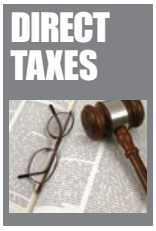
Legal Decisions[1]



Income Tax

LD/64/135

Vijay Singh Kadan

Vs.

Chief Commissioner of Income Tax & Other

25th April 2016 (DEL)

Sec. 245 of the Income Tax Act, 1961 - Set off of refunds against tax remaining payable.

Revenue cannot resort to adjustment of pending demand against refund due to the assessee without issuing notice u/s 245.

Mr. Vijay Singh Kadan was a legal heir of deceased assessee Mr. Randhir Singh Kadan. During AY 2006-07, AO assessed assessee's income and raised certain demand. The ITAT allowed assessee's appeal by virtue of which assessee was entitled to refund of ₹1.65 crore (approx. alongwith interest). Appellant applied to Revenue for giving effect of appeal order and requesting for refund. Reminders were also sent to Revenue for the same. Appellant filed Writ petition before Delhi HC, upon which the Revenue was to issue refund within 2 weeks. Assessee thereafter received demand draft for ₹1,29,01,503/- as 'Income Tax Refund' and on inquiry it was informed by Revenue that balance amount of ₹36,34,267/- was adjusted towards demand for AY 2008-09.

Aggrieved by such adjustment u/s 245, assessee filed writ petition before Delhi HC. Appellant argued that no prior intimation was served upon him before such adjustment of demand. Further, against the demand for AY 2008-09 an appeal was pending before CIT(A) together with stay application.

HC observed that mandate of Sec. 245 is clear. The mandate states that the AO, DCIT(A), CIT(A) or CCIT 'may' set off the amount to be refunded against amount found to be payable *"after giving an intimation in writing to such person of the action proposed to be taken under this Section".* HC observed that in the present case, although the refund voucher mentioned 'adjustment to be made', refund was issued only after adjustment was made. HC observed that Revenue was fully aware of the matter for AY 2008-09 pending before CIT(A), hence it cannot be said that the withholding of the said amount was pending 'verification' of the demand for AY 2008-09.

HC relied on rulings in case of Glaxo Smith Kline Asia (P.) Ltd, and *The Oriental Insurance Company Limited v. DCIT* in Writ Petition (Civil) No. 6172 of 2014, in which it was held that prior to invoking the discretionary power u/s 245 to set off or adjust an amount against any pending refund, the assessee had to be given an intimation in writing of the action proposed to be taken. HC remarked that *"Whatever the demand may be for the AYs 2008-09 and 2010-11, the fact remains that prior to making the adjustment of such demand against the refund due to the Petitioner, no notice was issued to the Petitioner as mandatorily required under Section 245 of the Act."*

HC directed the Revenue to forthwith issue balance refund of Rs. 36.34 lakhs with interest. Further, it directed CIT(A) to pass an order on the stay application for AY 2008-09 and till the time CIT(A) passed such order, Revenue was restrained to take any coercive steps to enforce the demand for AY 2008-09.

Service Tax

LD/64/136

M/s Tech Mahindra Ltd.

Vs.

CCE

3rd March, 2016 (MUM)

Amounts paid towards reimbursements of costs by Indian company to its branch abroad is not liable to service tax.

The appellant has established a network of branches and subsidiary companies at different locations outside the country. The branches of the appellant act as salary disbursers of the staff deputed from India to client locations besides carrying out other assigned activities. The salaries so disbursed, as well as other expenses of the running the branch, are met from the coffers of the appellant. Payments made by customers are also received in branches and transmitted to the head office after netting the expenses incurred by the branch. Revenue initiated proceedings and also confirmed the demand service tax on the payments made by the appellant to branch by entertaining a view that the branches are rendering services to its head office in India.

On appeal the Tribunal set aside the demand of service tax on the basis of the following findings:

- Section 66A(2) which provides that the branch outside India is permanent establishment in such territory, cannot be interpreted to mean the branch and the head office as two commercial entities.

