the AO, did not contest or object that notice under Section. 147/148 was not duly served as it was not served on the authorised officer or director or that the notice was not addressed to the principal officer. As per the High Court, if the respondent-assessee had taken the said plea, the Assessing Officer had the option to furnish and serve the notice on the director or the authorised representative.

High Court perused Section 282 and noted that this provision was enacted to ensure compliance of principles of natural justice and for ease of service, and not for hairsplitting and fault finding. High Court noted that in case of a company, notice may be addressed to the principal officer. High Court observed that use of the word "may" in subSection (2) reflected that this provision was permissive and not mandatory. Thus, the High Court rejected ITAT's observation that the notice under Section 148 not being addressed to the principal officer, but to the company itself was invalid and completely illegal so as to not confer jurisdiction on the AO.

High Court relied on ruling in *Malchand Surana [(1955) 28 ITR 684 (Cal.)]*, wherein it was observed that the mere fact, that the physical delivery of the notice was made to a person, other than the addressee, who had no authority to receive the letter on the addressee's behalf, would not be sufficient to prove lack or failure of proper service. Presumption would still be there and would remain unrebutted notwithstanding that the actual service had been affected on a different person. As per GC, legality and sufficiency of service would depend on facts.

High Court observed that there was no occasion for the assessee to object as Mr. Rajeev Aggarwal, Director of assessee-company was duly furnished a copy of the notice. Thus, the object and purpose of service of notice was to inform and make the company aware that proceedings under Section 147/148 were initiated. High Court thus concluded that the initiation to this extent was valid, and not disputed and challenged in the present case.

High Court held that the assessment proceedings under Section 147/148 were not invalid or void for want of proper service of notice. However, High Court stated that an order of remand was required to be passed as the ITAT had not adjudicated and decided the appeal filed by the assessee on merits.

Thus, High Court ruled in favour of Revenue

Service Tax

LD/67/20

Radiowani
Vs.
CST
(Mumbai- CESTAT)
29th May, 2018

Mere registration under 'sound recording services' under service tax law, does not make contract of producing entire radio programme as taxable under 'sound recording services'. When there is no proposal in show cause notice to tax it under any other category, demand under the said other category is not sustainable.

Facts:

The appellant was registered with service tax department as provider of sound recording services. They were engaged by advertising agencies for producing radio spots for clients i.e. mini-programs that are intended to be broadcasted by clients. Alleging that appellant provided sound recording services by producing said radio spots, revenue demanded impugned service tax liability under category of 'sound recording services'.

Held:

At the outset, tribunal noted that merely obtaining registration for sound recording services is not sufficient to operate as a conclusive ground of taxability because the levy under Finance Act, 1994 is not on the persona but on the activity. Neither the registration nor wherewithal for rendering the service can substitute for classifying the activity within the definition of the service.

As regards appellant's submission of alternative classification of impugned activity under 'advertising agency services', tribunal noted that the entire programme is produced by appellant and is then submitted to its client for further use. These may well be in the nature of subcontract by an advertising agency, but is yet an independent one. It was held that in absence of proposal in show cause notice to tax the activity as provision of 'advertising agency service', the appellant is not required to choose between alternate classification as that is the responsibility of the tax collector. Fitment within an alternative classification suffices to erase the proposal in the notice but cannot crystallise

liability unless the alternative was also proposed in the notice. Therefore, tribunal declined to test the activity of appellant for fitment under a different classification.

Further, tribunal noted that every taxable service may be an end in-itself to a consumer. However, there is no bar on such a taxable service being an input for another service. That is the nature of a commercial supply chain. Tribunal observed that the appellant undertakes the conceptualisation, the script preparation, identification of voice, actual recording, editing and ultimate development of the entire radio spot programme as a package ready for broadcast and the client pays compensation for the entire range of activities. Therefore, tribunal held that though sound recording is part of activity but it does not make for whole of the activity as that of sound recording, nor can the consideration be disaggregated to value the sound recording undertaken in pursuance of the contract. Thus, it was held that the activity of the appellant is clearly not that of sound recording per se and impugned demand was set aside.

LD/67/21

CCE & ST

Vs.

Shree Nakoda ISPAT Ltd.

(Delhi- CESTAT)

18th May, 2018

Activity of providing assistance in implementation of 'clean development mechanism' project in terms of Kyoto protocol which resulted in generation of transferable 'emission reduction certificates' i.e. carbon credits was held to be taxable as 'services of management or business consultancy'.

