Legal Decisions[1]

Income Tax

LD/66/84

GKN Driveline India Ltd.

vs.

CIT

27th November, 2017

Deduction to assessee with respect to payment of non-compete fee to one of the assessee's competitors denied and held as capital in nature. Even the non-compete obligations in clause 11 appear to be illusory in nature and restricted to 'constant velocity joints or any other competitive products'. Same is of limited nature and there was also no obligation of non-compete imposed upon the promoter directors; Payment, which is more than half of the consideration paid for the net assets of the unit itself, was for a multitude of obligations and covenants which were fastened upon SML and not only towards the non-compete obligations

The High Court dealt with the question whether the amount paid by the assessee to a newly established company is a non-compete fee and whether the assessee is entitled to deduction on the ground that it is revenue expenditure.

Assessee was in the process of expanding its manufacturing capacity and since demand for axles was increasing and new models of cars were coming into the market, it entered into an agreement dated 16th February 1995, for purchase of assets and liabilities of a newly set up factory, established by a company named 'Shriram Mobiles Limited' (SML) in Madras. During the assessment proceedings, the AO held that the Assessee obtained an advantage of an enduring nature and hence the expenditure is in the nature of capital expenditure. It was also held that the intention of the Assessee was to keep competitors out of the market thereby increasing sales, the said amount could not be held to be revenue expenditure as it derived long term benefit. On appeal, CIT (A) held that since the non-competition period was for a short term of five years the expenditure is revenue in nature. The said ruling was reversed by the ITAT. According to the ITAT, the expenditure was capital in nature as the Assessee eliminated its only competitor after acquiring the factory, thereby perpetuating its exclusivity in the market.

Aggrieved, the assessee preferred an appeal before the Delhi High Court.

The Delhi High Court referred to a few relevant clauses of the agreement, which clarified the fact that, while the consideration of ₹1.30 Cr. was towards the net value of assets, payment of ₹70 lakhs was 'for obligations and covenants'. The High Court stated that the obligations were imposed upon SML and had a direct bearing on the final execution and implementation of the agreement. Thus, it was held that the entire consideration was not towards non-compete fee only. It was further held that consideration of ₹70 lakhs was paid to ensure that, there was no impediment in the smooth transfer of SML and that, it was complete and final.

The High Court stated that the payment of ₹70 lakhs was towards all the obligations and covenants imposed upon SML, i.e. obtaining permissions from financial institutions, obtaining approvals from governmental authorities, income tax authorities, indemnity towards other losses, if any, and maintenance of confidentiality about the agreement along with incidental property and other data and information.

The High Court held that even the non-compete obligations in clause 11 appear to be illusory in nature and restricted to *'constant velocity joints or any other competitive products'.* Clearly, the same is of limited nature and there was also no obligation of non-compete imposed upon the promoter directors of SML. It was further held that the payment of ₹70 lakhs, which is a substantial sum, i.e., more than half of the consideration paid for the net assets of the unit itself, was for a multitude of obligations and covenants which were fastened upon SML and not only towards the non-compete obligations.

Thus, the High Court held that the payment of ₹70 lakhs was in the nature of capital expenditure and ruled in favour of assessee.

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[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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Legal Update

LD/66/85

Ambience Hospitality Pvt. Ltd.

vs.

Dy. CIT

23rd November, 2017

Delhi High Court holds assessee-company guilty u/s. 276C/277 of the Income Tax Act for false depreciation claim on land; HC holds that the false claim cannot be a mere accounting mistake; the High Court reasons "The petitioner had ample time to rectify its mistake by either bringing the same into the notice of the Assessing Officers soon after its detection or by filing a revised IT return to that effect."

The assessee, Ambience Hospitality Pvt. Ltd. during A.Y. 2007-08 had shown land under the head 'property' along with building and claimed depreciation on land. With respect to false depreciation claim on land, Dy. CIT filed a complaint against assessee alleging that false depreciation on land has been claimed. After the assessment, AO imposed penalty for concealment. The assessee filed an appeal before Delhi HC who dismissed the same. Consequently, Revenue filed an appeal before Additional Chief Metropolitan Magistrate (ACMM) who held the assessee guilty for the offence punishable u/s. 266C and 277 of the Act and sentenced him to pay fine.

Aggrieved, assessee filed a revision petition u/s. 397 before the Delhi High Court seeking quashing of judgment and order of sentence by ACMM.

The High Court observed that after the assessment of the Balance Sheet for A.Y. 2007-08 by AO, two order sheet entry dated 4th September, 2009 and 23rd November, 2009 was made by the AO. It was further observed that by way of the order sheet assessee was asked to explain the claim of depreciation on building shown in the balance sheet for A.Y. 2007-08. It was noted that the said order sheet entries were proved by the IT department in the cross examination.

The High Court refused to accept assessee's contention that the alleged mistake was mere clerical in nature and no element of *mens rea* was present. The High Court stated that it was rightly held by Additional Chief Metropolitan Magistrate ('ACMM') that no sincere efforts were put in by assessee after detection of the alleged mistake by filing the revised return immediately thereafter.

The High Court observed that the said mistake was detected in the month of August, but the same was informed by assessee to AO only on September 2009. The High Court remarked that, *"The petitioner had ample time to rectify its mistake by either bringing the same into the notice of the Assessing Officers soon after its detection or by filing a revised IT return to that effect"*. The High Court stated that however no action was taken by the assessee until 8th December, 2009. The High Court held that it was a manifest procedure that before filing of the Income Tax return the same was to be scrutinised, firstly, by the auditors of the company and then by the directors before endorsing their signatures on the final Balance Sheet.

Thus, HC held that it cannot be a mere accounting mistake.

LD/66/86

CIT

vs.

Parle Soft Drinks

17th November, 2017

Bombay HC holds compensation received by assessee company for breach of Right of First Refusal as capital receipt; Upholds ITAT's finding that sale proceeds on sale of capital assets cannot be held to be a revenue receipt after the sale, the block of assets have been reduced and accordingly whatever is there in the block of assets, deprecation has to be allowed in accordance with the provisions of law

Assessee, Parle Soft Drinks, is a private company and during the relevant assessment year, it had shown income from the hire charges of vehicles and interest. During scrutiny of the return for assessment year 1998-99, the AO noted that the company had received a sum as compensation of a settlement for loss of its bottling rights with Coca Cola Company, USA. The company claimed the amount to be a capital receipt not liable to tax and was declared in the accounts as a capital reserve after deducting a sum for professional fees paid. On appeal, the CIT (A) held that the receipt was taxable as capital gains since Section 55(2)(a) covers such a situation as that of the respondent assessee. However, he held that the right of first refusal dated back to 31st March, 1994, the date when the subsidiary company was formed for developing this new line of business or profit and hence the said receipt was taxable as long term capital gain.

On further appeal, the ITAT held that as per the master agreement, there was a clear indication

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regarding the formation of Bangalore subsidiary and this subsidiary would be given the bottling rights. ITAT held that the ROFR itself constituted a substantial right and foundation on which the assessee could have built its bottling business.

Aggrieved, the Revenue preferred an appeal before the Bombay High Court.

The High Court upheld view of ITAT that the compensation received was not a revenue receipt and was capital receipt. It upheld the ITAT's finding that sale proceeds on sale of capital assets cannot be held to be a revenue receipt after the sale, the block of assets have been reduced and accordingly whatever is there in the block of assets, deprecation has to be allowed in accordance with the provisions of law.

The High Court rejected the Revenue's reliance on Supreme Court ruling in the case of *Shantilal (P.) Ltd.* [(1983) 144 ITR 57] where in it was held that damages awarded for breach of contract were held to be business loss and not speculative transaction on the ground that Revenue had pick up a stray sentence from the SC judgment to hold the compensation as revenue receipt.