[1] *Contributed by CA. Sahil Garud, CA. V. Raghuraman, Indirect Taxes Committee and ICAI's Editorial Board Secretariat.*
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- A branch, by its very nature, cannot survive without resources assigned by the head office. The activity of the head office and branch are thus inextricably enmeshed. The employees of the branch are without doubt, the employees of the company.
- Merely because there is a branch and that branch has, in some way, contributed to the activities of the appellant-assessee in discharging its contractual obligations, the definition of 'business auxiliary service' in section 65(19) of Finance Act, 1994 may not apply.
- Transfer of funds to the branch is nothing but reimbursement and taxing of such reimbursement would amount to taxing of transfer of funds which is not contemplated by Finance Act, 1994.

LD/64/137

Dy Commissioner of Excise
Vs.
Sushil & Company
13th April, 2016 (SC)

Entry 23 of Section 65 of the Finance Act, 1994-Cargo Handling Service-Quashing of Show Cause Notice.

The Hon'ble Supreme Court observed following two issues in this case:

Nature of services that could be classified under Cargo Handling services: The Supreme Court held that there are two conditions which needs to be satisfied for considering any service to be 'Cargo Handling Service', namely; (1) there must be a cargo i.e. a packed or unpacked commodity accepted by a transporter or carrier for carrying the same from one destination to another. It is only after the commodity becomes a cargo, its loading and unloading at the freight terminal for being transported by any mode becomes a cargo handling service, if it is provided by an independent agency and; (2) the service provider must independently be involved in loading-unloading or packing-unpacking of the cargo. Applying these principals on the facts involved in the present case, the Court held that from the records of the case, as per the contract entered into between the respondent and the customer, the respondent was to supply manpower for working at the packing plant as per the customer's requirement. Therefore, the services cannot be classifiable under Cargo Handling services.

(Note: During the relevant period there was no levy on manpower supply)

Whether High Courts could interfere at Show Cause Notice Stage: The Supreme Court held that High Court did not commit any mistake or illegality in entertaining the writ petition when no disputed questions of fact were involved and the legal issue was to be decided on the basis of the facts, as admitted by the parties.

LD/64/138

Cleartrip Pvt. Ltd. Mumbai & Others
Vs.
Union of India
26th April, 2016 (MUM)

Threat of Arrest–Only after following due process of law

Assessee challenged the recovery threats of the service tax department to recover the service tax and arrest the responsible officers for non payment without following the procedure of issuing show cause notice and adjudicating the dues.

In this background, the High Court held that any recovery by coercive measures is straightway impermissible unless the investigation results into issuance of a show cause notice, an opportunity to the Petitioner to resist the demand, adjudication thereof by a reasoned order and protective remedies such as appeals.

Further, Court also held that the Petitioners do not dispute the department's right to investigate in accordance with law. The petitioners have already attended the offices of the concerned Respondents and once the statement of the Petitioners was recorded goes without saying that on further summons being issued and on called upon to attend the Officers of the Respondents, they will attend and co-operate in these investigations by producing all the documents and answering the requisite queries, subject, of-course, to their rights in law. It is only when these investigations conclude that the authorities would be in a position to take a decision whether to launch any prosecution. Without completing the process of investigation, no arrest could be permissible.

LD/64/139

M/s Kanjirappilly Amusement Park and Hotels Pvt. Ltd.
Vs.
Union of India
22nd March, 2016 (KER)

Power to levy-Centre vs. State – Admission to Amusement Facility is different aspect.

Assessee challenged the levy of service tax on the

amusement parks on the ground that the taxes on amusement facility is covered under the State list and the Parliament does not have power to levy tax on such activities.

The High Court held that the petitioners, maintaining an amusement park, are obliged to pay entertainment tax to the State, whether or not there are entrants to the park. The Union Parliament has provided for a tax on admission to the parks, making it clear that the levy is only when the service is availed of. The Court observed that the "service" provided is the object of taxation and it is imposed on the admission fee which is a permissible measure of tax and the incidence is at the time when a person pays the admission fee to enter the park. It was held that there is no conflict between the two entries, which are fields of legislation. The two aspects taxed by the respective legislatures are the 'service' and the 'amusement'. The tax, imposed by the Union Parliament, in pith and substance, is also one on the service offered by the petitioners and the Union did not encroach upon the power conferred on the State, in fact or in law, since the respective legislatures tax two different aspects. The incidental overlapping, if at all, is only to be ignored.