Facts:

Respondent-assessee is manufacturer of iron and steel products. While installing power plant for manufacturing activities, it entered into contract with foreign service provider for assistance in implementing clean development mechanism as per Article 12 of Kyoto protocol. The said services involved assistance in obtaining registration and certification of CDM project involving project design validation, registration, regular verification and arranging independent validation of such CDM. The execution of CDM project resulted in emission reduction certificates (CERs), which can be transferred/sold for a consideration. Further, the foreign service provider agreed to provide marketing of such credit certificates arising out of CDM project by obtaining most favourable terms, for annual fees of 7.5 % of the value of CERs arising out of such CDM project. SCN proceedings were initiated against respondent on the ground that respondent received 'management or business consultancy services' and thus, were liable to pay service tax under reverse charge mechanism. Aggrieved by confirmation of impugned SCN by impugned OIO, appellant filed appeal before first appellate authority.

During said appellate proceedings, the first appellate authority held that the CERs are 'goods' sold by respondent to foreign company. Further, relying upon CBEC's circular dated 27.06.2011, it was held that since the foreign service provider acted as an agency in pursuance of Act/Regulation, no service is provided to respondent assessee and thus, impugned OIO was set aside. Being aggrieved, Revenue filed present appeal.

Held:

Hon'ble Tribunal noted that the as per the terms of agreement, the foreign service provider was assisting respondent in project design, validation, registration and regular verification of such CDM project and the CERs were generated in said CDM project implemented in respondent's power plant. Tribunal noted that the annual fees were charged by foreign service provider for providing consultancy and other related activities in creation of CDM project. Further, tribunal categorically observed that the generation of CERs and their saleability no doubt are in terms of Kyoto Protocol of international convention, however, the respondent did not receive any statutory service from foreign company and the transaction is purely commercial in nature. Accordingly, tribunal held that the terms of the agreement and the manner of consideration to be paid, make it clear that the services received by the respondent are covered under the category of 'management or business consultant service'. Consequently, impugned OIO was restored by allowing Revenue's appeal.

LD/67/22

Holtec Asia Pvt Ltd.
Vs.
CCE, GST PUNE-I
(CESTAT-Mumbai)
20th April, 2018

A foreign entity and its Indian project office are different establishments in terms of Section 65B(44) of Finance Act, 1994. Thus, for the purpose of services directly rendered to such entity located abroad, the location of recipient of such services cannot be said to be in India only for the reason that such foreign entity has project office in India as registered premises under service tax.

Fact:

Appellant provided consulting engineer services to its parent company located outside India. They filed refund claims under Rule 5 of Cenvat Credit Rules, 2004 read with Rule 6A of the Service Tax Rules, 1994 in terms of *Notification No. 27/2012 CE (NT) dt. 18.06.2012* towards Cenvat Credit paid on input services used in providing output services. Meanwhile, the foreign parent company opened project office in India for providing services under a separate and independent project. While sanctioning instant refund claim, lower authorities took a view that in terms of rule 2(i) of Place of Provision of Service Rules, 2012 (i.e. POPS rules), the location of service recipient i.e. foreign parent company would be premises for which the registration has been obtained i.e. India (project office in India). Thus, as the location of service provider and service recipient is in India, the conditions laid down in rule 6A of STR, 1994 are not fulfilled and the impugned service cannot be said to be exported. Appellant replied the said objection by clarifying that impugned services provided by it to foreign parent company are independent of services provided by Indian project office of foreign parent company to third party service recipients, thus service tax registration of said project office shall not have any bearing on impugned refund claims. However, the lower adjudicating authorities as well as first appellate authority rejected appellant's refund claim by holding that the conditions laid down by Rule 6A of STR, 1994 are not fulfilled. Being aggrieved, appellant filed present appeal.