LD/66/87

CIT

vs.

M/S GAD Fashion

10th November, 2017

The Larger Bench of Rajasthan High Court, ruling through Justice Inderjeet Singh and Justice K. S. Jhaveri (majority view) holds circular of the CBDT binding on the subordinate officers, when the legislation had thought it fit to put some prohibition on the department; However, the third Judge, Justice M. N. Bhandari, delivering a partially dissenting judgment, opines that if the issue decided by the CIT (Appeals) or Tribunal is contrary to the judgments of the Supreme Court, the Department can prefer an appeal

The High Court dealt with the question 'Whether the Department can take a contrary view than the circular which has been issued for reduction of arrears in the Supreme Court, High Courts and Tribunals and insist for arguing the matter on merits'.

The Rajasthan High Court noted that the intention of the legislation is very clear to prohibit the appeal analogous to the provisions of Code of Civil Procedure where there is a prohibition that appeals upto the value will not be entertained by the Court. It was further noted that from the policy which has been referred by different High Courts and the intention of the legislation to reduce the pendency of the tax appeal and to have a uniform policy for the department through-out the country, therefore, the direction issued by the CBDT is binding on all subordinate officers and Section 268A(4) which has been amended with retrospective effect is applicable with all force in pending matters.

On analogous principle of Section 96(4) of the CPC, the High Court noted that the appeal would be prohibited if the legislation has thought it fit to prohibit the department to file appeal, the instruction of CBDT to delegate the power. It was further noted that in view of Section 96(4) of the CPC where it has been prohibited that no appeal shall lie from a decree in any suit of the nature cognisable by Courts of Small Causes, when the amount or value of the subject matter of the original suit does not exceed ₹10,000.

The High Court referred plethora of High Court rulings and held that where the majority views are in favour of the assessee and in view of all the judgments referred by the assessee, if two views are possible, then one view which is in favour of the assessee is required to be upheld and the same is upheld. The Court asserted *"..it is well known that the Courts are flooded with litigation where the State Government and Central Government or the Department or Corporation are the largest litigants, therefore, frivolous litigation is curb for larger interest of avoiding more Tribunals or Courts to decide the matters on merits."*

The Larger Bench of Rajasthan High Court, ruling through Justice Inderjeet Singh and Justice K S Jhaveri (majority view), asserted that it is well known that the Courts are flooded with litigation where the State Government and Central Government or the Department or Corporation are the largest litigants, therefore, frivolous litigation is curb for larger interest of avoiding more Tribunals or Courts to decide the matters on merits. Thus, the larger bench opined that when the legislation had thought it fit to put some prohibition on the department, the issue is required to be answered in favour of the assessee and against the department in as much as the circular of the CBDT is binding on the subordinate officers.

However, the third Judge, Justice M. N. Bhandari, delivering a partially dissenting judgment, opined that the Circular issued by the CBDT u/s. 268A of

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the Act of 1961 was held binding on the Department, thus appeal could not be filed, if it was barred. It is, however, with a clarification that if the issue decided by the CIT (Appeals) or Tribunal is contrary to the judgments of the Supreme Court, the Department can prefer an appeal, however, care would be taken to file it only in those cases where the order passed by the CIT (Appeals) or the Tribunal is contrary to the ratio propounded by the Supreme Court on the same issue.

LD/66/88

BSES Rajdhani Power Ltd.

vs.

Pr. CIT

8th November, 2017

Failure to issue notice on any particular issue does not vitiate the exercise of power u/s. 263, as long as the assessee is heard and given opportunity; Unlike the power of reopening an assessment under Section 147 of the Act, the power of revision under Section 263 is not contingent on the giving of a notice to show cause

A show cause notice u/s. 263 was issued by the Commissioner, alleging that there was variation in cost of fixed assets, which aspect had not been verified or examined by the AO while framing assessment u/s. 143(3) of the Act. In response to the show-cause notice issued u/s. 263, the assessee filed its replies, resisting the move to revise the completed assessments; the appellant also pointed that since the original order of the AO had merged with that of the CIT (A), after the disposal of appeal, the re-appraisal under Section 263 was unwarranted. The assessee's appeal to the ITAT was rejected. The Tribunal held that the assessment was concluded by the AO without making adequate enquiries with respect to variation in cost of fixed assets and accordingly, order passed by the CIT u/s. 263 was upheld. Aggrieved, the assessee preferred an appeal before the Delhi HC.

The High Court stated that as far as the question of dealing with issues that were not the subject matter of show cause notice is concerned, counsel points out that the previous judgments of this Court and several other High Courts has now been overruled in *Commissioner of Income Tax vs. Amitabh Bacchan* [2016 SCC Online SC 484]. In that judgment, the Supreme Court held that the failure to issue notice on any particular issue does not vitiate the exercise of power u/s. 263, as long as the assessee is heard and given opportunity.

Ruling in with respect to exercise of power u/s. 263, the High Court concluded that the issue stood concluded, in the light of the amendment with effect from 1989, by insertion of Explanation (c) to Section 263 (1). Thus it held that non-consideration of the larger claim for depreciation and the consideration of only a part of it by the AO, who did not go into the issue with respect to the whole amount, was an error, that could be corrected u/s. 263.

The High Court relied on Supreme Court ruling in *Amitabh Bachhan* which upheld the power of the Commissioner to consider all aspects which were the subject matter of the AO's order, if in his opinion, they are erroneous, despite the assessee's appeal on that or some other aspect. The High court re-iterated the extracts from the said ruling *"..unlike the power of reopening an assessment under Section 147 of the Act, the power of revision under Section 263 is not contingent on the giving of a notice to show cause. In fact, Section 263 has been understood not to require any specific show cause notice to be served on the assessee. Rather, what is required under the said provision is an opportunity of hearing to the assessee".* It was further re-iterated *"What is contemplated by Section 263, is an opportunity of hearing to be afforded to the assessee. Failure to give such an opportunity would render the revisional order legally fragile not on the ground of lack of jurisdiction but on the ground of violation of principles of natural justice".*

Thus, the High Court ruled against assessee's favour and opined that the revisional order, to the extent that it did not provide any pre-decisional opportunity to address the issues it dealt with could not be sustained.

LD/66/89

Cairn India Ltd.

vs.

DIT

6th November, 2017

High Court remands matter back to DIT to pass fresh order after giving due opportunity of hearing to assessee; Holds that failure to put to the Assessee areas of concern and/or objection and underlying material, if any, that the DIT may have in his possession would turn the exercise of granting an oral hearing an empty formality

The High Court noted that the show cause notice ('SCN') issued u/s. 263, DIT only mentioned that deduction claimed by assessee u/s. 80IB(9) was not computed in accordance with provisions of Section 80IB(13) read with 80IA(5), however, in the final order u/s. 263, DIT went into the aspects pertaining to assessee's eligibility to claim deduction u/s. 80IB. The High Court stated that Tribunal's observation that there was no variance between the SCN and the order of the DIT dated 12.03.2009 was factually not correct. The High Court held *"No doubt, there is no requirement in law to issue a notice under Section 263 of the 1961 Act, but, once, the DIT chooses to issue, he should specify as to why the assessment order is erroneous and prejudicial to the interest of the Revenue."*

The High Court held that even if the SCN does not advert to the areas of concern or objections on the assessment order, the revisionary jurisdiction would have been rightly exercised as long as at the time of hearing, the DIT confronts the assessee with the said concerns on the assessment order and discloses the material to the Assessee, which led him to believe that the assessment order passed is both erroneous and prejudicial to the interest of the Revenue.