LD/64/140

N. Bala Baskar

Vs.

Union of India

7th April, 2016 (MAD)

Development of property for the Landlord in a Joint Development is a construction service.

The petitioner, owner of land entered into agreement with the developer to develop and construct apartment and in return, the owners would be eligible for a portion of the constructed property and balance constructed building would be to the share of the developer and the petitioner would transfer that undivided portion of land to the developer. The petitioner challenged the levy of service tax on land owners share of the building by assailing the circulars dated 10.02.2012 and 20.1.2016 issued by the Central Board of Excise and Customs (CBEC).

Writ Petition of the petitioner was dismissed on the following counts:

a) The petitioner not being a service provider does not have locus standi to challenge the levy.

b) The agreement gave rise to a bouquet of rights for the developer/builder. One was to put up a construction of an area, a part of which could be sold by them to third parties. They could be sold not only as such, but also along with the undivided share of land. Those parties had certainly availed the services of the fifth respondent as a service provider. The petitioner did not stand on a different footing than those persons. Therefore, the challenge of the petitioner to the circular does not merit acceptance.

c) Since the cost of construction could not be paid by the owner in the form of cash, they agreed to exchange the undivided share of the land with the contractor. What the developer had done is actually the service of construction and therefore, it is not an easy proposition that it was a transfer of immovable property by way of sale or exchange.

LD/64/141

CCE

Vs.

M/s Kalpesh Transport

6th April, 2016 (MUM)

Demand on deceased person to abate on death.

Department preferred appeal against a portion of the order by which demand of service tax was dropped against a proprietorship firm, the proprietor of the same having been deceased. In this background of fact, Tribunal referring to Rule 22 of CESTAT (procedure) Rules, 1982, held that the departmental appeal would abate as appeal cannot be continued against a deceased person.

Customs

LD/64/142

Union of India

Vs.

M/s Engee Industrial Services Co Ltd & Anr

4th April, 2016 (SC)

The additional duty of customs (equivalent to duty of excise) would not be liable to be paid where the goods similar to imported one are exempt from duty when manufactured in India.

Assessee imported ship for the purpose of breaking and challenged the levy of additional duty of customs (equal to excise duty) on the ground that the activity of ship breaking is exempt from duty of excise. Division bench of the High Court allowed the exemption and against which the department preferred appeal before the Supreme Court.

Hon'ble Supreme Court agreeing with the view of the High Court and relying on the decision of the Supreme Court in the case of *Hyderabad Industries*

Legal Update

Limited v. Union of India held that where no excise duty is payable and the product manufactured in India is exempted from excise duty, import of such goods would not attract the levy of additional duty of customs.

LD/64/143

M/S Mustan Taherbhai

Vs.

CCE

4th April, 2016 (SC)

Clearance of a ship for breaking purposes would not amount to importation to attract levy of duty of customs.

A ship, named M. V. Jagat Priya was manufactured by Hindustan Shipyard Ltd., Vishakhapatnam and was sold to M/s. Dempo Steamships Ltd. on payment of duty of excise. The Ship was an ocean going vessel till the said vessel ceased to ply and was grounded at Bedi Bunder, Jamnagar in 1986. An order was passed by the Hon'ble High Court of Bombay on a suit filed by the creditors of M/s Dempo and Hon'ble High Court passed the order for auction of the said vessel on "as is where is" basis. The appellant purchased it being the highest bidder and took delivery. Thereafter the appellant cleared the ship for breaking and the department insisted that the duty of customs be paid on such ship used for breaking. The demand was upheld by the CESTAT against which the appellant preferred appeal before the Supreme Court.

Based on the above facts, the Hon'ble Supreme Court held that by no stretch of imagination, it can be treated as import when the vessel was manufactured by an Indian company and was sold to another Indian company which was using this vessel.