Held:

Hon'ble tribunal observed that there was no connection between the services provided by appellant to foreign company and the services rendered by Indian project office of foreign parent company. Appellant filed instant refund claims on account of services rendered by it to recipient located outside India and the refund claim was filed in terms of Rule 5 of CCR, 2004. Hon'ble tribunal did not concur with the contention of lower authorities that, in terms of provisions of Rule 2(i) of POPS Rules the location of the service recipient automatically becomes the 'premises for which service tax registration' is obtained. Tribunal noted that in the present case the services were rendered to service recipient who is located outside India. The Indian project office was not at all concerned with such services. Further, it was observed that in terms of explanation 3 to Section 65B(44), different establishments located in non-taxable territory and taxable territory are to be treated as establishment of different persons i.e. the parent company located outside India is different from its project office in India. Therefore, tribunal held that since it is the parent company located abroad which has availed services from appellant, such services would clearly fall under category of export of services u/r 6A and thus, appellant's refund claim cannot be denied. Accordingly, impugned order was set aside.

Excise

LD/67/23

Commissioner of Central Excise Bengaluru
Vs.
Indian Telephone Industries Limited.
20th June, 2018

Unjust enrichment principle not applicable to refund/adjustment of excess duty upon finalisation of provisional assessment.

The assessee is a manufacturer and supplier of telecommunication equipment to the Department of Telecommunication (DOT) (now known as 'BSNL'). During the period 1998-99 to 1999-2000 at the time of removal of goods and sale thereof to BSNL, the final price of goods sold was to be determined under the contract between the assessee and DOT/BSNL. Therefore, the goods were allowed to be cleared on

the basis of provisional assessment, on payment of provisional duty in terms of Rule 9B.

As per the Revenue, the assessee was entitled to a refund only after following the procedure under Section 11B(2) of the Act. Therefore, the assessee was required to satisfy the Revenue about the aspect of unjust enrichment that it had not passed on the incidence of provisional duty paid by it at the time of removal of goods. As per the Revenue, the adjustment/refund under Rule 9B was impermissible.

Assesee relied on Supreme Court decision in *CCE, Mumbai-II vs. Allied Photographics India Ltd. [2004 (166) E.L.T. 3],* wherein the Apex Court had held that Section 11B of the Act and Rule 9B operate in different spheres. In cases where duty is paid under Rule 9B and refund arises on adjustment under Rule 9B(5), then such refund will not be governed by Section 11B of the Act. Only if an independent refund claim is made and if any adjustment under Rule 9B(5) re-agitating the same issue is made, then only such claim would attract the provisions of Section 11B. High Court observed that though Revenue had referred to this Supreme Court judgement, it had not followed its ratio in the order passed by the Adjudicating Authority.

High Court remarked that the very fact that the Central Excise Department made an allegation of 'unjust enrichment' and wanted to enquire into it against the Government of India Undertaking (assessee) is not palatable, especially because the customer / purchaser of Tele-equipments from the assessee was none else than Central Government Department (DOT) itself or BSNL. Thus, the High Court stated that who was getting "unjustly enriched" at whose cost is anybody's guess, but still the Excise Officer of the Central Government in the Central Excise Department chose to put public money in precious man hours and other resources in the whirlpool of litigation at various forums by taking a rather too narrow and pedantic approach in the matter.

High Court further remarked that it is hopeful that the concerned persons in the Government will awaken to this stark reality and take better reasoned and considered decisions before launching a trail of litigation in the Courts of law.

High Court held that the adjustment/refund or short payment of the provisional duty was required to be determined by the Adjudicating Authority under Rule 9B(5) of the Rules as it then existed during the contemporary period of taxable event of manufacture and removal of goods. The Rule governing the obligations or liability of the assessee relevant on the date of removal of goods and payment of provisional duty would apply, rather than the Rule as amended subsequently after which the belated order came to be passed. High Court opined that Revenue should have followed the Supreme Court ruling in Allied Photographics and thus, the order of Authority was contrary to this ruling.

High Court, thus, dismissed Revenue's appeal and ruled in favour of the assessee.

Customs

LD/67/24

Commissioner of Central Excise and Customs
Vs.
M/s OEN India Ltd.
18th June, 2018

In case of diversion of imported goods to unregistered factory for manufacture, the High Court states that there could not be an exemption claimed and utilisation established, without the factory in which manufacture has been carried out, having registration under the said Rules.

