entitled to a specified percentage of the distributor's sales revenue less operating costs/expenses of the distributor. However, ITAT noted that since the assessee had no revenue left after reducing the operating cost/expenses, the AE was not paid any percentage. The revenue generated by selling the goods is retained by the assessee. ITAT noted that the TPO has instead computed the mark up on the operating cost of the assessee to determine the ALP and brought the notional income to tax which is not justified.

Regarding applicability of the provisions of Section 92, ITAT observed that sub-Section (3) lays down that where the assessee declared better and more favourable results as per its books of account, then by reason of TP adjustment, the income chargeable to tax shall not be decreased or the loss shall not be increased. If the provisions of Section 92(3) would apply, then the provisions of sub-Sections (1) and (2A) of Section 92 would not be attracted. ITAT noted that since it has already held that the transaction is a distribution transaction and not service agreement, then the TP analysis has to be done afresh and then it has to be seen if the provisions of Section 92(3) would apply.

ITAT therefore directed the Assessing Officer/ TPO to conduct fresh TP analysis by treating the assessee's transaction as a distribution agreement and by determining the most appropriate method afresh and after allowing the necessary adjustments. If the loss declared by the assessee is increased by such TP study, then no TP adjustment can be made as provided in Section 92(3) of the Act.

ITAT thus ruled in favour of the assessee.

LD/66/178

Bombardier Transportation India Private Limited

vs.

Dy. Commissioner of Income Tax

09th April, 2018

Question regarding appropriateness of one or other method under Section 92C cannot be considered as a question of law.

The assessee had approached the High Court against the decision of the ITAT on the ground involving use of the 'most appropriate method'. The assessee urged that Comparable Uncontrolled Price(CUP) was the most appropriate method for ALP determination and is justified given that the rates at which it supplies the articles in question i.e.; the finished railway wagons coincide with the rate at which they are supplied to the Delhi Metro i.e.; the ultimate purchaser.

High Court observed that question as to the appropriateness or otherwise of one or other method under Section 92C read with Rule 10B(1) of the Income Tax Rules, 1962 cannot *per se* be a question of law as it involves a fact analysis that is done by the revenue authorities at the first instance and settled by the ITAT. Unless the facts show glaring distortion in the adoption of one or the other method, a question of law cannot be said to arise.

High Court observed that in the present case, the CUP method was rejected as an appropriate method, having regard to the fact that it unduly restricted the choices of the Revenue. The TNMM was considered to be a more appropriate method where greater choice was available. The assessee's contention in this respect that the supplies made to the Metro Rail alone ought to be considered is equally unpersuasive. The most appropriate method or the transactional similarity does not dictate that two entities alike in all particulars can only be considered for comparative purposes. High Court noted that it is the functional similarity which is to be taken into account.

High Court thus denied admitting grounds of appeal related to appropriateness of method; however, it admitted the appeal on other questions of law.

Service Tax

LD/66/179

Power Mak Industries

vs.

CCEC&ST

1st February, 2018

Tribunal held that when the hire agreement for supply of Diesel Generators only sets out terms and conditions of hire and do not put any shackles on the hirer for full enjoyment of DG sets by hirer and the effective possession and control of DG sets rests with hirer, such transaction would be regarded as 'deemed sale' attracting sales tax/ VAT and not as transaction of supply of tangible goods so as to attract service tax.

Facts:

Appellants entered into Hire Agreement with parties for supply of Diesel Generators on hire basis subject to conditions as laid down in "Hire Agreement". It appeared to the department

that essential components to constitute these transactions as sale, namely, (i) an agreement to transfer title, (ii) supported consideration and (iii) actual transfer of title in goods were absent and all through agreement period, equipment was in the possession and control of the owner. It also appeared that insurance, maintenance, repairs and damages charges pertaining to diesel generators were also borne by the appellant owner. Department therefore took the view that the appellant rendered services of 'supply of tangible goods' to the hires and is liable to pay service tax on consideration received from hirers.

Appellant contended that appellants are engaged in letting out of DG sets on lease basis to various hirers for their use during subsistence of contract and they do not have any control over DG sets and entire control of possession of DG sets vests with the hirers. Therefore, appellant submitted that the transaction with hirers is only of 'transfer of right to use any goods involving transfer of both possession and control of the goods to the users' which is 'deemed sale of goods' and is leviable to sales tax/ VAT.