The High Court observed that Section 263 confers powers on the DIT to revise the assessment order, albeit, after giving the Assessee an opportunity of being heard and after making and causing such enquiry to be made, as may be deemed necessary. The High court stated that the exercise of jurisdictional would be irregular since the assessee was not confronted with material available with the DIT, which has caused him to exercise the revisional power vested in him u/s. 263. The High Court accepted assessee's stand that there was breach of the principles of natural justice and remarked *"No doubt, there is no requirement in law to issue a notice u/s. 263, but, once, the DIT chooses to issue, he should specify as to why the assessment order is erroneous and prejudicial to the interest of the Revenue"*.

The High court referred the Supreme Court ruling in *CIT vs. Amitabh Bachchan*, [(2016) 384 ITR 0200 (SC)] and noted that the reason of allowance of appeal of the Revenue, was that, the record did not

show that the revisional authority had not given an opportunity to the Assessee to controvert, the facts on the basis of which it had concluded that the order of AO was erroneous and prejudicial to the interest of the Revenue.

The High Court opined that failure to put to the Assessee areas of concern and/or objection and underlying material, if any, which the DIT may have in his possession would turn the exercise of granting an oral hearing an empty formality. Thus, the High Court set aside DIT's revisionary order u/s. 263 and remands matter back to DIT to pass fresh order after giving due opportunity of hearing to assessee.

LD/66/90

CIT

vs.

Spice Enfotainment Ltd.

2nd November, 2017

Assessment in the hands of non-existing amalgamating company is void; Once it is found that assessment was framed in the name of non-existing entity, it does not remain a procedural irregularity of the nature which can be cured by invoking the provisions of Section 292B and it is a jurisdictional defect as there cannot be any assessment against a dead person

The assessing officer (AO) selected the return for scrutiny & issued the notice u/s. 143(2) in the name of Spice Corp Ltd. The factum of Spice Corp. Ltd., having been dissolved, as a result of its amalgamation with M Corp (P) Ltd. was duly brought to the notice of the AO. However, the AO passed an order u/s. 143(3) framing the assessment on Spice Corp. Ltd., the amalgamating company. On appeal, both the CIT and ITAT upheld the AO's order.

On a further appeal by assessee, the Delhi High Court had observed that after the sanction of the scheme by the HC, Spice had ceased to exist with effect from 1st July, 2003. Even if Spice had filed the returns, it became incumbent upon the IT authorities to substitute the successor in place of the said 'dead person'. When notice under Section 143(2) was sent, M Corp (P) Ltd. appeared and brought this fact to the knowledge of the AO. He, however, did not substitute the name of M Corp (P) Ltd and instead made the assessment in the name of M/s Spice which was non-existing entity on that day. The High Court held that an assessment order passed in the name of M/s Spice, which was a non-existent entity would clearly be void. Such a defect cannot be treated as procedural defect. Mere participation by the appellant would be of no effect as there is no estoppel against law.

The High Court held that once it was found that assessment was framed in the name of non-existing entity, it did not remain a procedural irregularity of the nature which could be cured by invoking the provisions of Section 292B and it was jurisdictional defect as there cannot be any assessment against a 'dead person'.

The Supreme Court dismissed the Revenue's appeal against the High Court order. SC held that *"we find no merit in the appeals and special leave petitions. Accordingly, the appeals and special leave petitions are dismissed."*

Excise

LD/66/91

Anubhav Enterprises

vs.

Commissioner of Central Excise

17th November 2017

Registration of brand name is not relevant for purpose of consideration of availability of exemption under Notification No. 8/2000-CE; SSI exemption ineligible against clearances under group entity's brand name

The assessee is a proprietary concern with Mr. Anil Kumar Jain as proprietor, who is also the Managing Director of A. K. Engineering Industries (I) Pvt. Ltd. and the Director of Rolling Industries (P) Ltd. Revenue was of the view that the proprietary concern was not eligible for exemption under Notification No. 8/2000-CE since goods were being manufactured and cleared under the brand name 'Rollin' owned by A. K. Engineering Pvt. Ltd. Resultantly, a demand was confirmed along with interest and penalty. Aggrieved, the assessee approached the CESTAT. Assessee submitted that both the proprietary concerns as well as other group concerns were equally entitled to use the name 'Rollin'.

The CESTAT noted the definition of 'brand name' which means *"a brand name, whether registered or not, that is to say, a name or a mark, such as a symbol, monogram, label, signature or invented words or any writing which is used in relation to a product, for the purpose of indicating, or so as to indicate, a connection in the course of trade between the product and some person using such name*

or mark with or without any indication of the identity of that person". CESTAT further took a view that 'Rollin' qualified to be considered as a brand name, though it was not registered. It was noted that assessee had incurred heavy expenditure on the publicity by using the said brand name. In addition to that, since the benefit of SSI had already been availed by A.K. Engineering Pvt. Ltd., it could not be extended again to the assessee.

Thus, the Supreme Court affirmed the view of the CESTAT and rejected assessee's appeal.

Value Added Tax

LD/66/92

The State of Tamilnadu

vs.

Tvl. Baron Power Ltd

16th November, 2017

'Export' also constitutes a "sale" as contemplated u/s. 3(4); High Court relies on 'Tube Investment of India Ltd' wherein the division bench held that Section 3(4) would have no application since situs of the export sales for the purpose of said Section was the State of Tamil Nadu, and by virtue of the said factual position, the applicability of Section 3(4) stood excluded for the exigibility of tax

The assessee, Baron Power Ltd., purchased raw materials availing concessional rate of tax u/s. 3(3) of the Act, by issuing Form XVII declaration. It used the raw materials in the manufacture of goods and effected export sales. However, the Assessing Authority rejected assessee's claim that purchases turnover u/s. 3(3) corresponding to export turnover would not be assessed to tax at 1% u/s. 3(4) of the Act. On appeal, the Tribunal set aside the assessment made at 1%.

Aggrieved, the Revenue filed revision applications. It relied on the Supreme Court ruling in the *State of Karnataka vs. B.M. Ashraf & Co.* [107 STC 571] wherein it was held that a sale deemed to be in the course of export u/s. 5(3) of Central Sales Tax Act, 1956, cannot be regarded as "intra-state

sale". It submitted therefore that the Tribunal had erred in interpreting the expression "in any other manner" occurring u/s. 3(4).

The High Court noted that the Supreme Court ruling in *B. M. Ashraf & Co.* (supra) had been distinguished in *Tube Investment of India Ltd.* [2010] 36 VST 67 (Mad.), wherein the Madras High court held *"sec 3(4) will have no application since situs of the export sales for the purpose of said Section was the State of Tamil Nadu, and by virtue of the said factual position, the applicability of Section 3(4) stood excluded for the exigibility of tax"*.

The High Court relied on *State of Tamil Nadu vs. Essar Inc.,* [(2015) 79 VST 588 (Mad.)] and *State of Tamil Nadu vs. Tvl. Saint Gobain Glass India Ltd.* [Tax Case (Revision) Nos.38 to 40 of 2016] and dismissed Revenue's revision applications.

LD/66/93

IJM Corporation Berhad

vs.

Commissioner of Trade & Taxes

2nd November, 2017

Interest u/s. 42 of Delhi VAT Act on refund of VAT amount accrues after period specified for processing refunds/returns u/s. 38(3)(a) and not from date of filing return

The Assessee, IJM Corporation Berhad, had filed VAT return in Form DVAT-16 for the month of March, 2012 claiming refund of tax paid. It also claimed interest on the ground that same was due and payable from the date of filing of the return. Revenue disputed that interest in terms of Section 42(1)(a) accrued after a period of one or two months from return filing date and not from date of filing of the return.

Being aggrieved, assessee preferred a writ petition before Delhi High Court.