LD/64/144

Mangali Impex Ltd

Vs

Union of India

3rd May, 2016 (DEL)

Jurisdiction - Who can Issue Show Cause Notice?

Hon'ble Supreme Court in the case of Commissioner of Customs v. Sayed Ali held that the officers of Customs Preventive wing and DRI are not empowered to issue Show cause notice and adjudicate short levy or short payment of customs duties. Consequent to this decision, the Government vide Finance Act, 2011 amended Section 28, effective from 8.4.2011 and vide Notification dt. 6.7.2011 declared preventive and DRI officers as proper officer for the purpose of Section 28. Further, vide Customs (Amendment and Validation), Act, 2011 Central Government sought to give such powers to DRI and Preventive officers retrospectively, by inserting Section 28(11). Assessee challenged the validity of such amendment.

In this connection, the High Court held that DRI or Preventive cannot issue SCNs/adjudicate the SCNs already issued prior to 8.4.2011 on the basis of the following observations:

a) Section 28(11) would override only the decisions or order of the court and not the other provisions. Explanation 2 to Section 28 clearly provides that all issues pertaining prior to 8.4.2011 would be governed by earlier provisions. Therefore, Section 28(11) would not have any operation on the issues prior to 8.4.2011.

b) Section 28(11) does not validate the show cause notices issued by the DRI, DGCEI Officers who are not 'proper officers' for the purposes of Section 2(34) of the Act if it amounted to undertaking any assessment or re-assessment of a non-levy, short-levy or erroneous refund prior to 8th April 2011.

c) There is merit in the contention that Section 28(11) is overbroad in as much as it confers jurisdiction on a plurality of officers on the same subject matter which would result in chaos, harassment, contrary and conflicting decisions. Such untrammeled power would indeed be arbitrary and violative of Article 14 of the Constitution.

Value Added Tax

LD/64/145

Commissioner, Delhi Value Added Tax.

Vs.

ABB Ltd.

5th April, 2016 (SC)

Import of goods for the purpose of supply of the same in pursuance of the turnkey contract would qualify as sale in the course of import where such supply is in pursuance of the conditions and/or as an incident of the contract.

The Assessee was awarded a contract by Delhi Metro Rail Corporation (DMRC) for supply, installation, testing and commissioning of traction electrification, power supply, power distribution and SCADA system. As part of the contract, the

DMRC approved for import and supply of certain equipment and in this connection also approved certain vendors outside India for said purpose. Similarly, for local procurement also, the vendors were approved. The assessee imported the approved equipment and supplied to DMRC for further installation. Assessee claimed that the said transaction would qualify as sale in the course of import in terms of Section 5(2) of Central Sales Tax Act, 1956 and no CST would be payable. The claim was rejected by the authorities and the VAT Tribunal. High Court held in favour of the assessee and against said decision, the department preferred appeal to the Apex Court.

The Hon'ble Supreme Court concurring with the view of the High Court held that the movement of goods by way of imports or by way of inter-state trade in the present case was in pursuance of the conditions and/or as an incident of the contract between the assessee and DMRC. The goods were of specific quality and description for being used in the works contract awarded on turnkey basis to the assessee and there was no possibility of such goods being diverted by the assessee for any other purpose. The Court also observed that principles of law laid down by the Constitution bench of the Supreme Court in the case of *M/s. K.G. Khosla & Co. v. Deputy Commissioner of Commercial Taxes, Madras* (1966) 3 SCR 352 = AIR 1966 SC 1216 has rightly been applied to this case by the High Court.

International Taxation

LD/64/146

Trans Global PLC

Vs.

DIT

(ITA 943/Kol/2013) (Kolkata ITAT)

Non compete ('PE') in India as per India–UK DTAA

Fee received by a Non-resident not taxable in India due to absence of Permanent Establishment.

The assessee was UK-based company having non-resident status in India. It received non-compete premium but did not offer said amount for tax in India. The DIT held in reassessment proceedings that said amount was taxable as capital gain. He, accordingly, directed the AO to tax said amount.