Held:

Hon'ble Tribunal noted that there cannot be "one-size-fix-all" method to determine whether a transaction is supply of tangible is "deemed sale" or "service". On the other hand, each transaction having its own unique entities and conditions, will have to be critically examined and subject to various tests laid down by the Courts, in particular the tests laid down by the Hon'ble Supreme Court in the landmark judgement of *Bharat Sanchar Nigam Limited vs. Union of India [2006(2)STR 161 (SC)]*.

After referring to various clauses in the agreement between appellant and hirers, Tribunal, *inter alia*, noted that there is definitely a consensus between lessor and the lessee as to identity of the goods. The hirers very much have legal right to use the goods. In fact, the agreements clearly lay down that lessee shall render/operate DG sets for his exclusive use and the lessor has transferred the right to use the DG set. Further, it is undisputed that as long as goods are with hirer, appellant does not have any legal right to use the goods themselves and the appellant has transferred right only to one hirer at a time.

As regards department's contention regarding appellant providing DG technicians to hirers and not permitting hirers to run DG sets in absence

of technicians, Tribunal noted that appellant has adequately clarified that DG technicians are provided as some of the hirers do not know how to technically operate the DG sets and such condition relates to the tolerance level of the equipments and deviation from it will result in break-down of the equipment, accordingly, they prescribed a list of "Do's" and "Don'ts" by the hirers. Even if the DG technicians are provided by the appellant, the manner of operation of DG sets is only as per the instructions and requirements of the hirers and not on the directions of the appellants. Further, Tribunal categorically noted that the hirers pay hire charges and not service charges and also, hirers pay deposit to the appellant, which is the practice only in cases of leasing contracts which are deemed sale transactions and not in case of service transactions.

Therefore, Tribunal held that the impugned transaction involving supply of DG sets on hire basis to various hirers is nothing but supply of tangible goods with transfer of both possession and control of the goods to the users of the goods and this is the case of supply of tangible goods for use, with legal right of possession and effective control vesting with the hirer, required to be treated as "deemed sale of goods", hence cannot be considered as "supply of tangible goods for use of service", for the purpose of charging service tax.

LD/66/180

AVC MC Cormick Ing Pvt. Ltd.

vs.

CCE&C

13th December 2017

Tribunal held that merely because a technical know how is recognised under international treaties to which India is signatory, in absence of municipal legislation enacting such treaty, it cannot be presumed that such knowhow is recognised under Indian law and service tax liability cannot be fastened on recipient of the knowhow under 'intellectual property services'.

Facts:

Appellant, a 100% EOU engaged in manufacture and export of spices, received technical knowhow and assistance from a foreign company and paid royalty for the same. Revenue took a view that appellant received intellectual property services in India and thereby rendering themselves liable to pay service tax under reverse charge basis.

Held:

As regards department's contention that such technical knowhow is recognised under international treaties to which India is a signatory and hence it is leviable to tax in India, Tribunal noted that as per Article 253 of the Constitution of India, for implementing any treaty agreement or convention with any country or any decision made at international conference etc., there should be a municipal legislation enacted for giving effect to such international agreement or treaties. Further, it was also found that the impugned notice does not clearly state the nature of knowhow which the appellant has availed from his foreign company. Therefore, it being settled position of law, as laid down in various judicial pronouncement that the intellectual property, proposed to be chargeable to service tax, has to be recognised as per Indian law, Tribunal set aside impugned demand and allowed present appeal.

LD/66/181

M/s Reliance Securities Ltd.

vs.

CST

13th December 2017

Once an agent discharges service tax on entire amount collected from customers, and then shares part of such amount with principal, no service tax can be demanded again on such sharing of fees under category of 'business auxiliary services' as it would amount to double taxation.

Facts:

Appellant, M/s Reliance Securities Ltd. (RSL) is stock broking company and provide its customers access to trade in equity derivatives, mutual funds and IPOs. The customer desirous to do trading has to register with the appellant's affiliate M/s Reliance Money Infrastructure Limited (RMIL) who provides the state of art online trading platform vide its web portal to trade in securities. For the purpose of trading the investor is provided with pre-paid cards also known as limit cards of various denominations and the fee charged for such cards from the investor is income to the appellant and M/s RMIL. The Appellant has entered into agreement with M/s RMIL outlining the role of each of them in providing consolidate service to the investor. By virtue of agreement M/s RMIL was entrusted with the sole responsibility of collection of card fee

including service tax for such consolidated service to the customer. It was agreed between the appellant and M/s RMIL that 95% of the total card fee would be disbursed to the appellant by M/s RMIL and the remaining 5% would be retained by M/s RMIL for providing services to the clients. Department issued show cause notice contending that the appellant is engaged in providing infrastructure services, namely its internet based trading platform to the clients of M/s RMIL and such service are classifiable under taxable service category of "Business Support Service".