The High Court noted that there could be time gap between filing of the original return and revised return and this aspect would depend on facts of each case. Further, the facts would matter in such case and require elucidation and clarity. It was further noted that interest was to be paid from the date when the refund was due to be paid to the assessee or date when the overpaid amount was paid, whichever was later. The High Court also observed that the date when the refund was due was the date on which the refund became payable i.e., in terms Section 38(3)(a)(i). The High court stated *"two sections, namely, Section 38(3) and 42(1) do not refer to the date of filing of return. This obviously as per the Act is not starting point for payment of interest."*

The High Court held that it would not like to go into the multifarious situations which may arise when an assessee files the revised return. It would be more appropriate and proper for the authorities under the DVAT Act to examine each and every case wherein a revised return has been filed and thereafter, determine whether the assessee would be entitled to interest and, if so, from which date, on the findings. The High Court directed the authorities to examine the question of interest payable on refund and the date from which it was payable in accordance with the aforesaid dictum and principles.

Thus, the High Court dismissed assessee's appeal.

Service Tax

LD/66/94

Commissioner of Service Tax, Mumbai-VI

vs.

M/s Gupshup Technology India Pvt. Ltd.

6th November 2017

When services are rendered to recipient located outside taxable territory who makes payment of entire consideration to service provider, then, even if such services are used in India by Indian subscribers of such foreign recipient, such services would be regarded as provided outside India and Rule 3/ Rule 8 of POPS Rules, 2012 cannot be invoked.

Facts:

In terms of agreement entered into with M/s Facebook, Ireland, the assessee provided business support services to M/s Facebook by undertaking activity of sending or receiving SMS to/from the Indian subscribers of Facebook by using a direct internet connection between them and Facebook. It was agreed that the assessee cannot charge any fee to Indian subscribers of Facebook or send any message to any subscriber other than the SMS message as directed by Facebook and entire consideration was paid by Facebook to the assessee in convertible foreign exchange. As regards the assessee's claim

for refund of unutilised cenvat credit under Rule 5 of Cenvat Credit Rules, 2004 r/w Notification No. 27/2013-CE(NT) dated 18.06.2012, the first appellate authority partly sanctioned refund claim for period 'January –June 2014' whereas, that for 'July –December 2014' was rejected entirely on the ground that services provided by the assessee are not export of services.

Revenue alleged that on behalf of Facebook, the assessee was providing SMS aggregator services within India to Indian Subscribers of Facebook; since both the service provider and service recipient i.e. Indian subscribers, are located within India; thus, in terms of Rule 3 and Rule 8 of Place of Provision of Rules, 2012 (POPS, 2012), the place of provision of service is in India and not outside India as submitted by respondent-assessee, hence, the services provided by the assessee cannot be regarded as 'export of services'.

The assessee relied upon ratio laid down in *M/s Paul Merchants Ltd. vs. CCE, Chandigarh 2013 (29) STR 257 (TRI) and M/s Vodaphone Essar Cellular Ltd - 2013-TIOL-566-CESTAT-MUM.*

Held:

The Hon'ble Tribunal noted that the Facebook initiates the transmission of SMS from their server located outside India through the assessee's API connectivity and respondent provides the services to M/s Facebook by sending or receiving SMS to subscribers of Facebook located in India, thus, the assesse is acting as aggregator/facilitator of all SMSs either originating from Facebook or subscribers of Facebook to transmit between them at direction and discretion of Facebook, for which service charges are paid by Facebook and in the entire process, respondent assessee neither interacts with the subscribers of the Facebook nor has any connection/ relation/concern with the said subscribers, the subscribers of Facebook are not even aware of existence of respondent and type of services rendered by them. Tribunal also found that CBEC itself in its education guide - Para 5.3.3 has clarified that the person who is obliged to make payment to the service provider is service recipient. Accordingly, Tribunal held that in sum and substance the recipient of services provided by the assessee would

be Facebook, Ireland and not the Indian subscribers of Facebook as alleged by Revenue.

As regards invoking Rule 3 of POPS, the Tribunal held that location of Facebook, Ireland is undisputed; thus, the Indian subscribers of Facebook cannot be termed as 'service recipient'. Further, it was held that Rule 8 would also not apply as the service recipient i.e. Facebook is located in Ireland, which is a non-taxable territory being located outside India. The Tribunal also held that if revenue considered that respondent has not rendered services outside taxable territory, however, by not issuing demand notice on the assessee for service tax on bills raised to M/s Facebook, revenue accepted that the assesse rendered services to party situated outside India being falling under category of 'Export of services', therefore, the rejection of refund claim is uncalled for. Tribunal thus held that respondent assessee is entitled to refund claim under Rule 5 of Cenvat Credit Rules, 2004.

LD/66/95

M/s Professional Education Services

vs.

CCE, Jaipur

23rd August, 2017

Tribunal allowed assessee's claim of cenvat credit pertaining to services used by assessee, for which initially the expenses were incurred by franchisor but subsequently, recovered from appellant by franchisor.

Facts:

The appellant is a commercial training and coaching center that obtained a franchisee of another training institute. The franchisor incurred advertisement expenditure for bringing students to coaching center of the appellant, also paid for courier services used by appellant and then, issued invoices to the appellant for reimbursement of proportionate amount of expenses incurred on behalf of the appellant. Appellant claimed cenvat credit on services availed for advertisement and courier services, which was denied by revenue by alleging that as appellant has not received these services, they are not entitled to cenvat credit of the same.

Held:

As regards revenue's allegation that advertisement services were not received by appellant in their premises, Tribunal found that the advertisement service is to be done in public at large for bringing students to the appellant's institute; admittedly by the advertisement done by the franchiser, the appellant got the students and thus, it was held that although the advertisement has been made by the franchisor, the advertisement service has been used by the appellant, thus, they are correctly entitled to cenvat credit.

With regard to disallowance of credit on courier services, as the said services were utilised for communication with the franchiser and students and also for procuring study material from the franchiser, Tribunal held that these were used by appellant only and not by the franchisor, thereby allowed appellant's claim for cenvat credit.

LD/66/96

Commissioner of Service Tax, Mumbai

vs.

M/s Ideal Road Builders Pvt. Ltd., M/s Mep Toll Road Pvt. Ltd.

26th September, 2017

When assessee collected toll on its own account and was required to pay fixed bid price to NHAI/MSRDC as per contractual terms, Tribunal held that assessee cannot be regarded as commission agent providing 'business auxiliary services' to NHAI/MSRDC and difference between toll collected by assessee on its own account and bid price paid by it to NHAI/MSRDC, cannot be charged to service tax as commission.

Facts:

Respondents secured rights to collect tolls for different sections of highways, on the basis of competitive bids from the National Highway Authority of India (NHAI)/Maharashtra State Road Development Corporation (MSRDC) and were obliged to pay fixed bid price for "toll collection charges" to NHAI/MSRDC irrespective of toll amounts collected by respondents. Revenue entertained a view that respondents have undertaken services of toll collection on behalf of NHAI/MSRDC i.e. respondents are collecting tolls as agents of NHAI/MSRDC and consideration for right to collect the toll was equivalent to total amount collected by respondent representing toll as reduced by bid price paid by them to NHAI/MSRDC. Thus, revenue alleged that respondents provided 'business auxiliary services'

to NHAI/MSRDC by acting as agent of NHAI/MSRDC for toll collection and part of amounts of toll as retained by respondent from toll collected, would be chargeable to service tax.