Assessee's Contentions:

The assessee is a non-resident company of UK in term of Article-7 of Double Taxation Avoidance Agreement (DTAA) with UK. Admittedly, the assessee is a non-resident British Company liable to tax in UK only and does not have a permanent establishment in India.

Non-compete fee premium is a mere refraining from carrying on activity, which can be taxed u/s. 28(va) of the Act as amended by the Finance Act, 2002 w.e.f. 01.04.2003. The assessee also pleaded that this can be assessed as business income but assessee being a non-resident having no permanent establishment in India and accordingly, in term of Article 7 of DTAA with UK any business income arising to the enterprise of a contracting state is taxable only in that state unless the enterprise is carrying on business in the other contracting state through a permanent establishment situated therein.

However, the assessee is not having a permanent establishment in India and as such in term of Article-7 of DTAA, being non- compete premium received by assessee cannot be taxed in India.

Revenue's Contention:

The departmental representative relied upon the act of the AO and contended that the non compete fee received by the assessee is taxable as capital gain.

The ITAT held as under:

The ITAT held that a perusal of non-compete agreement clearly shows that by any stretch of imagination it cannot be held that there is a transfer within the meaning of section 2(47) resulting in assessment being erroneous and prejudicial to the interest of revenue for not assessing non-compete premium as capital gains.

Further, the assessee clearly accepted that the provisions of section 28(va) will apply to this non-compete premium being business income but that will be taxed in UK being assessee a non-resident British Company having no permanent establishment in India in term of article-7 of DTAA.

Accordingly, the ITAT observed that non-compete premium received by assessee is a business receipt assessable under section 28(va) but in term of article 7 any business income arising to the enterprise of a contracting state is taxable only in that state, assessee being a non-resident company and does not have a permanent establishment in India, liable to tax in UK only.

The assessment framed by the AO is neither erroneous nor prejudicial to the interest of revenue and hence, the revision order is without any basis and quashed.

Legal Update

LD/64/147
DCIT
Vs.
Media (P.) Ltd.
(68 taxmann.com 305) (Mumbai ITAT)

Article 12 of DTAA.

Payments made by assessee towards downloading of photographs for publishing in assessee's magazine was not considered as royalty under Article 12 of DTAA and not liable to TDS

The assessee was engaged during the year in the business of publishing magazines. The AO made disallowance of an aggregating amount of ₹7.59 lakhs being payments made to two entities, one located in Singapore and another in United Kingdom, for procuring images and figures to be published in assessee's magazines in India on ground that these payments were in the nature of royalty and therefore, required deduction of tax at source which was not done, and therefore disallowance was made under section 40(a)(i).

The CIT(A) upheld the action of the AO. Aggrieved by the CIT(A) order, the assessee filed an appeal before the ITAT

Assessee's contentions:

The payees were the owners of the photographs and images, and they uploaded these pictures on their website. The assessee was given user name and password to have access on these photographs and download them to be published in the magazines. It was submitted that for each downloading of the photographs the assessee was required to make separate payment. Thus, the download of the photographs and images was for a limited use and restricted purposes. These payments did not fall under the definition of the royalty as per the DTAA of Singapore and UK and hence, the assessee was not required to deduct tax on these payments.

Revenue's contentions:

The Revenue argued that photographs would come within the definition of artistic work as per the provisions of section 9(1)(vi) explanation-2(v).

The Revenue also relied upon the judgment in the case of *Agence France Press v. ADIT*, 153 ITD 568 (Delhi ITAT) wherein payments made for download of news photos were held to be payment for royalty after considering the aforesaid provisions of the Act as well as Indo-France Treaty.

The ITAT held as under:

The ITAT observed that the written terms of agreement with Singapore party and copies of bills and payments in respect of UK party show that terms of transactions with both of them are identical.

The photographs of celebrities and other models, like those which the assessee has obtained through the website of these foreign parties, are generally taken by the photographers who are generally on contract with some corporate entity. These corporate entities become the owners of the photographs of these celebrities and others models by way of making payments to the celebrities, and thereby acquiring a right to use of these photographs in the manner they like.