Appellant submitted that they are providing stock broking services to investors and no service is provided to RMIL. It also submitted that appellant is providing stock broking and related services to the investors and has entered into a facility agreement with RMIL for recovery/collection of the entire consideration for stock broking service provided to the investor and thereafter discharge the service tax liability on behalf of appellant and the balance amount attributable was to be given to the appellant by RMIL who acts in the capacity of agents only for the purpose of collection of card fees and discharging tax liability on behalf of appellant. Appellant also submitted that same transaction cannot be taxed twice and it would be a case of revenue neutrality as whatever service tax is charged is available as credit.

Held:

Hon'ble Tribunal noted that the agreement specifically recognises the clients to that of M/s RMIL to which the services are provided by the appellant. In sharing of such fee, M/s RMIL is effectively discharging service tax on full amount of card fee. M/s RMIL has retained only 5% amount as its share and the remaining 95% has been forwarded to the appellant. This clearly shows that M/s RMIL has acted as agent of appellant for provision of financial services. The discharge of service tax liability has been made by M/s RMIL as it has collected fee as agent of the appellant and paid applicable service tax before remitting the 95% amount to the appellant. Further, Tribunal noted that the amount of 95% has

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been received by the appellant from M/s RMIL and not from the clients. Thus, Tribunal held that the sharing of fee cannot be interpreted as rendering of services by appellant to the clients of M/s RMIL and the amount thus shared in between the appellant and M/s RMIL cannot be taxed as it has already suffered taxes at the time of receipt by M/s RMIL. Accordingly, it being settled position of law that once the service tax on entire value has been discharged, there cannot double taxation, Tribunal dropped impugned demand in present case.

Excise

LD/66/182

Jubilant Life Sciences Ltd.

vs.

The Commissioner of Central Excise

16th April, 2018

CESTAT order rejecting refund claim under Section 11B of Central Excise Act, set aside by High Court; HC remarked that there was no independent application of mind by CESTAT and CESTAT only endorsed legal findings by the Adjudicating Body/Authority.

The assessee manufactures organic chemicals falling under Chapter 29 of First Schedule to Central Excise Tariff Act, 1985 (CETA). The assessee also also manufactures Rectified Spirit and Extra Neutral Alcohol. The assessee uses molasses as input in manufacture of Rectified Spirit, on payment of excise duty at specific rate on per tonne basis. The spirit so manufactured is either captively consumed in the manufacture of Extra Neutral Alcohol or sold as such in the domestic market. The Extra Neutral Alcohol too is either captively consumed in the manufacture of dutiable goods or sold as such in the domestic market. Extra Neutral Alcohol is exempted from payment of excise duty.

The assessee followed the procedure laid down under the erstwhile Rule 6(3)(a) of the CENVAT Credit Rules, 2004, as per which a manufacturer engaged in the manufacture of goods falling under Chapter Heading 2207 of the Central Excise Tariff Act, 1985 was required to pay an amount equivalent to the CENVAT credit attributable to inputs used in the manufacture of exempted final products. Bearing in mind the nature of the operation and the manufacturing process, the assessee stated that it was not feasible to maintain separate accounts for receipt, consumption and inventory of molasses for manufacture of dutiable and exempted goods. The assessee had therefore reversed CENVAT credit equivalent to duty paid on molasses used in manufacture of exempted goods. Pursuant to amendment to Rule 6(3) by way of Notification dated 01/03/2008 the assessee submitted that during the course of internal audit, it realised that from April, 2008 to September, 2009, it had paid/reversed higher amount of CENVAT credit for molasses and therefore, claimed refund seeking re-credit of excess reversal.

