certificate in October 2017 in view of existing demand of ₹6.90 crore. Aggrieved, assessee filed a writ petition before Bombay HC.

Before HC, Revenue contended that a revision appeal u/s. 264 would be an efficacious remedy which assessee failed to exhaust. Further, Revenue submitted that no prejudice would be caused to assessee in case of cancellation of the certificate as

[1] *Contributed by CA. Sahil Garud, CA. Mandar Telang, Indirect Taxes Committee, Committee on International Taxation, Insolvency and Bankruptcy Laws Group, Disciplinary Directorate and ICAI's Editorial Board Secretariat.*
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the amount received on account of withholding tax would be refunded if no tax demand is payable in future.

HC held that alternative remedy in the given case would not be an efficacious remedy as the order of cancellation was decided with the concurrence of the CIT (TDS). HC observed that u/s. 197, a right is given to an assessee to apply for nil/ lower rate of withholding tax and there is an obligation upon the AO to grant the same, if the conditions are satisfied. Though AO is empowered to cancel a certificate already granted u/s. 197(1), it should stand the tests applicable to a rejection of an application made u/s. 197. Since there was no change in circumstances, as they existed when the certificate dated May 2017 was issued and when the impugned order cancelling the certificate was passed, HC held that the order was without jurisdiction.

HC rejected Revenue's argument that cancellation of certificate was on ground that it was issued by mistake without considering Rule 28AA(2) in the context of the pending demands. HC observed that in the absence of the reasons being recorded, certificate u/s. 197 could not be challenged to state that it is erroneous and prejudicial to the Revenue. HC relied on ruling in the case of *Larsen & Toubro* [326 ITR 514] and remarked that, in the instant case the section does not do away with requirement of issuing a reasoned order while issuing a certificate under Section 197.

HC held that these reasons ought to have been furnished to the assessee before contending that the aspect of Rule 28AA was not considered at the time of granting the certificate. HC observed that the show cause notice seeking to review the original certificate did not indicate that the certificate was granted without considering the applicability of Rule 28AA.

Further, HC denied Revenue's contention that no prejudice would be caused to assessee in case of cancellation of the certificate as the amount received on account of withholding tax would be refunded if no tax demand is payable in future. Provisions of Section 197 provide a facility to an assessee who may not be liable to tax to have the benefit of not having tax deducted at source on his behalf. As per HC, such a stand of Revenue would render provisions of Section 197 redundant since in all cases an assessee would be entitled to refund after assessment and no occasion to apply Section 197 of the Act can ever arise.

W.r.t. Revenue's contention about some previous outstanding tax demand, HC observed that neither Section 197 nor Rule 28AA provide that no certificate of nil/lower rate of withholding tax can be granted if any demand, howsoever minuscule, is outstanding.

Ruling in favour of assessee, HC thus held that order cancelling the certificate u/s. 197 was a non-speaking order, and thus allowed assessee's writ.

LD/66/122

The Commissioner of Income Tax

vs.

M/s Baby Marine Exports

11th January, 2018

Interest charged u/s. 234B on demand pursuant to reassessment deleted, though advance tax was refunded to assessee after regular assessment.

Regular assessment in case of assessee was completed u/s. 143(3) by determining the total income at ₹55.35 lakhs. Against this, the assessee had paid advance tax (including TDS) of ₹5.12 lakhs. On appeal, CIT(A) deleted additions and the income was re-determined at ₹11,080. Thus, the advance tax paid and TDS were liable to be refunded. Subsequent to the reassessment litigation which travelled till the HC, the total income came to be determined at ₹23.32 lakhs. Resultantly, the AO worked out the total demand alongwith interest u/s. 234B(3).

ITAT deleted the levy of interest holding that Section 234B(3) is a consequential levy and only if there is a liability of advance tax, could there be a levy of interest under sub-Section 243B(3). Aggrieved, Revenue filed an appeal before Kerala HC.

HC observed that language *'amount on which interest was payable in respect of shortfall in payment of advance tax for any financial year under sub-Section (1) is increased'* used in Section 234B(3) was not to make the levy consequential to the levy under sub-Section (1). As per HC, only the amount falling deficient as stipulated in Section 208 and Section 210 was explicitly stated in Section 234B(1). HC observed that if there is no tax liability on a regular assessment; and if a reassessment is made within the limitation provided under Section 147 and eventually escapement of income is proved, there could be no levy under Section 234B.

As per HC, where a regular assessment is completed determining total income at a certain amount and then a re-assessment is made, computing

total income at a higher amount; the assessee would not have paid advance tax at 90% of the tax dues, on the excess amounts computed on re-assessment. In view of the above, HC thus stated that assessee would be liable to pay interest u/s. 234B(3) from April 1 of next FY to the date of determination of total income on re-assessment.

HC stated that only if the regular assessment was upheld finally and there was a reassessment and re-computation of total income, the assessee would have been liable to pay advance on which, an interest would be levied u/s. 234B(3). The entire tax assessed on regular assessment; for which there was advance tax payment in compliance with Section 208 and Section 210 was set aside and the advance tax paid was refunded to the assessee. Further, the Department also had the benefit of advance tax from 31-03-1992 to 04-03-1996, when the refund was made. HC thus held that there would be no liability on the assessee under Section 234B(3), since there could not be a liability created from 01-04-1992.

HC remarked that *"We are conscious of the fact that the Department stands to loose, in so far as the re-assessment made of the total income, in loosing the interest from the date on which the refund is made to the date of payment of tax dues. However, we find that the Legislature has not contemplated the peculiar situation of a refund having been made of the advance tax and a reassessment determining escaped income after the refund. The Legislature having not contemplated such a situation and not thought it fit to levy interest, it would not be proper for this Court to re-write the provision by levying an interest, which liability is not available in the statute."*

HC held that there could be no levy of interest u/s. 234B(3) since the advance tax on the computation made on reassessment was paid by the assessee in the close of the previous year to the assessment year. However, since Section 234B was compensatory in nature and since assessee had already got the refund of advance tax paid by him, HC directed Department to compute the interest paid to the assessee in ordering refund on which a demand would be raised and which will be paid by the assessee.

LD/66/123

Chief Commissioner of Income Tax Central and Anr vs. Naresh Kumar Aggarwal

09th January, 2018

SC affirms HC decision allowing interest u/s. 244A on refund arising due to waiver of interest u/s. 220(2) by CCIT; Section 244A interest is not restricted to only tax, but is allowable on interest waiver also.

The assessee filed an application for waiver of interest u/s. 220(2A), which was accepted by CCIT on 30/03/2015. Thereafter, the assessee filed an application before the AO for grant of simple interest @ 6% u/s. 244A on the amount of waiver u/s. 244A from the date of recovery of the interest till the date of refund. However, AO rejected assessee's claim.

In writ petitions before HC, the assessee contended that the expression "in any other case" occurring in Section 244A(1)(b) would include the interest waived by the CCIT pursuant to the applications filed by him u/s. 220(2A).

Revenue contended that on a collective reading of sub-clauses (a), (aa) and (b) of Section 244A(1) together with the Explanation thereunder, it would become apparent that the expression "in any other case" would apply only in the cases of refund of tax and penalty and not any other amount.