In this manner, these corporate entities become owners of such photographs. However, on the basis of agreement and other terms of conditions that what has been given to the assessee is only the right to use a particular photograph, and right is limited to publication of the photographs in assessee's own magazine which is a limited right has been given to the assessee in lieu of a payment. The foreign party did not sell the 'photo', and therefore it cannot be classified a business transactions, since the ownership of the photographs has not been transferred to the assessee.

Further the ITAT held that it has been argued that the definition of the term royalty given in DTAA is more restrictive in nature as compared to the definition given in the Act, though, the impugned payment would not fall even in section 9(1)(vi) read with its explanation 2(v). As per the provisions of article 12, of DTAA with Singapore, royalty includes any copyright of a literary, artistic or scientific work, including cinematograph film or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right, property or information.

However, the ITAT observed that it is settled law that as per section 90(2), out of the provisions of DTAA and Income Tax Act, the provisions which are more beneficial to the assessee can be availed by it for the purpose of determining its tax liability.

Thus, to be included in the definition of 'royalty', the payment should be made for use of a copyright of the items which have been mentioned in the

aforesaid Article. Even if it is presumed, although denied by the assessee, that photograph will fall in any one or more of the items mentioned in the above said definition, even, then it is mandatory on the part of the revenue before applying these provision to show that the payment was for use of 'copyright' and not 'copyrighted article'.

The ITAT distinguished the use of copyright and the use of copyrighted article stating that the use of copyright and 'copyrighted article' are altogether two different things as has been held in many judgments also. The admitted fact is that the photograph has been given to the assessee for the limited purpose of its one time use in the magazine. The assessee can neither edit the photograph nor can it make copies of the photograph to be sold further or to be used elsewhere. The assessee is not permitted to make resale of these photographs to any other person for any other use. Thus, what has been permitted to the assessee is to make use of the article and not use of the copyright.

The transactions of downloading of photographs for exclusive one time use for publication in the magazine did not fall within the provisions of relevant article 12 of DTAA and therefore, assessee was not liable to deduct tax on the payments made for the same.

The ITA thus allowed the appeal of the assessee and deleted the additions made by the AO.

Transfer Pricing

LD/64/148

Essilor India (P.) Ltd.
Vs.
DCIT
(IT(TP)A No. 29/Bang/2014 & 227/Bang/2015)
(Bangalore ITAT)

Excess Advertising, Marketing and Promotion ('AMP') expenditure incurred by the assessee is not an international transaction in absence of any agreement with the Associated Enterprises ('AEs')

Essilor India (P.) Ltd. ('EIPL') is engaged in the business of trading in finished, semi-finished opthalmic lenses, optical meters and processing of semi-finished opthalmic lenses. It purchased ophthalmic lenses from AE and sold them after some processing.

During transfer pricing proceedings, the Transfer Pricing Officer ('TPO') observed that the AMP expenditure amounted out to 14.2% of the total revenue, while in the case of comparable companies chosen by the assessee-company the average expenditure on those items worked out to only 3.3% of the turnover. Therefore, the TPO adopted 3.3% of the turnover to benchmark the transaction of the AMP with its AE.

The TPO had also worked out the operating margin on the total operating cost at 20.22% after excluding the additional expenditure incurred on AMP from the total operating cost.

The assessee contended before the Dispute Resolution Panel ('DRP') that in the absence of agreement between the assessee-company and its AE, the question of promotion of brand or sharing the advertisement expenditure did not arise; and that it could not be presumed that there was an international transaction within the meaning of section 92B.

The DRP confirmed the existence of international transaction on AMP expenditure following the ruling of Special bench of Tribunal in the case of *LG Electronics India (P.) Ltd. v. Asstt. CIT (140 ITD 41) (Delhi ITAT)*. However, it remitted the matter to the file of TPO for determination of Arm's Length Price ('ALP') in the light of law laid down therein.

Assessee's Contentions:

The assessee applied the Transactional Net Margin Method ('TNMM') which was considered to be the most appropriate method for the purposes of benchmarking the international transaction. The assessee's operating profit margin (i.e. operating profit/total turnover) was computed at 13.45% and the arithmetic average of the operating profit margins of the said comparables was computed at (-)3.31%. Therefore, according to the assessee-company, since its PLI was more than the average PLI of the comparables, it was claimed that these transactions with its AE are at ALP.