Held:

The Hon'ble Tribunal held that since NHAI/MSRDC are engaged in sovereign function and not into any business activity, respondents cannot be said to be providing services as auxiliary to business. Further, the Tribunal found that the activity of toll collection was undertaken neither on commission basis nor in lieu of any remuneration from NHAI/MSRDC; once the respondent paid bid amount to NHAI/MSRDC, all the proceeds of toll collection belong to respondents with no interference or right of NHAI/MSRDC i.e. the income generated from toll collection is respondent's own business income and NHAI/MSRDC has no right over such toll collection. Tribunal also noted that respondent did not collect the toll as representative or agent of NHAI/MSRDC nor any commission in terms of quantum of amount or percentage is charged by respondent from NHAI/MSRDC, rather they were liable to pay bid amount fixed at the auction to NHAI/MSRDC irrespective of whether such collection of toll is profitable to them or not. Accordingly it was held that toll collection by respondent is not arising out of rendering 'business auxiliary service' as alleged by revenue.

The Tribunal found that even otherwise, NHAI/MSRDC do not consider toll collection by respondents on their behalf as activity of commission agent as they consider respondent as in business of toll collection and collects tax at source u/s. 206C of Income-tax Act, 1961 from the installments paid by respondents (i.e. collection of income tax at the time of receipt of amount), further, since respondent's income is towards its own toll collection and they do not get any commission on account of collection of toll from NHAI/MSRDC, there is no deduction of tax at source under Section 194H which is towards deduction of tax as commission income. Therefore, the Tribunal held that the difference between the toll collected and the bid amount paid by the respondents to

Legal Update

M/s NHAI/MSRDC in no way can be termed as consideration for any service and set aside the demand of service tax on respondents under 'business auxiliary service'.

LD/66/97

Commissioner of Central Excise

vs.

M/s Tehri Pulp and Paper Ltd.

28th November 2017

Merely undertaking ancillary/supplementary activities of supervision and arranging transportation, commission on sale and follow up of for payment etc., while providing principal service of commission agency, would not constitute 'clearing and forwarding agency services' for which the essential condition is clearing of goods by agent on behalf of principal and thereafter forwarding these goods to particular destination at the instance and on the directions of the principal.

Facts:

Respondent entered into contract with its customers for providing host of services viz. supervision of transportation, arranging transportation, commission on sale and follow-up for payment etc. The Respondent was of the view that primarily they were engaged in providing commission agency services which are chargeable to service tax under category of 'business auxiliary services' and all other services were ancillary to main service of commission agency, whereas revenue sought to demand service tax from respondent by alleging that commission agency contracts entered into between respondent and its customers are for services of 'clearing and forwarding agency'.

During appellate proceedings before Tribunal, as there was difference of opinion between judicial member and technical member, matter was referred to third member who agreed with view taken by judicial member and held that services provided by respondent cannot be said to be those of clearing and forwarding agency and allowed respondent's appeal.

Aggrieved by the order of Tribunal, revenue filed present appeal on the ground that other than that as has been noted by the Tribunal, respondent was engaged in providing supervision of transportation, supervising supplies to be made to its customers etc. and thus, services provided by them were a bundle of services which amongst others include services of commission agency to procure orders and hence, said activities taken together lead to the conclusion that the assessee was providing 'clearing and forwarding services'.

Held:

The Hon'ble High Court relied on decision of Hon'ble Supreme Court in case of *Coal Handlers Pvt. Ltd. vs. CCE 2015 (38) STR 897 (SC)*, wherein it was held that the expression 'clearing and forwarding operations' would cover those activities which pertain to clearing of goods and thereafter forwarding those goods to particular destination at the instance and on the directions of the principal. In the process it may include warehousing of the goods so cleared, receiving dispatch orders from the principal, arranging dispatch of the goods as per the instructions of the principal by engaging transport on his own or through the transporters of the principal, maintaining records of the receipt and dispatch of the goods and the stock available on the warehouses and preparing invoices on behalf of the principal, i.e. essentially the agent has to get the goods cleared, on behalf of the principal, from supplier of goods and thereafter dispatching/forwarding said goods to different destinations as per instructions of principal. Accordingly, High Court upheld order of the Tribunal by observing that view taken by technical member of Tribunal is inconsistent with ratio laid in *Coal Handlers Pvt. Ltd. (Supra)*, in as much as all the activities that have been noted by the Technical Member to conclude that the assessee was engaged in 'clearing and forwarding' service are such activities, as are not involved either with clearing of goods or with forwarding of any goods to any destination or person, rather, such activities are only ancillary or supplementary to the activity of commission agency because they only seek to ensure prompt placement of orders; prompt supply of goods and prompt payment against such supplies etc. Hon'ble High Court thus held that since such ancillary activities are all arising from contract of commission agency, in any case, these activities are not such as may be linked with any of the activities required to be performed to treat the service as "clearing and forwarding service" and dismissed revenue's appeal.

LD/66/98

M/s Sudhir Chand Jain

vs.

Commissioner of Central Excise

Tribunal held that subcontractor, who provides services through main contractor to Deputy Commissioner of SEZ, would be entitled to exemption as services were provided to Deputy Commissioner of SEZ and no further approval of Approval Committee would be required.

Facts:

Appellant rendered civil construction services in SEZ, in the capacity of sub-contractor and claimed benefit of exemption notification which provided for exemption to service provider if such services are provided for utilisation fully in SEZ. Revenue denied benefit of exemption to appellant by contending that appellant has not fulfilled conditions stipulated for being entitled to exemption in as much as appellant has failed to establish that services provided by him had been approved by board of approval of SEZ and services provided by appellant were included in list of authorised operations and have been wholly consumed in SEZ. Appellant submitted that regardless of work done by main contractor or sub-contractor, the transfer of property in goods or services has accrued to principal i.e. deputy commissioner of SEZ. Appellant also submitted that approval from the Approval Committee is required in case of a unit in the SEZ, consuming the 'specified services', however, where the service is being consumed for the development of the SEZ in the course of work allotted by the Deputy Commissioner of the SEZ, no further approval of committee is required.

Held:

The Tribunal held that since admittedly the work order has been issued by Deputy Commissioner, SEZ, it amounts to providing and consuming service to SEZ i.e. there is *ipso facto* approval of the Deputy Commissioner of the SEZ and no further approval of the Approval Committee is

required. Further, relying upon ratio laid down by Hon'ble Apex Court in case of *Imagic Creative* and by Hon'ble Patna High Court in the case of *Hindustan Dorr Oliver Ltd. vs. State of Bihar*, Tribunal held that appellant as subcontractor, through main contractor, has provided construction services to Deputy Commissioner of SEZ, thus entitled to benefit of exemption and thereby set aside impugned order demanding service tax along with penalties.

Transfer Pricing

LD/66/99

Amrit Feeds Ltd

vs.

DCIT

6th November, 2017

Tribunal dismisses Assessee's appeal against CIT's revisionary order u/s. 263 on the ground that AO failed to verify specified domestic transactions; Tribunal ruled "...Simply submission of necessary details in form of 3CEB does not prove that the AO has verified the details regarding the deduction claimed by the assessee u/s. 80IB/80IE of the Act"; When there was no examination by the AO because the AO has not even raised any query on this issue, then it is a clear case of non- conduct of any enquiry on the issue

The Tribunal noted that CIT (A) had held that the assessee was very much carrying out the manufacturing activity and therefore eligible for deduction u/s. 80IB/80IE. However, ITAT observed that the quantum of deduction u/s. 80IB/80IE was not decided by CIT (A) as this issue was never raised before him. The Tribunal rejected assessee's argument that AO's order got merged with CIT(A)'s order with respect to determination of the question whether the activity of assessee is manufacturing in the nature or not.

ITAT stated that Circular No.3/2003 issued by CBDT was in relation to international transactions and same was mandatory in terms of judgment of Delhi HC in the case of *Ranbaxy Laboratories Limited* [345 ITR 193 (Del)]. ITAT explained that the concept of specified domestic transactions came into force with effect from A.Y. 2013-14 under the provision of Section 92C. Prior to the A.Y. 2013-14, there was no concept of determination of ALP in relation to specified domestic transactions. Thus, ITAT held that *"we have no hesitation in holding that the provisions as contained in CBDT's Instruction No.3/2003 cannot be applied to the specified domestic transactions"*.