HC analysed provisions of Section 244A and observed that Clause (b) deals with 'any other case'- which has to be a case other than refund of taxes or penalties. Clause (b) stipulates that "in any other case" the interest payable shall be calculated at the rate of one-half per cent for every month or part of a month comprised in the period or periods from the date "or, as the case may be" dates of payment of the "tax or penalty" to the date on which the refund is granted. This has to be read with the expression "refund of any amount that becomes due" occurring in Section 244 A (1) of the Act. When the entire sub-Section (1) of Section 244A of the Act is read as a whole, the legislative intent does not appear to be to limit the expression "any amount becomes due" occurring in Section 244A(1) or the expression "in any other case" occurring in Section 244A(1)(b) only to tax and penalty as is sought to be contended by the Department.

The words "as the case may be" refers to the period for which the interest will become payable and that the period is said to be dates of payment of tax or penalty to the date on which the refund is granted. This does not mean that the amount other than tax or penalty cannot be included in the expression "in any other case". It is only reflective of the periods for which such interest would become payable. In fact the disjunctive "or" between the words "period" and "periods" indicates that 'in any other case' interest

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would be calculated for every month or part of a month comprised in the period or periods from the date on which the refund is granted.

Then, HC observed judgment of *Tata Chemicals Limited* [(2014) 363 ITR 658] wherein it was held that even when there is no express statutory provision for payment of interest on the refund of tax made to the Resident/Deductor u/s. 240, the government cannot avoid its obligation to reimburse the lawful monies "together with accrued interest" for the period of "undue retention". HC stated that *"Once it is clear that Section 244A (1) (b) of the Act which talks of "any other case" does not have to be interpreted restrictively and can include situations like in the present case, then it is evident that there is nothing in the said provision which prohibits the payment of interest on an amount of refund due to the Petitioners as a result of the waiver of interest under Section 220(2A) of the Act. The circular of the CBDT dated 26th April 2016 accepts the above proposition laid down in Union of India v. Tata Chemicals Limited (supra) in its entirety."*

Further, HC observed that the sum found refundable to the Petitioners as a result of the waiver of interest order passed by the CCIT is a definite sum that was wrongly deducted from the Petitioners as interest. Payment of interest on that sum by the Revenue cannot be characterised as payment of interest on interest.

Ruling in favour of assessee, HC directed Revenue to pay the interest amount as claimed by assessee on the amount refunded, in terms of Section 244A(1)(b) from the date of recovery till the date of payment. Against the HC order, the Revenue had filed an SLP before the SC. SC dismissed the said SLP thereby affirming HC's decision.

LD/66/124

Principal Commissioner of Income Tax

vs.

Shri Shankar Lal Saini

19th December, 2017

Assessee allowed capital gains relief u/s. 54B and Section 54F though he had deposited un-utilised net sale consideration in the capital gain account scheme (CGAS) beyond the due date of Section 139(1) but within the due date of filing belated tax return u/s. 139(4).

The assessee had sold two properties and claimed exemption u/s. 54B of ₹1.6 Cr and u/s. 54F of ₹52 lakhs. The AO declined the claim of exemption u/s. 54B and Section 54F on the ground that assessee had not deposited the net sale consideration in the capital gain account [CGAS] before due date of filing of return u/s. 139(1). The assessee claimed that the entire sale consideration was deposited in the specified capital gains account before the due date of filing of belated return u/s. 139(4), and hence he was eligible for exemption u/s. 54B and 54F. The CIT(A) ruled against the assessee, however, the ITAT ruled in favour of the assessee. Aggrieved, Revenue filed an appeal before the HC.

The Revenue relied on Kerala HC ruling in the case of *Xavier J. Pulikkal* [[2016] 242 Taxman 206 (KERHC)] wherein it was held that for claiming benefit u/s. 54F(4) due date would be considered u/s. 139(1) only and not u/s. 139(4). Revenue contended that every word in sub-Section (2) of Section 54B and Section 54F has to be construed very strictly otherwise provision will be rendered nugatory.

HC agreed with the assessee that while considering the provisions related to prosecution, the provisions are to be very strictly construed whereas in the case of exemption and other benefits, they are to be construed very liberally.

HC rejected Revenue's contention that investment was to be made before the return filing due date u/s. 139(1) otherwise it will render the provision nugatory. HC remarked that since three High Courts have taken the view and the Tribunal has followed the Karnataka High Court which has followed the earlier Gauhati judgment which has been independently supported by the Punjab & Haryana High Court, the present issue is required to be answered in favour of assessee.

HC, thus, ruled that capital gains relief u/s. 54B and Section 54F can be allowed even though the capital gain proceeds are deposited by assessee within the due date u/s. 139(4) and not within due date of Section 139(1).

LD/66/125

John Baptist Lasrado

vs.

Income Tax Settlement Commission

27th November, 2017

Assessee not liable for interest u/s. 234B in respect of salary received outside India, when the employer had paid the interest u/s. 201(1A) for not deducting tax at source.

The assessee is an employee of a multinational Company, namely, M/s. Columbia Sportswear (Inc) of USA, which has a Liaison Office at Chennai and assessee heads the Indian operations of that Company. With respect to the salary received by the assessee outside India, the employer did not deduct tax at source. The assessee also received stock options from his employer and these shares were listed on American Stock Exchange. These shares were sold by the assessee on various dates and the net proceeds were credited into his bank account, which was held outside India. For the AYs 1996-1997 to 2005-2006, the assessee filed his income tax returns disclosing only the amount earned in India. Subsequently, assessee approached the Income Tax Settlement Commission and filed an application for the relevant AYs, wherein he offered all income, which he earned abroad during the relevant AYs, which included the salary income and the income through Employees Stock Option. The Settlement Commission charged interest u/s. 234B on the excess of the tax assessed over the advance tax paid for all the relevant AYs. Settlement Commission dismissed the petition by holding that interest u/s. 234(B) and interest u/s. 201(1A) are two types of defaults and by different entities and the operation of these provisions are in two different spheres and on different subjects and it cannot be held that there is any double levy on the same subject for the same default. Aggrieved, assessee filed petition before the High Court.

HC held that the employer abroad having remitted and paid the interest u/s. 201(1A), once again tax could not be recovered from the assessee. HC made reference to rulings in case of *Emilio Ruiz Berdejo* [Bombay HC] and the decision of the Uttaranchal HC in the case of *Sedco Forex International Drilling Company Ltd.* wherein it was held that no further interest can be claimed from assessee either under Sections 234A or 234B or 234C, where deductor has already discharged the tax liability with interest payable u/s. 201(1A).

HC relied on Delhi HC ruling in *Jacabs Civil Incorporated* [(2011) 330 ITR 0578 (Delhi)] wherein division bench had held that when the payee had no role in deducting or collecting the tax and since, it was not his duty, then the question of payment of any interest did not arise, hence, it could not be said in such circumstances that the payee was in default for the purposes of Section 234B. In that case, the Delhi HC had rejected Revenue's stand that that Section 234B of the Act is an independent and standalone provision and once the ingredients/conditions contained in that section were satisfied, the liability to pay the interest would arise.

Thus, ruling in favour of assessee, HC held that assessee was not liable for payment of interest u/s. 234(B), in respect of the salary income earned by him outside India, when the employer had paid the interest u/s. 201(1A) for not deducting tax at source.

Transfer pricing

LD/66/126

Prin. Commissioner of Income Tax
vs.
Frigoglass India Pvt. Ltd.
19th January, 2018

Deletion of TP adjustment on royalty payment to associated enterprises upheld; TPO had erred in judging commercial and business expediency of expenditure while determining ALP for royalty at Nil.