The assessee is a manufacturer of "Electrical-Relays". It had imported copper wire, which would be wound inside the Relays. The assessee's factory at Cochin is registered under the Rules of 1996 and it availed of duty concession under the Rules of 1996. The assessee at its factory in Cochin having reached its maximum capacity, sought for transfer of a portion of the goods imported to its Peenya unit in Bangalore. The Revenue did not respond to the same, and hence, the transfer was made to the factory at Bangalore and the manufacture of Relays was carried out there. The factory at Cochin maintained simple accounts of the utilisation of inputs as provided under the Rules of 1996. The accounts maintained at the factory at Cochin involve both the Relays manufactured in Cochin and that manufactured in Bangalore. The question raised by Revenue is that whether the manufacture made at the factory at Bangalore could be taken as due utilisation for the exemption, when and if the factory at Bangalore is not registered under the Rules of 1996.

High Court observed that there could not be any exemption claimed and utilisation established,

without the factory in which the manufacture had been carried out, having registration under the Rules. Perusing rule 3 and rule 4 regarding Registration and Application by the manufacturer to obtain the benefit, High Court observed that, "the registration has to be obtained from the Officer having jurisdiction over the factory, of whose certificate shall contain the following particulars: (1) Name and address of the manufacturer. (2) Excisable goods produced in his factory. (3) The nature and description of imported goods used in manufacture". Under Rule 4, the manufacturer has to indicate the estimated quantity and value of the goods to be imported, which is utilised in the manufacturing process; for the purpose of claiming exemption under Rules of 1996. High Court stated that a registration under the Rules of 1996 is required for every factory owned by the same manufacturer. Only in such circumstances, there could be a proper monitoring of the transfer of goods as also the utilisation, by the respective officers, who granted registration to the various factories of same assessee.

High Court refused to rule on the question as to whether the assessee was disentitled to the benefit under the Rules and liable to differential duty, noting that in the present case, the issue as to whether the factory at Bangalore had registration under the Rules, had not been looked into by any of the authorities.

High Court vacated the orders of the Tribunal to the extent it found that the claim of exemption was being availed on the ground of establishment of utilisation in the other factory premises; and stated that this issue shall be left open to be considered in an appropriate case. Additionally, on the issue of whether the proceedings were beyond the period of limitation, the High Court observed that since the diversion of goods was intimated to the Department and since the permission was sought for by the assessee, the extended period of limitation was inapplicable. Thus High Court ruled, in favour of the assessee on this front.

Accordingly, it disposed Revenue's appeal.

Transfer pricing

LD/67/25

Principal Commissioner of Income Tax

Vs.

Kirloskar Toyota Textile Machinery Private Ltd

26th June, 2018

Gross profit ratio upheld as a profit level indicator to benchmark transaction of purchase of auto-components.

The assessee is engaged in manufacture and sale of textile machinery, manufacture and sale of auto transmission components and engaged in distribution of material handling equipment. The assessee purchased components from its AE. The TPO made an adjustment of Rs. 8.98 crores. Assessee did not get relief at DRP level, aggrieved by which the assessee filed an appeal before Bangalore ITAT.

ITAT had noted that the TPO himself in many cases had acknowledged the fact that in case where in the rate of depreciation impacts the profit margin of the company, then the company should be allowed depreciation adjustment or can opt for PLI as PBDIT/TC. ITAT held that 'GP over sales' can eliminate the difference in claim of depreciation due to age of machinery, rate at which it was claimed and method of claims like straight line or WDV". ITAT, thus directed the AO/TPO to adopt the comparison of profitability ratios using GP over sales. ITAT observed that since the details of capacity utilisation of the comparable companies and rate of depreciation could not be analysed as commented by DRP, it would be better if GP analysis was undertaken taking sales less cost of raw material as basis (excluding cost including depreciation, interest, etc.) so that auto components profitability could be analyzed so as to consider whether the import of material from AE had affected the profitability of assessee under the TP provisions. ITAT, thus set aside, the impugned order of the Revenue and restored the matter to the file of the AO/TPO.

Thus ITAT ruled in favour of assessee on this matter, aggrieved by which the Revenue filed an appeal before the Karnataka High Court.

High Court relied on co-ordinate bench ruling in *Softbrands India Pvt. Ltd [I.T.A.No.536 & 537/2015],* wherein the High Court had held while dealing with appeals under Section 260A, High Court would not disturb those findings of fact, unless such findings are ex-facie perverse, unsustainable and exhibit a total non-application of mind by the Tribunal to the relevant facts and evidence before the Tribunal.

High Court therefore held that no substantial question of law would arise in the present case, and thus dismissed Revenue's appeal, thereby ruling in favour of the assessee. ■