The Tribunal stated that the AO must have verified the necessary details with regard to the deduction claimed u/s. 80IB/80IE of the Act. The assessee had also not brought anything on record suggesting that the AO had raised some queries with regard to the deduction claimed u/s. 80IB/80IE of the Act other than submission that the form 3CEB was available before the AO. It was further held that *"Simply submission of necessary details in form of 3CEB does not prove that the AO has verified the details regarding the deduction claimed by the assessee u/s. 80IB/80IE of the Act"*.

The Tribunal ruled that *"the AO has not made any verification for the quantum of deduction claimed by the assessee u/s. 80IB/80IE of the Act. When there was no examination by the AO because the AO has not even raised any query on this issue, then it is a clear case of non- conduct of any enquiry on the issue"*. The Tribunal noted that the AO did not ask any question, any record or explanation to justify the quantum of deduction claimed u/s. 80IB/80IE. The Tribunal held that *"a case of complete lack of enquiry which renders the order of the AO erroneous so far as prejudicial to the interest of the revenue"* and dismissed assessee's appeal.

LD/66/100

Bausch & Lomb India Pvt. Ltd.

vs.

ACIT

Delhi ITAT

Power of the Dispute Resolution Panel is co-terminus with that of the Assessing Officer/ Transfer Pricing Officer and DRP can do all such things, which the authorities could have done but omitted to do.

Facts and Background:

The assessee, Bausch & Lomb India Pvt. Ltd., is engaged in the manufacturing and trading of soft contact lenses, eyecare solution and protein removing enzyme tablets. The assessee is also involved in the trading of surgical equipments, such as, Excimer Laser System and Cataract Machines and Intra Ocular lenses.

During the course of transfer pricing assessment, TPO did not propose any transfer pricing adjustment in his order on account of

intra group services. During the course of hearing, DRP found that TPO inadvertently overlooked intra group services while passing the order. The DRP required the TPO to incorporate the benchmarking analysis and propose transfer pricing adjustment w.r.t. intra group services in his order.

Accordingly, TPO carried out such benchmarking analysis and determined Nil ALP of such a transaction. The DRP, after due notice to the assessee and having entertained its objections, directed to make transfer pricing adjustment on account of intra group transaction.

Issue:

Whether the powers of DRP are coterminous with that of AO/TPO?

Held:

On perusal of Section 144C(8) read with the Explanation (inserted retrospectively from 1.4.2000), ITAT stated that it clearly emerged that the DRP has a power to enhance variations proposed in the draft order on an international transaction, even if it was not raised by the assessee.

ITAT clarified that `Enhance the variations' include not only increasing the amount of TP adjustment already proposed, but also making a new TP adjustment, which was omitted to be proposed/ made by AO/TPO.

Accordingly, ITAT stated that power of the DRP is co-terminus with that of the AO/TPO and DRP can also do all such things, which the authorities could have done but omitted to do. ITAT further opined that *"If the language of the provision is read as disabling the DRP to exercise the power of enhancement in the circumstances as are obtaining in the instant case, as has been canvassed on behalf of the assessee, it would amount to diluting the power, which the statute has expressly granted."*

Further, ITAT referred to Section 144C(7) which provides that DRP, before issuing any final directions u/s. 144C(5) may either (a) make such further enquiry, as it thinks fit; or (b) cause any further enquiry to be made by any income-tax authority and report the result of the same

to it. ITAT stated that *"In the instant case, the DRP has impliedly taken recourse to clause (b) of sub-section (7) by causing the further enquiry to be made by the TPO before issuing direction u/s 144C(5). In view of the foregoing discussion, it is clear that no exception can be taken to the course adopted by the DRP in making the enhancement."*

ITAT also rejected assessee's contention that if there was some mistake in the order of the TPO or the draft order, then the remedy was with the CIT to revise the order u/s. 263 and not in making the enhancement by the DRP. In this regard, ITAT referred to Section 263(1) which clearly provides that CIT may call for and examine the record of any proceeding under this Act, and if he considers that any `order' passed therein by the AO is erroneous in so far as it is prejudicial to the interests of the revenue. ITAT clarified that an order can be prejudicial to the interest of the revenue only when it crystallises the liability of the assessee to pay and notice of demand is issued, which in the opinion of the authority is prejudicial to the interest of the revenue.

If no final liability, pursuant to which a demand notice can be issued, is capable of determination at that stage, such a draft order ceases to be characterised as an `order' capable of revision u/s. 263.

International Taxation

LD/66/101

Google India Pvt. Ltd.

vs.

ACIT

Bangalore ITAT

The Google Adwords advertisement module is not merely an agreement to provide advertisement space but is an agreement for facilitating the display and publishing of an advertisement to the targeted customer using Google's patented algorithm, tools and software. Google Adwords uses data regarding the age, gender, region, language, taste habits, food habits, etc. of the customer so as to maximise the impression and conversion to the ads of the advertisers. Consequently, the payments to Google Ireland are taxable as "royalty" and the assessee ought to have deducted TDS thereon u/s. 195

Facts & Background

Google India is a wholly owned subsidiary of Google International LLC.

Google India was appointed as a non-exclusive authorised distributor of Google Ireland's *AdWords program* in India under an agreement dated December 12, 2005 for resale of online advertisement space to advertisers in India.

Apart from marketing and distribution services provided to Google Ireland, under the Distribution Agreement with Google Ireland, Google India was also required to provide pre-sale and post-sale customer support services to the advertisers.

During the relevant year, the assessing officer observed that Google India had credited ₹ 119 crore to the account of Google Ireland without deduction of taxes.

As per Google India, purchase of AdWords Space under the Distribution Agreement would be characterised as business income in Google Ireland's hands and in the absence of a permanent establishment of Google Ireland in India, such income would not be liable to tax in India.

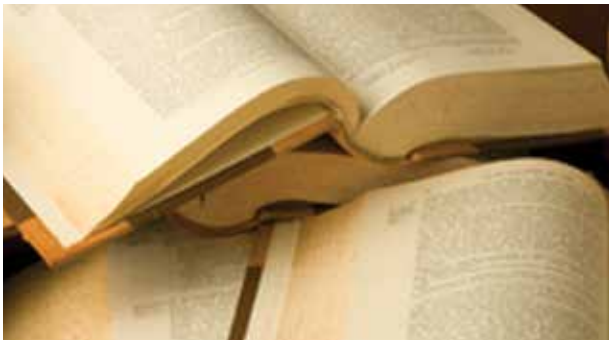
However, the AO treated the payments as royalties on which tax should have been withheld by Google India. Aggrieved, Google India appealed to the Commissioner of Income Tax (Appeals), however, CIT(A) upheld the order of the AO.

According to Department, Google India's marketing and distribution functions involved the sale of certain rights in the AdWords Program, for which Google India required a license to use the AdWords Program.

The distribution rights granted to Google India under the Distribution Agreement were therefore in effect a license to use Google Ireland's intellectual property i.e., *inter-alia*, the copyright in the underlying software code of the AdWords Program.

The grant of distribution rights also involves transfer of right in processes, including Google Ireland's databases software tools etc., without which it would not be able to perform its marketing and distribution functions.

The grant of distribution rights also involves the transfer of right to use Google Ireland's industrial, commercial and scientific equipment i.e., the servers on which the AdWords Program runs.



Further, Google India has been permitted to use Google Ireland's trademarks and brand features in order to market and distribute the AdWords Program.

However, Google India submitted that the distribution rights granted to Google India under the Distribution Agreement did not involve a license to use Google Ireland's intellectual property.