The assessee is a subsidiary of Norcool Holding ASA, Norway, and is engaged in glass door merchandising. The assessee entered into an international transaction of payment of management fee and royalty to its Associated Enterprises [AE]. The assessee adopted TNMM approach stating that its transactions were closely linked to the manufacture of glass door refrigerators. However, the TPO rejected TNMM and adopted CUP method as the most appropriate method, and proposed a TP adjustment of ₹8.77 crore.

ITAT ruled in favour of assessee, stating that TPO erred in judging commercial and business expediency of expenditure while determining ALP at Nil. ITAT followed Delhi HC ruling in *EKL Appliances* [341 ITR 241] wherein it was held that so long as the expenditure or payment by assessee has been demonstrated to have been incurred or laid out for the purposes of business, TPO cannot disallow the same on any extraneous reasoning. ITAT also observed that no comparable transaction was brought on record by AO/DRP and thus rejected application of CUP. With regard to payment of management consultancy fees, ITAT remitted the matter to TPO to verify as to whether the Head Office had correctly allocated the hours of service/ cost of service rendered and also whether any other cost centers had been erroneously included in the allocation.

Revenue pointed out that DRP had noted that even though the AE had presence in 120 locations with 15 sales operations spread across the world, it chose to allocate treatment royalties only to 10 countries and their subsidiaries/enterprises located there, further, the enterprise in China was not loaded with such costs. Revenue argued that thus ITAT erred in holding that the assessee was justified in claiming these as pay-outs or expenses.

HC had affirmed ITAT ruling holding that the ITAT had correctly decided the matter relying on *EKL Appliances* [341 ITR 241] case. HC had therefore dismissed Revenue's appeal on the matter. Aggrieved, Revenue filed an SLP before SC. However, the SLP was also dismissed by SC, thus ruling in favour of assessee.

LD/66/127

M/s EIH Limited
vs.
DCIT
(ITA No. 110/Kol/2016, ITA No. 153/Kol/2016)
(Kolkata ITAT)

Kolkata ITAT deletes TP-adjustment in respect of corporate guarantee provided to 100% Mauritius subsidiary for AY 2011-12 accepting assessee's contention that corporate guarantee was provided as a matter of commercial prudence to protect the interest and fulfill the shareholder obligation

Facts

M/s. EIH Limited, (Taxpayer) had incorporated a 100% subsidiary called M/s. EIH Flight (AE) in Mauritius in the financial year 2007-08 by investing US $1.1 million for the purpose of setting up off-shore flight catering unit. The business objective of AE was to provide in-flight catering services to airline companies operating in and out of Mauritius. Budgeted cost for setting up the catering unit was US $24.3 million. For funding the project, external loan funding of USD 19 million was to be provided by third party through the corporate guarantee provided by the parent company (taxpayer).

Taxpayer had not charged any fees for providing such guarantee to its AE. Accordingly, TPO considered this arrangement between the taxpayer and its subsidiary as in the nature of providing services to AE and categorised it as international transaction. Thus, TPO applied the CUP method as the most appropriate method (MAM) for benchmarking the guarantee fee and considering the guarantee fee rate of 3% as the arm's length rate, made an addition of ₹2.62 crore.

Issue

(i) Whether provision of corporate guarantee can be in the nature of shareholder activity and hence, not requiring any TP adjustment and (ii) whether corporate guarantee is an International Transaction?

Held

Hon. ITAT agreed with the contention of the taxpayer that the corporate guarantee as provided by the taxpayer was a matter of commercial prudence to protect and by fulfilling the shareholder obligation, as any financial incapacitation of the subsidiary would jeopardise the investment of the taxpayer. Hon. ITAT relied on the order of the Coordinate Bench of Tribunal in the case of *Tega Industries Ltd. vs. DCIT* (ITA No.1912/Kol/2012) wherein it was held that the provision of corporate guarantee is in the nature of shareholder activity and hence, no TP adjustment on account of corporate guarantee is required.

On the alternate plea of the taxpayer that corporate guarantee is not an International Transaction, Hon. ITAT held that when a parent company extends an assistance to the subsidiary, being associated enterprise, such as corporate guarantee to a financial institution for lending money to the subsidiary, which does not cost anything to the parent company, and which does not have any bearing on its profits, income, losses or assets, it will be outside the ambit of international transaction under Section 92B(1) of the Act. ITAT also relied upon decision of Ahmedabad Tribunal in case of *Micro Inks* in ITA No. 2873/Ahd/2010. Hon. ITAT also distinguished the Revenue's reliance on the decision of Bombay High Court in case of *Everest Kanto Cylinder Ltd.*

ITAT noted that guarantee was inserted in the definition of 'international transaction' in Section 92B by inserting an Explanation in the Finance Act, 2012 with retrospective effect from 01/04/2002. ITAT explained that the Explanation states that it is clarificatory in nature and is 'for the removal of doubts'. Thus, it does not alter the basic character of definition of international transaction under the main Section 92B.

Under this Explanation, five categories of transactions have been clarified to have been included in the definition of 'international transactions'. Clauses (a) (b) and (d) do not cover guarantee, lending or loans. Other two, (c) and (e) deal with (i) capital financing, and (ii) business restructuring or reorganisation. Clause (c) refers to lending or guarantee. But the Explanation which is for removal of doubts or is clarificatory, cannot be read independent of Section 92B(1). Section 92B(1) provides those transactions as international transactions which are in the nature of purchase, sale or lease of tangible or intangible property (explained by clauses (a) and (b) of the Explanation), or provision of services, (explained by clause (d) of the Explanation), or lending or borrowing money (explained by Clause (c) of Explanation). The plain reading of provisions of Section 92B(1) of the Act indicate that the various transactions mentioned in Section 92B(1) of the Act, (i.e. purchases, sales, provision for services, lending or borrowing or any other transaction) should have bearing on the profits, incomes, losses or assets of such enterprises. In our opinion, condition precedent of a transaction having a bearing on profits, incomes, losses, or assets would apply to each of the aforesaid transactions namely purchase, sale, or lease of tangible or intangible property or provision of services, or lending or borrowing money or any such transaction.

This understanding of ours gets further clarified by way of insertion of Explanation in Section 92B(1) by the Finance Act, 2012 with retrospective effect from 01.04.2002 vide clause (a) to (d). ITAT found that in the said explanation, clause (e) alone has been carved out as an exception wherein, the transaction thereon has been specifically mandated to be an international transaction where a transaction of business restructuring or reorganisation, entered into by an enterprise with an AE irrespective of the fact that it has bearing on the profits, incomes, losses, or assets of such enterprises at the time of transaction or at any future date.

LD/66/128

Prin. Commissioner of Income Tax

vs.

M/s Veer Gems

05th January, 2018

SC affirms HC decision which held that assessee and one another entity, though indirectly controlled by same family of four brothers and their close relatives were not AEs.

The assessee entered into certain international transactions with a Belgian entity named Blue Gems BVBA [BVBA]. The AO considered this entity as an associated enterprise (AE) of the assessee for the purposes of Section 92A(2)(j), contending that the two entities were being controlled by the same family of four brothers and their close relatives. Ruling in favour of assessee, CIT(A) deleted the addition on merits and therefore did not find it necessary to deal with the question as to whether BVBA is AE of the assessee or not. ITAT held that assessee and the BVBA were not AEs as conditions specified in Section 92A(2) were not fulfilled. ITAT explained that as long as an enterprise participates in any of the three aspects of the other enterprise, i.e. (a) management; (b) capital; or (c) control, these enterprises are required to be treated as AEs, and also when common persons participate in management, control or capital of both the enterprises.