However, the Adjudicating Authority held that if the assessee had opted to pay an amount equivalent to the CENVAT attributable to input, it should have intimated the fact to the jurisdictional authority. It further held that the claim for re-credit was incorrect and inadmissible as it was an afterthought, and by switching the option between Rule 6(3)(i) and Rule 6(3)(ii) in the middle of the financial year, it was seeking to derive benefit. CESTAT ruled in favour of Revenue aggrieved by which the assessee approached the High Court.

High Court noted that the assessee had already filed before the Commissioner (Appeals) a declaration from the management certifying that option under Rule 6(3)(ii) has not been exercised. However, that submission was not considered in the impugned order and no specific findings have been rendered in respect of the same.

The CESTAT had entirely agreed with the Commissioner and had only endorsed its reliance on Explanation-1 to Rule 6(3). There was no independent application of mind and CESTAT was expected, as the last fact finding authority, to render a specific finding.

High Court remarked that *"We do not think that the case could have been disposed of even if the revenue involved was not substantial, by a mere endorsement of the Appellate Authority's finding, particularly on the interpretation of the Rule prevailing at the relevant time. The Tribunal is not expected to endorse legal findings by the Adjudicating Body/Authority and that of the First Appellate Authority."*

Ruling in favour of assessee, High Court quashed the CESTAT order and directed a fresh decision on merit. High Court stated that the Tribunal must render its independent conclusion on the issues involved and should not be influenced by its earlier findings and it is not expected to merely endorse what the Appellate Authority has done in the instant case.

LD/66/183

M/s Nyati Hotels and Resorts Pvt. Ltd.

vs.

CCE

13th April, 2018

Time limit prescribed u/s 35(1) of Finance Act, 1994 for filing of appeal is not applicable for payment of mandatory pre-deposit u/s 35F. Tribunal held that appeal is admissible if filed within stipulated time limit although pre-deposit was paid late.

Facts:

The appellant had filed an appeal before first appellate authority within time limit stipulated under Section 35(1) of Finance Act, 1994. However, pre-deposit in terms of Section 35F was paid after filing such appeal. First appellate authority dismissed the appeal on the ground that time limit prescribed under Section 35(1), for filing of appeal, is also applicable for payment of pre-deposit payable in terms of Section 35F so as to enable the first appellate authority to entertain that appeal. Aggrieved by the same, appellant filed present appeal.

Held:

Hon'ble Tribunal noted that both the Section 35(1) and Section 35F are independent of each other and have got no overriding effect on the other. Section 35(1) is in respect of type of appeal which can be

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filed before first appellate authority and it does not deal with entertaining appeal by first appellate authority, whereas Section 35F in turn deals only with entertaining the appeal subject to condition of pre-deposit seven and a half percent. It nowhere prescribes time limit for making pre-deposit, thus, provisions of Section 35F cannot be read in context of Section 35(1) as it had got no application. Tribunal held that non-payment of pre-deposit is curable defect. Further, Tribunal noted that the question of entertaining appeal comes at the time of filing appeal which has to be filed within stipulated time. Therefore, it was held that once the appeal is filed within stipulated time limit, same cannot be dismissed on the ground of late payment of pre-deposit amount. Accordingly, Tribunal remanded the case back to first appellate authority and directed to hear the same on merits.

LD/66/184

Spykar Lifestyles Private Ltd.

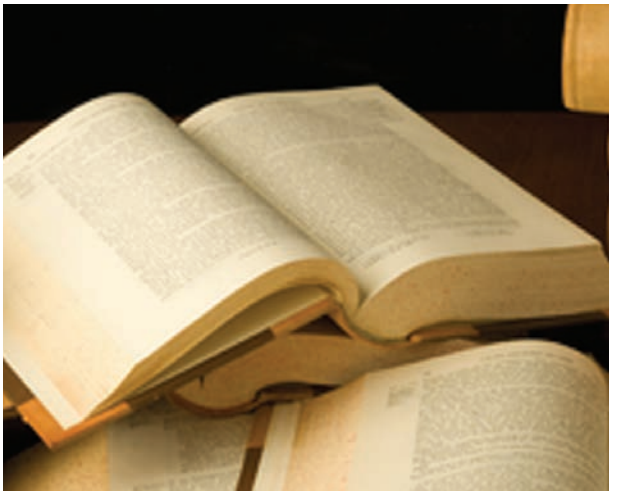
vs.