Google India neither receives any right nor access to the AdWords Program under the Distribution Agreement and does not use it in any manner whatsoever.

The payment to Google Ireland is merely towards purchase of the ad space for resale without access to any underlying computer program.

Google India performs marketing related activities in order to promote the sale of ad space to advertisers in India.

The services provided by Google India are to ensure that ads placed by advertisers globally confirm with Google's editorial guidelines and the local laws of the country from where the ad originates. These services are not linked in any manner to its AdWords Program distribution function.

The right to use the Google trademarks and brand features granted to Google India were merely to enable Google India to distribute the ad space in India and were incidental to the main purpose of the distribution agreement which was the sale of ad space. Google India submitted that the mere use of brand name for procuring ad contracts would not amount to use of trademark.

Google India does not have access to or control over any back-end processes such as databases, software tools etc., under the Distribution Agreement.

Google India has no right to use Google Ireland's equipment or servers. The operation, control and maintenance of the servers, located outside India, solely rests with Google Ireland.

Issue

Whether payment of amount by Google India to Google Ireland is business income or royalties for use of software, trademarks and other intellectual property rights?

Decision of Tribunal Ruling

Tribunal concluded that the Distribution Agreement was not merely an agreement to sell ad space but rather is an agreement to provide services to facilitate the display and publication of an advertisement to targeted customers with the help of technology.

AdWords Program gives an advertiser a variety of tools to enable it to maximise attention, engagement, delivery and conversion of its advertisements.

The tools are provided using Google's intellectual property, software and database (including data on numerous individual web-users and their name, age, gender, location, habits, preferences, online behavior, search history etc.) with Google India acting as a gateway.

By using the patented algorithm, the taxpayer decides which advertisement is to be shown to which consumer visiting millions of website/search engine.

The Tribunal was of the view that the use of customer data for providing services under the Service Agreement was also utilised for marketing and distribution functions under the Distribution Agreement. It concluded that the use of customer data and confidential information should be regarded as the use of Google Ireland's intellectual property by Google India.

Tribunal distinguished the reports of OECD as well as earlier tribunal rulings in case of *Right Florist, Yahoo* and *Pinstorm Technologies* where courts have held that payments made to a foreign company for banner advertisement hosting services would not constitute royalties.

Google India has been provided access to the IPR, Google brand features, secret process embedded in AdWords Program as tool of the trade for generation of income

Legal Update

LD/66/102
ABB FZ-LLC
vs.
DCIT
Bengaluru ITAT

A foreign company constitutes a service PE in India under the India-UAE tax treaty. Services provided in the form of sharing or permitting to use the special knowledge or expertise falls within the term 'royalty' under the tax treaty

Facts & Background of the Case

The assessee ABB FZ LLC ("ABB Dubai"/"Assessee") is a non-resident company incorporated in United Arab Emirates.

During the year, assessee rendered regional service activities for the benefit of ABB Limited (ABB India) pursuant to the regional headquarter service agreement between the ABB Dubai and ABB legal entities in India, Middle East and Africa, for which it received the consideration.

For rendering of services, employees of assessee were physically present in India for a period of 25 days, although, the services were provided from remote location as well through various other communication channels.

The assessee claimed that the above amounts are non-taxable in India as per India - UAE Double Tax Avoidance Agreement (DTAA), as the DTAA does not contain the Fees for Technical services clause and since this clause has been specifically excluded from the treaty, the taxability would fall under Article 22 - other income, which provides that that income would be taxable in India only if taxpayer is having PE in India.

As per Article 5(2)(i) of the Treaty, a foreign company is deemed to have its PE in India, if the foreign company renders services through its employees or any other person for a period of 9 months or more in any 12 months period.

However, Assessing Officer denied the benefit of treaty by stating that payment shall be taxable as Royalty as well as FTS. As per AO, if treaty is silent as regards taxability of particular category of income, its taxability has to be ascertained as per domestic law.

On filing objection with Dispute Resolution Panel ('DRP'), the DRP upheld the order of the tax officer and also held that taxpayer would constitute PE in India.

Issues involved in the ruling

1) Whether ABB Dubai's rendering of services constitutes service PE in India?
2) Whether the services provided by assesse fall in the definition of Royalty as per DTAA?

Held

Tribunal held that furnishing of services including consultancy services by assessee to ABB Ltd. for the project in India or with connected Project was for a period 3 months after commencing its activities in January 2010. Thus, it fulfils the prerequisite of service PE and service PE does not require fixed place of business. In the present age of technology where the services, information, consultancy, management etc., can be provided with various virtual modes like email, internet, video conference, remote monitoring, remote access to desk-top, etc., through various software, therefore, the argument of fixed place of business raised by the assessee that three employees rendered services only for 25 days cannot be sustained, as the services can be rendered without the physical presence of employees of the assessee.

It was held that it is not the stay of the employees for more than 9 months, which is required to be there but it is the fact of rendering of services or activities which was required to be rendered for a period of nine months.

The providing of services for a period of nine months is stipulated in the period of 12 months. Once the activity of the assessee commenced only in the month of January, 2010, then the argument of completing 9 months service before March, 2010, is preposterous, implausible and against the common sense. Since the assessee continues to render the services with effect from January, 2010 and thereafter also in the subsequent assessment year.

Tribunal held that payment received by assesse will fall in Article 12(3) of DTAA as it is a consideration for the use or the right to use, industrial, commercial or scientific equipment or for information concerning industrial, commercial or scientific equipment.

Tribunal held that the information provided by the assessee to ABB Ltd., were acquired by the assessee of its expertise, experience and knowledge based on its association with ABB group Zurich.

The said information are not available in the public domain or cannot be acquired by ABB Ltd. on its own effort and the information which are provided were in the nature of special knowledge, skill and expertise.

The agreement gives opportunity to ABB Ltd. of using the information pertaining to industrial/ commercial/scientific experience belonging to the assessee.

The information provided by the assessee to ABB Ltd. were in the nature of know-how contract; given by the assessee to ABB Ltd. so that such know-how can be used by ABB Ltd., for its commercial and industrial purposes and further this special knowledge and experience would remain unrevealed to the public.

These information were not already existing and were supplied by the assessee after its development or creation to ABB Ltd. and there also exist specific provisions concerning the confidentiality of these information. Moreover the assessee has done very little after giving access to these information to ABB Ltd., thus the information provided of the assessee given to ABB Ltd with the right to use and exploit commercially were concerning industrial, commercial or scientific experience activities would fall under Royalty of DTAA.

As has been held that the activities under consideration of the assessee fall under Royalty clause 12 of DTAA and not under residual clause, therefore the assessee is liable to be taxed within India in accordance with Article 12 of DTAA, Section 5 read with Section 9.

LD/66/103

Apollo Tyres Ltd.

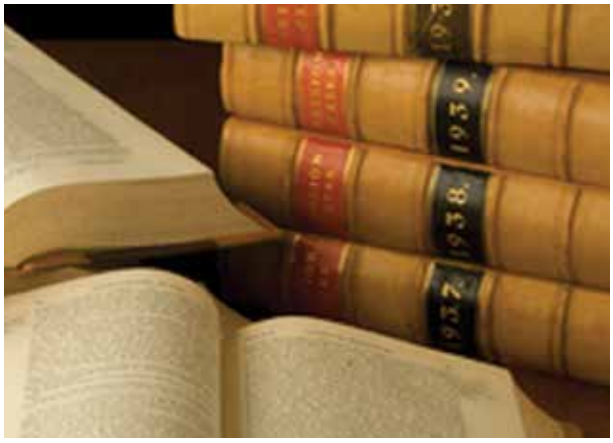
vs.