ITAT held that while a certain degree of control may actually be exercised by these enterprises over each other, due to relationships of the persons owning these enterprises, that itself is not sufficient to hold the relationship between the two enterprises as associated enterprises.

HC noted Tribunal's conclusion that the provisions of clauses j, k and l of Section 92A(2) would not apply in assessee's case and therefore supplier of rough diamonds Blue Gems was not an associated enterprise. HC observed that clause (i) would apply in a case where goods or articles are manufactured or transferred by one enterprise. In the present case, admittedly BVBA does not either manufacture or process any articles. Further, Clause (j) would apply when an enterprise is controlled by an individual. In the present case, both the enterprises are partnership firms and there was nothing to suggest that they are controlled by any individuals. Clause (l) would of course apply in a case where the enterprise is a partnership firm, however, the condition for the other enterprise to hold not less than 10% interest in such firms was not present in assessee's case.

HC thus held that assessee and BVBA were not AEs. The Revenue had filed an SLP before SC against this HC order. However, SC dismissed SLP, thus affirming HC order which was favourable to assessee.

LD/66/129

Springer India Pvt. Ltd.

vs.

Assistant Commissioner of Income Tax

15th December, 2017

Assessee had adopted TNMM for benchmarking its international transactions in all previous years but sought to use 'other method' which was effective for subject AYs and resorted to TNMM only for transactions not covered by the other method, whereas the AO applied TNMM for all; ITAT remanded matter to TPO stating that it did not find any reasons for change in assessee's approach; As per ITAT, AO should have proceeded with the matter afresh instead of having remanded the matter totally to the TPO.

The assessee is a subsidiary of an international AE and has a specialisation in the scientific and technical journals. Assessee urged that revenue modals of the assessee and its AE are based upon the complex system of allocation of cost and revenue based upon collection and the expenses charged and allocated globally. For the allocation of costs, the AE gets the services of a Swiss-based entity owned by it and then proceed to allocate the costs of such analysis to the concerned subsidiaries/ associated units based upon the number of articles, subscriptions etc.

The assessee adopted the Transactional Net Margin Method (TNMM) for all previous years but sought to use 'other method' which was brought into force for the concerned AYs. In respect of the transactions that were not covered by the other method, the assessee used the TNMM. AO rejected the use of the other methods in totality and proceeded to apply the TNMM method in totality. The DRP remanded the matter in the first instance and thereafter even proceeded to reject the AO's remand report as perverse. However, it confirmed the adjustments made. In appeal, ITAT remanded the issue with the observation that *"we did not find any reasons stated therein for the change in the approach of the assessee for this year and further this aspect is also not dealt with in the order of the ld TPO/ld DRP."*

The instant case is with respect to the applicability of the other method for benchmarking international transactions under Section 92C for which the assessee claimed applicability of Rule 10B (brought into force w.e.f. 2012-13).

HC observed that the TP study report clearly claimed that the 'other method' was the most appropriate method and also outlined why the revisions for its adoptions in certain transactions even while using the TNMM for others. HC observed that this aspect was not dealt with by the ITAT-and also apparently by the DRP- hich had at the same time rejected the AO's remand report. Since the other method was introduced for the first time and also there did not appear to be much judicial thinking on the application of the other method as most appropriate method and all the considerations should weigh to the tax administrators in this regard vis-a-vis revenue and cost allocation, HC opined that the ITAT should have proceed with the matter afresh instead of having remanded the matter totally to the TPO, as it did in the circumstances.

Thus, HC directed the ITAT to go into the matter afresh and return the findings both on the question of law and the facts afresh. HC stated that all rights and contentions of the parties on the jurisdiction of the ITAT are reserved, and that nothing stated in this order shall preclude the exercise of jurisdiction of the ITAT in any manner, to seek such remand reports as are necessary.

Excise

LD/66/130

Commissioner of Central Excise and Service Tax

vs.

Ultra Tech Cement Limited

01st February, 2018

CENVAT credit on GTA service availed for transport of goods from place of removal to buyer's premises is not admissible to assessee, post amendment to Rule 2(l) of CENVAT Credit Rules in 2008

The core issue involved in the present case is with regard to the admissibility or otherwise of the Cenvat Credit on Goods Transport Agency service availed for transport of goods from the place of removal to buyer's premises. The assessee is involved in packing and clearing/forwarding of cement classifiable under Chapter sub-heading 25232910 of Central Excise Tariff Act. It gets finished goods (cement) from its parent unit on stock transfer basis and sells the same in bulk form and packed bags. According to Revenue, the transport agency service used by the assessee for transportation of product from their premises to customers premises cannot be considered to have been used directly or indirectly in relation to clearance of goods from the factory viz., place of removal in terms of Rule 2(l) of the Rules and as such cannot be considered as input service to avail Cenvat credit.

A show cause notice was issued, *inter alia*, stating that on scrutiny of ER- 1 return for the said period, it was noticed that assessee had wrongly availed credit and therefore, was liable to recovery of ₹25.66 lakhs (approx.) alongwith penalty.

The Adjudicating Authority held that once the final products are cleared from the factory premises, extending the credit beyond the point of clearance of final product is not permissible under Cenvat Credit Rules and post clearance use of services in transport of manufactured goods cannot be input service for the manufacture of final product. Accordingly, the demand was confirmed with interest and penalty. The Commissioner (Appeals), CESTAT and HC all ruled in favour of assessee, aggrieved by which the Revenue approached the SC.

SC analysed definition of "input service" under Rule 2(l) of CENVAT Credit Rules and observed that only those services are included which are used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products 'upto the place of removal.'

The original definition of 'input service' contained in Rule 2(l) of the Rules, 2004 used the expression 'from the place of removal.' As per the said definition, service used by the manufacturer of clearance of final products 'from the place of removal' to the warehouse or customer's place etc., was exigible for Cenvat Credit. This stands finally decided in Civil Appeal No. 11710 of 2016 (*Commissioner of Central Excise Belgaum vs. M/s. Vasavadatta Cements Ltd.*). However, vide amendment carried out in the aforesaid Rules in the year 2008, which became effective from March 1, 2008, the word 'from' is replaced by the word 'upto'. Thus, it is only 'upto the place of removal' that service is treated as input service. This amendment has changed the entire scenario. The benefit which was admissible even beyond the place of removal now gets terminated at the place of removal and doors to the cenvat credit of input tax paid gets closed at that place. This credit cannot travel therefrom. The word 'from' was the indicator of starting point, the expression 'upto' signified the terminating point, putting an end to the transport journey. SC, thus, stated that Adjudicating Authority was right in its interpretation of said Rule.

As per SC, the CBEC Circular dated 23/08/2007 was issued in clarification of the definition of 'input service' as existed on that date i.e. it related to unamended definition, hence, it could not be applied after amendment of the definition of 'input service' which brought about a total change. The definition of 'place of removal' and the conditions to be satisfied, had to be in the context of 'upto' the place of removal. If this Circular was made applicable even in respect of post amendment cases, it would be violative of Rule 2(l) of Rules, and such a situation could not be countenanced.

Thus, ruling in favour of Revenue, SC held that CENVAT credit on GTA service availed for transport of goods from place of removal to buyer's premises was not admissible.