The Commissioner of Central Excise, Thane

11th April, 2018

Interest under Rule 6(3A)(e) of CENVAT Credit Rules, 2004 (CCR) on late reversal of CENVAT credit attributable to traded goods in terms of Rule 6(3)(A)

The assessee manufactures readymade garments in respect of their own manufactured goods as well as trading goods. The assessee is availing Cenvat credit in respect of common inputs service, which is used for both types of clearances. As per the Revenue, in respect of traded goods being exempted service, assessee is require to pay an amount equal to the Cenvat credit attributable to the traded goods in terms of Rule 6 (3A) of Cenvat Credit Rules, 2004. The appellant have reversed the amount as required under Rule 6(3A) of Cenvat Credit Rules, 2004, which was confirmed by the Adjudicating Authority. However, the assessee has not discharged the payment of interest on the late reversal of amount of ₹81.75 lakhs under Rule 6(3A), which was demanded in the impugned order.



Assessee argued that availment of credit was not erroneous and that, Rule 14 of CCR applies only where there is a short payment of duty whereas in the present case there was no question of short payment of duty, hence interest under Section 11AB of Central Excise Act, 1944 (Act) was not chargeable. In absence of invokability of Section 11A or Rule 14, provision of Rule 6(3A)(e) of CCR, cannot be invoked being a delegated legislation.

CESTAT analysed Rule 6(3A)(e) of Cenvat Credit Rules, 2004 and observed that the interest is in respect of the amount payable under the provision of Rule 6(3A), which is explicit provision and therefore in terms of said Rule, interest is legally chargeable. CESTAT stated that interest is not chargeable under Rule 14 and Section 11AA, however for specific purpose for payment of an amount under Rule 6(3a), the charging provision of interest was created as per the Rule 6(3a)(e). Therefore, there is no reason why this provision cannot be invoked. CESTAT further stated that if assessee's submission is accepted that interest is not chargeable, then provision of Rule 6(3A)(e) shall stand redundant, which is not the intention of the legislation.

CESTAT rejected assessee submission on non-chargeability of interest for a longer period. As per CESTAT, once the amount is admittedly reversed, interest shall be chargeable as piggy back of the principal amount, therefore assessee cannot get relief on limitation.

CESTAT thus dismissed Revenue's appeal.

LD/66/185

Dinshaws Dairy Foods Ltd.

vs.

CCE

27th March, 2018

When the charges for hiring of specialised refrigerated vans used for transportation of goods were payable on kilometer basis and not on

destination or quantity of goods transported and also, no consignment note was issued by vehicle owners, Tribunal held that such services cannot be regarded as services of goods transport agency.

Facts:

Appellant, manufacturer of ice-cream, are clearing their goods to distributors/dealers all over the country by specialised refrigerated vans. They entered into agreement with the owners of such van to hire their Vehicles on hire charges at a fixed rate based on kilometer basis. The Vehicles were under the disposal of the appellant and were transporting goods as per Appellant's instructions. Revenue demanded service tax from appellant under category of 'goods transport agency' on reverse charge basis in respect of transportation charges paid to vehicle owners. While rebutting the same appellant submitted that vehicles were hired on per kilometer basis and the vehicles were under its control and disposal and also, no consignment note was prepared but bills were raised by the vehicle owners on the basis of monthly kilometers travelled by the van. Therefore, the activity cannot be termed as of Goods Transport Agency but of 'transfer of right to use' and treated as deemed sale within Article 366(29A) of the constitution.

Department contented that as the details of monthly invoices contain the vehicle number, date of transportation, destination of consignment and the actual kilometers which have been travelled, such invoices has got all the basic details as required by consignment note and mere assertion that consignment note is not given cannot be accepted without examination.

Held:

Tribunal noted and held that when vehicles are hired on monthly basis and charges are not based upon destination but on kilometer basis, it cannot be said that services involved are of Goods Transport Agency. Tribunal noted that in such case no consignment note is issued as vehicles run on direction of appellant and the charges are fixed not on the basis of destination or quantity of goods or any other basis but solely on kilometers vehicles have run in a month. Obviously, no consignment note is issued as service is not of consignment to be taken to any particular destination. Also, Tribunal noted that ratio laid down in *South Eastern Coalfields Limited vs. CCE, Raipur 2017 (47) STR 93(Tri-Del)* is squarely applicable to appellant's case. Therefore, it was held that services provided by appellant would not fall under category of 'Goods Transport Agency' and impugned demand was set aside.