International transactions cannot be presumed on incurring AMP expenditure in absence of tangible material to show that the two parties 'acted in concert'. The AMP expenditure was incurred by the assessee-company only to promote the sales of the products of the company.

The expenses such as convention expenses, loyalty programme expenses and merchandising expenditure should not be treated as advertisement marketing expenditure.

Legal Update

Revenue's Contentions:

The department vehemently argued that the issue of transfer pricing adjustment on AMP needs to be set aside for fresh adjudication on the basis of the law laid down by the Hon'ble Delhi High Court in the case of *Sony Ericsson Mobile Communications India (P.) Ltd. v. CIT (374 ITR 118).*

The ITAT held as under:

The Delhi High Court in *Sony Ericsson Mobile Communications India (P.) Ltd. v. CIT (374 ITR 118)* concurred with the majority of the Special Bench of the ITAT in the LG Electronics case qua the applicability of section 92CA(2B) and how it cured the defect inherent in section 92CA(2A). The issue concerning retrospective insertion of section 92CA(2B) was decided in favour of the revenue. AMP expenses were held to be international transaction as this was not denied as such by the assessees.

In the instant case, the assessee imports the lenses from its foreign AE and after some processing, sells the products on its own. However, the amount of value addition on account of processing in terms of total revenue is not clear from the material on record. That apart, *the assessee has been throughout contesting before all the authorities the very existence of international transaction on account of incurring AMP expenditure between assessee and its AE* and, therefore, the contentions that the law laid down by the Delhi High Court in *Sony Ericsson Mobile Communications India (P.) Ltd.* (supra) should be applied to the case on hand, is not correct. Subsequent to the decision in the case of Sony Ericsson Mobile Communications India (P.) Ltd. (supra), the Delhi High Court had rendered five decisions on the same issue. Those decisions are:

Maruti Suzuki India Ltd. v. CIT (237 Taxman 256) (Delhi High Court), CIT v. Whirlpool of India Ltd. (381 ITR 154) & (64 taxmann.com 324) (Delhi High Court), Bausch & Lomb Eyecare (India) (P.) Ltd. v. Addl.CIT (381 ITR 227) (Delhi High Court), Yum Restaurants (India) (P.) Ltd. v. ITO (380 ITR 637) (Delhi High Court), Honda Seil Power Products Ltd. v. Dy. CIT (64 taxmann.com 328) (Delhi High Court)

In the abovementioned decisions, the issue of the very existence of international transaction on incurring AMP expenditure and the method of determination of ALP was the subject matter of appeal before the Delhi High Court. The Delhi High Court had categorically held that in the absence of agreement between Indian entity and foreign AE whereby the Indian entity was obliged to incur AMP expenditure of a certain level for foreign entity for the purpose of promoting the brand value of the products of the foreign entity, no international transaction can be presumed. It was further held that the fact that there was an incidental benefit to the foreign AE, it cannot be said that AMP expenditure incurred by an Indian entity was for promoting brand of foreign AE. One more aspect highlighted by the High Court is that in the absence of machinery provisions, bringing an imagined transaction to tax was not possible.

In view of aforesaid decisions, no TP adjustment can be made by deducing from the difference between AMP expenditure incurred by assessee and AMP expenditure of comparable entity, if there is no explicit arrangement between the assessee and its foreign AE for incurring such expenditure. The fact that the benefit of such AMP expenditure would also endure to its foreign AE is not sufficient to infer existence of international transaction. The onus lies on the revenue to prove the existence of international transaction involving AMP expenditure between the assessee-company and its foreign AE. In the absence of machinery provisions to ascertain the price incurred by the assessee-company to promote the brand values of the products of the foreign entity, no TP adjustment can be made by invoking the provisions of Chapter X of the Act.