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Service Tax

LD/66/131
Commissioner of Service Tax
vs.
Lakshminarayana Mining Company
24th January, 2017

SC set aside HC's judgment wherein HC incorrectly relied on ruling in ABB Ltd. where the issue pertained to admissibility of CENVAT credit of service tax in respect of output transportation from the place of removal as "input service"

SC observed that question which needed consideration by the High Court was as to whether the category of "Goods Transport Agency" is exigible to service tax as per Section 65(105) (zzp) and Section 65 (50b) of the Finance Act as well as Rule 2(1)(d)(v) of the Service Tax Rules, 1994. Section 65 (50b) defines "Goods Transport Agency" to mean any person who provides service in relation to transport of goods by road and issues consignment note by whatever name called. On the other hand, Section 65(105) (zzp) provides that the service to a customer by a goods transport agency, in relation to transport of goods by road in a goods carriage.

SC remarked that the High Court was required to decide as to whether the services provided by the assessee herein are covered by the aforesaid definitions. The High Court has not discussed the aforesaid issue. Instead, it has dismissed the appeal of the Revenue by observing that the aforesaid questions of law are covered by the decision of the Division Bench of the High Court dated 23.03.2011 in C.E.A No. 121 of 2009 and other connected matters titled as *Commissioner of Central Excise & S.T., LTU, Bangalore vs. ABB Ltd.* reported in [2011(23) S.T.R. 97 (Kar.)]. Supreme Court remarked that in the said judgment the issue pertained to CENVAT credit of service tax in respect of input service and that whether output transportation from the place of removal was input service of which CENVAT credit was admissible. Thus, the issue in ABB Ltd. case was entirely different and the High Court has wrongly dismissed the appeal of the Revenue.

In view thereof, SC set aside the impugned order and remitted the matter to HC for de novo consideration

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LD/66/132

M/s Sir Ganga Ram Hospital, Bombay Hospital and Medical Research Centre, Appollo Hospitals, M/s Max Health Care Institute Ltd.

vs.

CCE, CCE & ST and CST

vs.

M/s Indraprastha Medical Corporation

6th December, 2017

The arrangement between hospitals and professional doctors wherein doctors are engaged by hospitals to provide treatment to patients coming to/admitted in hospital for getting healthcare services and the fees to doctors are paid by hospital by applying pre-determined ratio on total amounts charged by hospital to patients towards health care services, cannot be regarded as provision of 'infrastructure support service' by hospital to doctors and thus, no service tax liability would sustain under category of 'business support services'.

Facts:

The appellants, engaged in providing health care services to patients, are managing hospitals/medical centers in various places. For providing medical services to patients, appellants engaged doctors/ medical professionals on contractual basis and the fees payable by hospital to such doctors were arrived at on the basis of pre-determined ratio to be applied on amounts received by appellant from patients. Revenue alleged that by providing to the doctors the space in the hospitals with required facilities to attend the patients (coming to hospital run by appellant), hospital is providing infrastructure support to doctors, without which they cannot undertake their activities as professional doctors and consideration due from doctors is earned by hospital by way of retaining certain portion from the total amounts received from the patients, namely "collection fees/facilitation charges", which would be liable to service tax for being consideration for provision of 'business support services' to doctors by appellants. It is the contention of department that method of sharing revenue etc. cannot alter the nature of services provided by appellant hospitals to doctors.

While rebutting allegations made by department, appellant submitted that being hospitals, they are mainly engaged in providing health care services to patients and the appointment of professional doctors is in furtherance of providing health care services to patients, accordingly, the agreement between doctors and appellant hospitals is essentially revenue sharing arrangement wherein doctors are entitled to fixed percentage of total revenue earned by hospitals from providing healthcare services to patients and remaining portion i.e. collection charges, belong to appellant hospitals, and thus, this is not the case of one party providing services to another. Relying on the decision of Hon'ble Gujarat HC in *Dr. K. K. Shah 135 ITR 146 (Guj)*, appellant submitted that doctors are not "business entities" and are not engaged in business or commerce, therefore, doctors cannot be said to have outsourced any activity to appellant hospital which would be chargeable to service tax under category of 'business support service'. In fact, in the present case, the service, if any, is provided by the doctors to appellant and not vice-versa as alleged by department. Appellant also submitted that the patients are of the hospital only and not of the individual doctors who are engaged by appellant hospitals

Held:

Tribunal noted that for providing healthcare services to patients, appellant hospitals can either appoint the required professional directly as employees or also by having contractual arrangements like the present ones. On perusal of contracts/agreements entered into between appellant hospital and doctors, Tribunal found that such agreements generally talk about the appointment of consultant doctors to provide services to the patients who will visit or get admitted in the appellant hospital; the contractual arrangement between the parties to such agreements do not specify the specific nature or list of facilities which can be categorised as infrastructural support to the doctors and even the agreed upon revenue model did not refer to any consideration attributable to such infrastructural support services. Thus, the Tribunal held that the patient pays full amount to the appellant hospitals for health care services; for providing such services, hospitals engage various consulting doctors who attend patients for treatment using their professional skill and knowledge and appellant hospitals manage the patients from the time they enter the hospital till they leave the premises, also manages the follow-up procedures and provide for further health service in the manner as required by the patients. In other words, the appellants are availing the professional services of doctors for providing health care services to patients and for such services of doctors, hospitals pay fees to doctors from amounts received from patients for rendering health care services and the balance money retained by appellant hospital is also necessarily for such health care services, therefore, there is no business support service in such mutually beneficial revenue sharing arrangement between appellant hospitals and doctors as alleged by r evenue.

Tribunal further noted that the services mentioned under 'business support services' are "provided in relation to business or commerce."; as such, to bring in a tax liability on the appellant hospital, as contented by revenue, it should be held that they are providing infrastructural support services in relation to business or commerce, that means, the doctors are in business or commerce and are provided with infrastructural support. However, Tribunal held that such a preposition cannot hold good as doctors are engaged in medical profession, and as examined by Hon'ble Guj HC in *Dr. K. K. Shah (Supra)*, there is discernible difference between "business" and "profession", therefore in terms of ratio laid down by Guj HC and scope of 'business support services', there is no taxable activity identifiable in the present arrangement for tax liability of the appellant hospitals.

Tribunal also noted that the view taken by revenue that in spite of the exemption available to health care services, a part of the consideration received for such health care services from the patients shall be taxed as business support service/ taxable service is not tenable because such a view will in effect defeat the very purpose of exemption provided to the health care services by clinical establishments. Accordingly, Tribunal set aside impugned service tax demand.

LD/66/133

M/s Hotel Kailash International
vs.
Commissioner of Central Excise
9th January, 2018

Tribunal set aside service tax demand under category of 'supply of tangible goods' on activity of constructing bunk houses along with other incidental facilities, at sites designated by client.

Facts:

In terms of service order received from its client for providing bunk houses along with all the incidental facilities such as housekeeping, breakfast, lunch etc., at the sites earmarked by the client, appellant constructed row of accommodation facilities at such sites in the form of bunk-houses assembled/ erected as per the requirement of the client. Revenue demanded service tax from appellant under category of 'supply of tangible goods' by alleging that bunk houses supplied by appellant are goods for these being movable properties which are easily moved from one place to another depending on the requirement. Appellant rebutted revenue's allegation on the ground that the whole facility of bunk houses is created at site and there is no ready built bunk house supplied by them, thus, it would not amount to services of supply of tangible goods but that of accommodation facilities.

Held:

Tribunal observed that the bunk house accommodation is created by appellant at its client's site and is based on permanent concrete base with some dismantlable components and as such there is no identifiable supply of bunk houses to be called supply of tangible goods; in fact, department could not point out exact nature of tangible goods allegedly supplied by appellant except holding that whole consideration for provision of bunk houses would be considered as supply of tangible goods. Therefore, Tribunal set aside impugned demand and allowed present appeal with consequential relief.