CIT

Karnataka HC

MFN Clause benefit granted to the Assessee

The Assessee, Apollo Tyres Ltd., had filed revision



petition under Section 264 seeking Most Favoured Nation (MFN) clause benefit under the protocol to India-Netherlands DTAA with respect to the payment of Fees for Technical Services ('FTS') to a Dutch party.

However, the same was rejected by the Commissioner. The Commissioner held that no notification was issued by CBDT making beneficial provisions under India Finland treaty applicable to India - Netherlands treaty. To support his contention, the Commissioner relied upon the ruling of the AAR in the case of *Steria (India) Ltd. (45 taxman 281)*. AAR had held that protocol, though an integral part of DTAA, cannot be treated as same as the DTAA provisions.

The Karnataka High Court ('HC') set aside CIT's revisionary order under Section 264 for AYs 2015-16 & 2016-17. The High Court rejected Department's contention that the beneficial FTS clause under the India-Finland treaty (which was made effective from April 1, 2011) cannot be read into the former India-Netherlands DTAA by virtue of the MFN clause.

The HC was of the view that the Protocol to the India- Netherlands DTAA itself provide for automatic application of subsequent Treaty, to the India–Netherlands Treaty in hand and *"therefore, no such separate Notification was envisaged to be issued for enforcing such subsequent Treaty with another OECD country, viz., Finland, to be made applicable to the facts of the present case."*

The HC followed the Delhi HC ruling in Steria India (*supra*) which reversed the AAR ruling which was relied by Department. However, there was no detailed discussion on the factual aspects of the matter about the payment of FTS was made by CIT. Accordingly, HC directed CIT to decide the revision petition filed by assessee u/s. 264 *de novo*.

Legal Update

Disciplinary Case

Shri ABC vs. CA. XYZ

Facts of the case:

A Complaint in Form I dated 5th May, 2009 was received from Shri ABC (hereinafter referred to as the "Complainant"), against CA. XYZ (hereinafter referred to as the "Respondent"). The charges alleged in the Complaint are as under:

- M/S XXX Pvt. Ltd. (hereinafter referred to as "the Company") received full amount of sale consideration in cash as per the sale deed registered before the Sub-Registrar of Stamp & Registration, under Registration Act but as per the Books of Accounts of the Company, it was showing that the Company has not received any amount against the sale of plot.
- That the Respondent did not obtain NOC from the outgoing Auditor to the effect that he has no objection.
- Income Tax Officer has also pointed out the following facts and disallowed land development expenses of ₹21,35,327/-, unexplained amount received from sales of plot ₹21,68,555/-, undisclosed interest on FDR ₹3,000/- and unexplained advance against plot received ₹27,96,419/- in his order and initiated penalty u/s. 40A(3), 271(1)(C) and 271D of the Income Tax Act.
- The auditor has also mentioned that he has not obtained the record for his audit work for whole year and he obtained the record only for the period 21-03-2006 to 31-03-2006. The Respondent conducted the audit without record.
- As per audited balance sheet it is shown that the auditors certified the addition in inventory of ₹21,25,390/- (purchase of land) he also certified the deletion of ₹13,99,528/- in inventory (cost of land) and ₹76,05,486/- in land development expenses. The Company has also incurred huge expenses of ₹59,75,630/- in development expenses during the year. The Respondent had certified these figures in his audit report when turnover of the Company was zero and no records were produced by the Company.
- Financial Year 2006-07: As per Audited Balance Sheet submitted by the Company to the ROC in which Company showed the turnover of ₹56,20,044/- and this turnover has been certified and verified by the Respondent but as per record from the registration authority this sale shall be ₹1,53,66,000/- the sale deed registered were made between 1-5-2006 to 10-5-2006 to the close relatives of the existing directors of the Company. The Complainant has raised the objection for registration of this sale deed before Registration authority. The dispute was published in all the well known daily news papers but the Respondent has neither taken proper care in the audit observation nor in auditor remark. He supported the fraud committed by the directors he has not shown in his audit report that the directors have transaction with their relatives. The guideline value of sales is ₹3,84,54,480/-(which is covered under Section 40A (2b).

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

At the outset, the Committee noted that there were disputes amongst the Directors of the Company and the instant complaint has been filed as a result thereof.

As regards the charge of treating the amount of non-receipt of the sale consideration as debtors, the Committee took into view the detailed submissions made by the Counsel for the Respondent wherein he stated that although the sale deeds executed in favour of all these persons contained an averment regarding payment of consideration, in some cases particularly in cases

of sale to Directors and their relatives (including Complainant and his relatives), the consideration was not received and the amount has been shown as outstanding from these persons in the accounts of Company, which has been duly reflected in the Accounts under the head "Advance for Plots". The Company has been consistently following the practice of recording all transactions of plot of sales in one consolidated account referred to above without maintaining separate individual accounts of parties. All amounts received as advance or towards consideration for sale of plots are credited to this account and whenever the sale takes place i.e. (sale deed executed), the account is debited by value of sale by crediting the sales account. The balance outstanding in the said account at the end of the Financial Year is duly reflected in the Balance Sheet. Since no personal accounts are maintained, even the amounts outstanding from the Directors and their relatives have been shown on the debit side of the said account and the net balance of the said account has been transferred to Balance Sheet at the end of the year. The balances are carried forward to next year and appear as opening balances in next year. The Committee, therefore, opined that the practice adopted by the Company in netting off the debit and the credits balance in the name of the different parties in the advance against the Plot A/c is not consistent with the basic principle of accounting even though the Company was following this practice. The Committee viewed that the Respondent did not exercise due care and failed to report the said fact in his audit report which is inconsistent with the principles of Accounting.

As regards the charge of not seeking NOC from the previous auditor, the Committee noted that the Respondent has brought on record an affidavit from the outgoing auditor to the effect that he has no objection and he has received the NOC. Thus, the said charge does not stand against the Respondent.

As regards the charge of additions made by AO in the assessment for A.Y. 2005-06 (Financial Year 2004-05), the Committee opined that the Respondent has correctly submitted that the additions in the order of assessment can never be a ground for professional misconduct because the additions/ disallowances in the assessment may be for number of reasons one of which is the provisions of Act and the other reason is revenue considerations and merely because certain additions or disallowances are made, it cannot be alleged that the auditor has failed to perform his duty particularly when the books of account are not rejected or considered to be not reliable. The Committee, accordingly, held the Respondent not guilty with respect to this charge.

As regards the charge of conducting audit for the year ending 31st March, 2006 without books of accounts for the entire year, the Committee noted that the Respondent had specifically reported in the report that the audit was conducted only for the period from 21/03/06 to 31/03/06 because of non-availability of books. The Respondent also reported that an opening Balance Sheet as on 20/03/2006 was prepared by the Management and the balances were accepted as opening balances by special resolution for further accounting and the audit was conducted on the basis of such opening balances as accepted by Management by way of Special Resolution.

Thus, the Committee opined that due caution had been exercised by the Respondent while carrying out the audit and he, in fact had certified the accounts of the Company only for a period of 10 days i.e. 21st March 2006 to 31st March 2006. As regards the charge of alleged difference in the turnover regarding sale of plots, the Committee took into view the detailed submissions made by the Counsel for the Respondent and opined that no reporting responsibility was attached to him.

The Committee opined that the Respondent is Guilty of Professional Misconduct falling within the meaning of Clauses (5), (7) and (8) of Part I of the Second Schedule and is Not Guilty of Professional Misconduct falling within the meaning of Clause (8) of Part I of the First Schedule and Clause (6) of Part I of the Second Schedule to the Chartered Accountants Act 1949 [as amended by the Chartered Accountants (Amendment) Act, 2006]. Thereafter Committee, affording an opportunity of hearing to the Respondent and after considering all the material on record is of the view that the accounting practices followed by Company, over the years is not consistent with basic accounting principles. However, 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. ■