Further, applying the above legal position to the facts of the present case, the ITAT held that it is not a case of revenue that there existed an arrangement and agreement between the assessee-company and its foreign AE to incur AMP expenditure to promote brand value of its products on behalf of the foreign AE, merely because the assessee-company incurred more expenditure on AMP compared to the expenditure incurred by comparable companies, it cannot be inferred that there existed international transaction between assessee-company and its foreign AE. Therefore, the question of determination of ALP on such transaction does not arise. However, the transaction of expenditure on AMP should be treated as a part of aggregate of bundle of transactions on which TNMM should be applied in order to determine the ALP of its transactions with its AE.

In other words, the transaction of expenditure on AMP cannot be treated as a separate transaction. In the present case, the operating profit cost to the

total operating cost was adopted as Profit Level Indicator which means that the AMP expenditure was not considered as a part of the operating cost. This goes to show that the AMP expenditure was not subsumed in the operating profitability of the assessee-company. Therefore, in order to determine the ALP of international transaction of assessee with its AE, it is sine qua non that the AMP expenditure should be considered as a part of the operating cost.

The issue of determination of ALP, on the above lines, was restored to the file of the Assessing Officer/TPO.

LD/64/149

DCIT

Vs.

Delta Power Solution India (P.) Ltd

(ITA 3004/Delhi/2013) (Delhi ITAT)

Resale Price Method ('RPM') is the most appropriate method ('MAM') for benchmarking transactions of trading segment of the company.

The assessee DPSIPL is wholly owned subsidiary of DET International Holding Ltd., Cayman Island. It is engaged in manufacturing/trading/assembling of Telecom Power Equipment, visual display products, industrial automation etc. The Registered office of the assessee was at Rudrapur.

During the year under consideration the assessee did not start production at Rudrapur plant however, the assessee entered into international transaction with its AE to the extent of ₹23.73 crores. The assessee used TNMM as the Most appropriate Method ('MAM') for the transactions relating to purchase of raw materials and export of finished goods and used the operating profit as Profit Level Indicator ('PLI').

In respect of Import of automation products and sales commission segment, the assessee used Resale Price Method ('RPM') as the MAM and gross profit as PLI sales.

The Assessing Officer ('AO') made a reference under section 92CA to Transfer Pricing Officer ('TPO') to compute Arm's Length Price ('ALP') regarding the international transactions made by the assessee company.

The TPO rejected the RPM used by the assessee and applied TNMM method for benchmarking the transaction and proposed an adjustment of Rs. 4.30 crores for import of industrial automation products. Accordingly on the basis of the order of TPO, assessment under section 143(3) was made by making an addition of ₹4.30 crores.

The Commissioner of Income Tax (Appeals) ('CIT(A)') allowed the appeal of the assessee.

Assessee's contention:

RPM is applied where an enterprise purchases from its AE and then resells to an unrelated enterprises. RPM must be MAM for these transactions as there is no value addition that is made by the assessee in the present case.

Revenue's contention:

The departmental representative relied upon the act of the TPO and contended that the Transfer Pricing adjustment made by the TPO was valid.

The ITAT held as under:

The ITAT observed that primary objective of the assessee is of manufacturing/trading/assembling of Telecom Power Equipment, visual display products, industrial automation and magnetic components, etc. The only issue in dispute is in regards to the MAM for determining ALP in respect of the trading section.

The assessee had used TNMM as MAM for arriving at the ALP in respect of purchase of raw materials, export of finished goods and in respect of Transaction relating to import of industrial automation products and sales commission it had used RPM as MAM. The assessee submitted that as there is no value addition in respect of goods sold by the assessee and therefore RPM is the MAM for determining ALP in respect of these two heads being import of industrial automation products and sales commission.

Further, the CIT(A) had reproduced the relevant extract of the accepted position for assessment year 2009-10, wherein the TPO has accepted the RPM as the most appropriate method for calculating the ALP in respect of trading segment.

The ITAT relied upon the earlier ruling of CIT(A) and held that there wass no infirmity in the findings of the CIT(A).

In the subsequent year the TPO himself has accepted RPM to be the MAM for determining the ALP for the trading segment, on the similar facts and circumstances, as recorded by the CIT(A).

Therefore, the findings of CIT(A) were upheld and the appeal of the assessee was allowed. ■