Legal Update

LD/66/134
M/s Cybercom Datamatics Information Solutions Ltd.
vs.
Commissioner of Service Tax
12th July, 2017

For deciding whether services provided by SEZ unit would constitute 'export of services' or not, provisions of SEZ Act, 2005 would prevail over Rule 6A of STR, 1994 and if answer is affirmative, such SEZ unit would be entitled to refund of unutilised accumulated cenvat credit in terms of Rule 5 of CCR, 2004.

Facts:

Appellant, a unit located in Special Economic Zone (SEZ) was engaged in export of services and filed refund claim of accumulated cenvat credit on input services, under Rule 5 of Cenvat Credit Rules, 2004 (CCR). The order of lower adjudicating authority sanctioning refund claim to appellant was challenged by department before first appellate authority, which held that in terms of Place of Provisions of Services Rules, 2012, the place of provision of services rendered by appellant was not outside India. Further, the activity undertaken by the appellant did not conform to all the six parameters embodied in Rule 6A of Service Tax Rules, 1994 which was an essential requirement for a service to qualify as 'export', so as to become eligible for refund of accumulated credit. Aggrieved by the order of first appellate authority, appellant filed present appeal.

Held:

As regards reliance placed on decision of the Authority for Advance Rulings (Central Excise, Customs & Service Tax) in *Universal Services India Pvt Ltd. [2016 (42) STR 585 (AAR)]* and that in *Godaddy India Web Services Pvt. Ltd. 2016-TIOL-08-ARA-ST*, Tribunal held that decisions of the Advance Rulings Authority are not binding on Tribunal and nor do they constitute a valid precedent to be cited by anyone other than applicant before such authority.

As regards question of whether services provided by appellant can be regarded as exports or not, Tribunal noted that Finance Act, 1994 is the statute enacted for levy and collection of tax on services rendered within the territory of India; however, the appellant operates under a special legislation enacted to govern the operations of entrepreneurs within specially demarcated areas, viz., namely, Special Economic Zones Act, 2005. Hence, while export of service has been defined in the Service Tax Rules, 1994, the special legislation i.e. SEZ Act, 2005, with intent promote exports by units in such SEZ contains within it a definition of 'service' and of 'export' which are not congruent with that in the laws governing taxation of services in India. Since under Section 51 of SEZ Act, 2005 the provisions therein shall prevail notwithstanding anything contained in any other law, Tribunal held that in determining whether a SEZ unit has performed activity amounting to exports, the provisions of Service Tax Rules, 1994 cannot be applied and services provided by appellant in present case would tantamount to export of services in light of provisions of SEZ Act, 2005 which overrides provisions of service tax law.

Thereafter, while deciding appellant's entitlement to refund of accumulated unutilised cenvat credit, Tribunal noted that in terms of Section 26 of SEZ Act, 2005 all duties and taxes on goods and services required for use in authorised operations within SEZ are exempted. In the instant case, since the destination of the services rendered by the appellant being undoubtedly the location of overseas clients, it necessarily follows that the domestic tax should not be carried outside the country and thus, requires refund of such tax, which in the present case, is represented by accumulated CENVAT credit. Therefore, Tribunal held that in the absence of other provisions, the appellant has no option but to rely upon Rule 5 of the CCR, 2004 to get such tax, which should not have been collected or would have been refunded owing to the primary provision of Section 51 of SEZ Act, 2005.

LD/66/135
M/s Lea International Ltd.
vs.
Commissioner of Service Tax
12th January, 2018

Tribunal held that once the income accruing to foreign head office has suffered service tax liability in India, no service tax can be further demanded under reverse charge mechanism on the expenditure recorded in books of Indian project office as entire income has already borne tax incidence.

Deputation of employees to group company does not amount to provision of 'manpower supply services'.

Facts:

The appellant is an Indian project office of foreign entity located outside India. The foreign entity entered into agreements with various Indian clients for providing engineering consultancy services and technical assistance in various projects and consideration accruing in terms of said contracts is directly credited to foreign entity. The appellant has no role in execution of agreements, rendering of services or receipt of consideration from Indian clients. However, service tax liability arising out of such contracts i.e. on consideration earned by foreign entity from Indian clients is being discharged by appellant to Indian service tax authorities.

In terms of certain provisions of Indian Income Tax law, appellant is required to maintain accounts in India wherein the income accrued to foreign entity is accounted for in the books of appellant so as to suffer income tax liability under India law and later on, such income is captured in accounts of foreign entity. Similarly, certain expenses are incurred/shown in accounts of appellant against income of consultancy/ technical fees and such expenditure also forms part of overall income and expenditure of foreign entity. Disregarding these accounting/compliance requirements, revenue entertained a view that the expenses shown in the accounts of appellant represent consideration paid by appellant to foreign entity i.e. its own head office, towards receipt of consultancy services by appellant from such foreign entity and demanded service tax from appellant under reverse charge mechanism (RCM). Revenue also alleged that the staff deputed by foreign entity in appellant's office in India tantamounts to supply of manpower, resulting in service tax liability on appellant under RCM.

Held:

Tribunal found that it is undisputed that the entire consideration accruing to foreign entity in terms of consultancy services provided to Indian clients, has suffered service tax liability and such consideration is captured in the accounts of the appellant and further adjusted in the accounts of foreign entity. While setting aside impugned service tax demand under RCM in respect of expenses shown in books of appellant, Tribunal held that the whole income accrued to foreign entity and shown in the books of accounts of appellant has suffered incidence of service tax and an expenditure which is part of accounting for such income, cannot be taxed under reverse charge tax. Further, it was noted that there didn't exist any agreement/ arrangement between appellant and foreign entity in terms of which appellant would receive consultancy services from foreign entity as alleged by department.

As regards impugned demand in respect of alleged manpower supply by foreign entity to appellant, Tribunal noted that it is settled law, especially as held in *Computer Science Corporation India Pvt. Ltd. - 2014-TIOL-1896-HC-ALL-ST* that the deputation of employee for executing work cannot be considered as a manpower supply and employer cannot be considered as manpower supply agency. Accordingly, Tribunal allowed present appeal on both the issues by setting aside impugned order.

LD/66/136

Religare Enterprise Ltd.
vs.
Commissioner of Service Tax
9th November, 2017

Tribunal held that making of payment by one partner of joint venture to other partner of joint venture towards expenditure incurred in connection with such joint venture, cannot be regarded as payment towards provision of business support service.

Facts:

Appellant entered into joint venture (JV) agreement with foreign entity for commencing and running business in India. In terms of such JV agreement, the foreign entity is obliged to provide capital protection for joint-venture, which they have done through providing bank guarantee. The contractual terms of said JV agreement mandated appellant to reimburse to foreign entity, the charges incurred for furnishing bank guarantee. Revenue held a view that such charges paid by appellant to foreign entity shall be liable to service tax under category of 'business support services' and accordingly confirmed service tax demand along with penalties. Appellant submitted that since the transaction is part and parcel of joint-venture agreement and in pursuance of business activity to set up and manage such joint-venture, and also it being transaction between partners of joint-ventures, it will not qualify as transaction between service provider and service recipient and thus, not chargeable to service tax.

Held:

Tribunal held that admittedly, the transaction in question is in pursuance of a joint-venture agreement for the joint business, hence, it cannot be construed that said foreign partner supported the business of the appellant and provided business support services. This is because both the appellant and foreign partner have jointly promoted their new business and in pursuance of such intention, made the capital protection arrangement and the payments are towards such arrangements. Therefore, as there is no third party involved and in absence of relationship of service provider and service recipient, as the activity is for the joint benefit of parties in joint-venture. In other words, these are part of shared responsibilities arising out of a joint venture agreement and hence there is no scope for service tax liability on such agreement.

International Tax

LD/66/137

Booz & Company (ME) FZ-LLC

vs.

DDIT

ITA No. 4063/Mum/2015

Mumbai ITAT

Hon. Mumbai ITAT holds that consideration of Rs.112.83 lakhs received by taxpayer (a UAE based Booz group company) for providing technical/professional personnel to its Indian associated enterprise (i.e. Booz India) during AY 2011-12, not taxable as business income under Article 7 of India-UAE DTAA absent taxpayer's PE in India

Facts:

Booz & Company (ME) FZ-LLC ('taxpayer'), company incorporated in UAE and engaged in the business of providing management and technical consultancy services, provided technical/professional personnel to its Indian associated enterprise named Booz & Company India Private Limited (Booz India). The taxpayer received a fee of ₹112.83 lakhs from Booz India during AY 2011-12.

The taxpayer did not offer the said income to tax contending that since India-UAE DTAA does not have any specific clause on taxability of fees for technical services and hence the said receipt is taxable as business income as per Article 7 of DTAA. However, since it did not have Permanent Establishment (PE) in India, above said fee is not taxable in India.

Assessing Officer (AO) noticed that group is a global network group of companies having subsidiaries all over the world. AO relied upon past AAR rulings in case of some of the group companies wherein the AAR has held companies are having PE in India.

CIT (A), upheld the order of AO. Aggrieved, taxpayer preferred the appeal before Hon. ITAT.

Issue:

Whether, in the facts of the case, taxpayer is having PE in India and consequently its income is liable to tax in India?

Held:

Hon. ITAT held that ruling given by AAR should not have been followed by the AO as ruling given by the AAR is binding only on those parties who have sought it and not on others. Even if it is considered that the same shall have persuasive value, a perusal of the ruling would show that it has been given without considering main aspects, such as, the Form of PE (whether fixed place PE, Service PE, Agency PE etc.), relevant provisions of DTAA country-wise etc. All the applicant companies before AAR were from different countries, but the AAR has given a common ruling without making specific reference to the provisions of respective DTAA. Accordingly, he submitted that the reliance placed upon the ruling of AAR is not justified.

Hon. ITAT noted that the employees of the taxpayer have worked for 156 solar days only (on all projects taken together), meaning thereby, the period of working is less than 9 months. Therefore, there is no Service PE also in terms of Article 5(2)(i) of DTAA.

Hon. ITAT also noted that taxpayer has provided service to M/s Booz India and did not receive any service, the question of dependent agent PE also does not arise in India.

Hon. ITAT also accepted the taxpayer's contentions that it does not have any fixed place of PE since M/s Booz India has not earmarked any specific place under the control or disposal of the taxpayer.

LD/66/138

Gea Refrigiration Technology Gmbh
(AAR. No. 1232/2012)
(New Delhi)

Authority for Advance Ruling rules transfer of shares in a German Company by German shareholders does not trigger tax in India

Facts

Gea Refrigiration Technology Gmbh ("Applicant") is a German company (part of the GEA Group AG) and is also a tax resident of Germany. It is engaged in the business of industrial refrigeration. It has entered into a share purchase agreement ("SPA") to acquire an unrelated German company, Bock Gmbh for Euro 40.50 million. (INR 2533 million)

Bock Gmnh has several subsidiaries across different countries of the world including its 100% subsidiary in India called as Bock India. All the shareholders of Bock Gmbh were tax residents of Germany. As a result of SPA, there was indirect change in the ownership of Bock India due to the acquisition of Bock Gmbh by the Applicant. As per valuation report, value of Bock India was determined at INR 136.70 Million.

Issue

Whether the income arising from indirect transfer of the shares of Bock GmbH in Bock India to the Applicant would be chargeable to tax in India, within the provisions of Section 9(1)(i) of the Income tax Act, 1961, read with the India Germany DTAA? And whether the applicant is liable to deduct tax at source under Section 195 of the Act?

Held

As per Section 9(1)(i) of the Act, all income accruing or arising in India, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situated in India, would be taxable in India. However, these broad provisions have been clarified/qualified by various explanations that follow.

Explanation 5 to Section 9(1)(i) of the Act states that an asset or a capital asset being any share

or interest in a company or entity registered or incorporated outside India shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India.

Explanation 6 further declares that to see whether the share or interest derives, directly or indirectly, its value substantially from the assets, two requirements are needed, namely: (i) that the value of such assets exceeds the amount of Rs. 10 crore; and (ii) that the value of such shares represent at least 50% of the value of all the assets owned by the company.

Based on valuation report submitted by the applicant, AAR held that income cannot be brought to tax in India as Bock Gmbh derives its value substantially from its other companies situated in Germany, China, England, Singapore, Thailand, Australia etc., whereas its value of assets in Bock India is a mere 5.40%, which is far lower than the requirement of 50%. Hence, it fails the test of deriving value substantially from the Indian Company.

On withholding obligation, AAR held that as per Section 195(1), any person responsible for paying to a non-resident interest or any other sum chargeable under the provisions of the Act shall deduct tax at the time of such credit or remittance. Thus, the liability to deduct arises only if the sum so paid was chargeable to tax. This view was upheld by the Hon'ble Supreme Court in *GE Technology Centre P. Ltd. vs. CIT*, 327 ITR 456, that in cases where income is not chargeable to tax under the Act, as per expressions used in Section 195 itself, there will be no obligation to withhold tax.

Insolvency and Bankruptcy Code

Macquarie Bank Limited vs. Shilpi Cable Technologies Ltd. Supreme Court of India 15-12- 2017

Sections 8, 9 and 238 of the Insolvency and Bankruptcy Code, 2016 read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Section 30 of the Advocates Act - A fair construction of Section 9(3)(c), in consonance with the object ought to be achieved by the Code, would lead to the conclusion that it cannot be construed as a threshold bar or a condition precedent - The *non-obstante* clause contained in Section 238 of the Code will not override the Advocates Act as there is no inconsistency between Section 9, read with the Adjudicating Authority Rules and Forms referred to hereinabove, and the Advocates Act - A conjoint reading of Section 30 of the Advocates Act and Sections 8 and 9 of the Code together with the Adjudicatory Authority Rules and Forms thereunder would yield the result that a notice sent on behalf of an operational creditor by a lawyer would be in order.

The present appeals raise two important questions which arise under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "Code"). The first question is whether, in relation to an operational debt, the provision contained in Section 9(3)(c) of the Code is mandatory; and secondly, whether a demand notice of an unpaid operational debt can be issued by a lawyer on behalf of the operational creditor.

The Supreme Court held as follows:

The true construction of Section 9(3)(c) is that it is a procedural provision, which is directory in nature, as the Adjudicatory Authority Rules read with the Code clearly demonstrate. The Code cannot be construed in a discriminatory fashion so as to include only those operational creditors who are residents outside India who happen to bank with financial institutions which may be included under Section 3(14) of the Code. It is no answer to state that such person can approach the Central Government to include its foreign banker under Section 3(14) of the Code, for the Central Government may never do so. Argument that such persons ought to be left out of the triggering of the Code against their corporate debtor, despite being operational creditors as defined, would not sound well with Article 14 of the Constitution, which applies to all persons including foreigners. Therefore, as the facts of these cases show, a so called condition precedent impossible of compliance cannot be put as a threshold bar to the processing of an application under Section 9 of the Code.

It is true that the expression "initiation" contained in the marginal note to Section 9 does indicate the drift of the provision, but from such drift, to build an argument that the expression "initiation" would lead to the conclusion that Section 9(3) contains mandatory conditions precedent before which the Code can be triggered is a long shot. Equally, the expression "shall" in Section 9(3) does not take us much further when it is clear that Section 9(3)(c) becomes impossible of compliance in cases like the present. It would amount to a situation wherein serious general inconvenience would be caused to innocent persons, such as the appellant, without very much furthering the object of the Act, therefore, Section 9(3)(c) would have to be construed as being directory in nature.

It is unnecessary to further refer to arguments made on the footing that Section 7 qua financial creditors has a process which is different from that of operational creditors under Sections 8 and 9 of the Code. The fact that there is no requirement of a bank certificate under Section 7 of the Code, as compared to Section 9, does not take us very much further. The difference between Sections 7 and 9 has already been noticed by this Court in *Innoventive Industries Ltd. vs. ICICI Bank & Anr.*, Civil Appeal Nos. 8337-8338 of 2017 decided on August 31, 2017.

A fair construction of penal statutes based on purposive as well as literal interpretation is the correct modern day approach. Any arbitrary interpretation, as opposed to fair interpretation, of a statute, keeping the object of the legislature in mind, would be outside the judicial ken. The task of a Judge, when he looks at the literal language of the statute as well as the object and purpose of the statute, is not to interpret the provision as he likes but is to interpret the provision keeping in mind Parliament's language and the object that Parliament had in mind. With this caveat, it is clear that judges are not knight-errants free to roam around in the interpretative world doing as each Judge likes. They are bound by the text of the statute, together with the context in which the statute is enacted; and both text and context are Parliaments', and not what the Judge thinks the statute has been enacted for. Also, it is clear that for the reasons stated by us above, a fair construction of Section 9(3)(c), in consonance with the object ought to be achieved by the Code, would lead to the conclusion that it cannot be construed as a threshold bar or a condition precedent.

Supreme Court on Notice issued by Lawyer on behalf of Operational Creditor:

Section 8 of the Code speaks of an operational creditor delivering a demand notice. It is clear that had the legislature wished to restrict such demand notice being sent by the operational creditor himself, the expression used would perhaps have been "issued" and not "delivered". Delivery, therefore, would postulate that such notice could be made by an authorised agent. In fact, in Forms 3 and 5 of the Adjudicating Authority Rules, it is clear that this is the understanding of the draftsman of the Adjudicatory Authority Rules, because the signature of the person "authorised to act" on behalf of the operational creditor must be appended to both the demand notice as well as the application under Section 9 of the Code.

The position further becomes clear that both forms require such authorised agent to state his position with or in relation to the operational creditor. A position with the operational creditor would perhaps be a position in the company or firm of the operational creditor, but the expression "in relation to" is significant. It is a very wide expression, as has been held in *Renusagar Power Co. Ltd. vs. General Electric Co.*, (1984) 4 SCC 679 at 704 and *State of Karnataka vs. Azad Coach Builders (P) Ltd.* (2010) 9 SCC 524 at 535, which specifically includes a position which is outside or indirectly related to the operational creditor. It is clear, therefore, that both the expression "authorised to act" and "position in relation to the operational creditor" go to show that an authorised agent or a lawyer acting on behalf of his client is included within the aforesaid expression.

The non-obstante clause contained in Section 238 of the Code will not override the Advocates Act as there is no inconsistency between Section 9, read with the Adjudicating Authority Rules and Forms referred to hereinabove, and the Advocates Act.

Since there is no clear disharmony between the two Parliamentary statutes in the present case which cannot be resolved by harmonious interpretation, it is clear that both statutes must be read together. Also, we must not forget that Section 30 of the Advocates Act deals with the fundamental right under Article 19(1)(g) of the Constitution to practice one's profession. Therefore, a conjoint reading of Section 30 of the Advocates Act and Sections 8 and 9 of the Code together with the Adjudicatory Authority Rules and Forms thereunder would yield the result that a notice sent on behalf of an operational creditor by a lawyer would be in order.

The expression *"an operational creditor may on the occurrence of a default deliver a demand notice….."* under Section 8 of the Code must be read as including an operational creditor's authorised agent and lawyer, as has been fleshed out in Forms 3 and 5 appended to the Adjudicatory Authority Rules.

Accordingly, the judgement of NCLAT was set aside.

Disciplinary Case

Summary of a disciplinary case, in the matter of:

CA. ABC vs. CA. XYZ

Facts of the case

A Complaint in Form I dated 5th December, 2011 was received from CA. XYZ of M/s LMN, Chartered Accountants, New Delhi (hereinafter referred to as the "Complainant"), against CA. PQR (hereinafter referred to as the "Respondent"). The charges alleged in the Complaint are as under:

- The Respondent has accepted & conducted the statutory audit of M/s. DEF (P) Ltd. (hereinafter referred as the Company) without any communication with the Complainant.
- The said audit was accepted by the Respondent even though the Complainant's outstanding balance/fees of ₹3,57,963/- was due.

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

- The Committee noted the submissions made by the Respondent during the course of hearing. It observed that the Respondent agreed that he failed to make written communication with the Complainant as per the requirement of clause (8) Part I of First Schedule to the Chartered Accountants (Amendment) Act, 2006.
- The Committee noted that in the instant case the Complainant was given PDC by the Company with the date which was from July, 2011 onwards. Whereas, the Respondent had admitted that he had signed the audit report on 11th May, 2011. Hence, it is clear that the audit fee of the Complainant was due on the date of accepting the audit and the same remained unpaid even on the date of signing of the audit report. Thus, the Respondent has contravened the Council Guidelines, 2008 as undisputed audit fees of the previous auditor was outstanding on the date of accepting the audit and signing the audit report.

The Committee, on an overall consideration of the facts and circumstances of the case, is of the considered view that the Respondent is guilty of professional misconduct falling within the meaning of Clause (8) Part I of the First Schedule and Clause (1) Part II of Second Schedule read with Council Guidelines No.1-CA/(7)/02/2008 dated 08.08.2008 to the Chartered Accountants Act, 1949 (as amended) and held him guilty thereof. Thereafter Committee afforded an opportunity of hearing to the Respondent. The Committee considered the facts that the Respondent himself agreed that he failed to make written communication with the Complainant; and post-dated cheque was given to Complainant in July, 2011 whereas the Respondent signed the audit report on 11th May, 2011 which clearly proves that the audit fee of the Complainant was due on the date of accepting the audit by the Respondent and same remained unpaid even on the date of signing the audit report. Thus, upon overall consideration and looking into the facts of the case, the Committee noted that firstly, though the Respondent has communicated with the previous auditor but the same is not in line with the requirement of the Code of Ethics and secondly, he has accepted and conducted the audit of the Company when the undisputed audit fees of the previous auditor was outstanding which is in contravention of the Council Guidelines, 2008.

The Committee, keeping the material on record, is of the view that the misconduct on the part of the Respondent has been established, yet keeping in view all the circumstances as aforesaid and material on record that there was a technical violation on the part of the Respondent at the time of acceptance and carrying out of audit, the Committee is of the view that the professional misconduct on the part of the Respondent does not qualify for a severe sentence and ends of justice shall be met if minimum punishment is awarded to the Respondent. Accordingly, the Committee ordered for reprimand of the Respondent. ■