the account is not something which is retained in a fiduciary capacity and is income at the hands of the assessee.

High Court observed that admittedly the entire amounts from the customers of the principals were credited to the agent-assessee, who maintained a running account for the Principals. There is no determination of the commission and admittedly after the expenses incurred on behalf of the Principal are met and the amounts due to the Principal are transferred what the assessee gets to enrich its coffers is the income obtained by the agent-assessee. High Court held that the amounts left in the account after deduction of expenses would be income taxable especially since on settlement of the suit claims, the right if at all available to the Principals to such amounts, stands extinguished. Further, High Court noted that there is no question of any further liability arising from the litigation initiated by the Principals, since the same has been settled and amounts due to the Principals were satisfied. Thus, there was no question of holding of amounts by the assessee towards any possible future claims.

High Court noted that Section 28(ii)(c) talks about taxing of compensation or other payment due to or received by any person, by whatever name called, holding an agency in India for any part of the activities relating to the business of any other person, at or in connection with the termination of the agency. Further Section 2(24) states that income includes any sum chargeable to income-tax under clauses (ii) and (iii) of Section 28.

Therefore, the High Court held that the amounts waived by the Principal in accordance with a settlement arrived at with their agent were 'income' for the assessee. High Court thus ruled in favour of the Revenue.

Service Tax

LD/67/64

EIH Limited

Vs.

C.C.E., Delhi-I

14th September, 2018

Supply of Aircraft/Helicopter on chartered basis is taxable as 'supply of tangible goods for use

The assessee has a unit of Maidens Hotels for providing Renting of Immovable Property Services, Mandap Keeper Service, Dry Cleaning Services, Business Auxiliary Services & Internet cafe services and has been accordingly registered. Further, the assessee was also registered for providing Aircraft Operator services. Revenue, after investigations noticed that assessee was supplying Aircraft/ Helicopter Service to different service receivers and this service fell under the category of 'supply of tangible goods'. The assessee did not have any Service Tax Registration for it and also thus had not paid any service tax on the said activity. The Revenue thus issued notice demanding service tax for the period of May 2008 to May 2010, along with interest and penalties.

As per assessee, this service fell under the category of Transport of passengers by air service, which was not taxable during the period of dispute.

CESTAT perused the Departmental Circular D.O.F. No.334/I/2008-TRU dated February 29, 2008, regarding the introduction of the levy of supply of tangible goods. CESTAT observed from one of the invoices of the assessee that the Aircraft was given on hire for use of charterer on the terms and conditions of the permit in favour of the assessee. Aircraft was supplied along with the licensed/trained Pilot and necessary Engineering crew to operate the Aircraft. Thus the effective control and possession still remained with the assessee who was charging the charterer on the basis of actual time consumed during the flight.

CESTAT referred to ruling in case of Global Vectra Helicorp Ltd. vs. Commissioner of Service Tax, Mumbai-II [2015 (2) TMI 974 – CESTAT MUMBAI (LB)], wherein on similar circumstances it was held that such services will be classifiable under the category of supply of tangible goods service. Relying on this ruling, CESTAT upheld the demand of service tax.

Separately, CESTAT held that that the Revenue was not entitled to invoke the extended period of limitation. CESTAT observed that onus heavily rests upon the Revenue to prove suppression of facts, before invoking extended period of limitation, which the Revenue had failed to do.

CESTAT thus partly ruled in favour of the Revenue.

LD/67/65

The Principal Commissioner of Service Tax

Vs.

M/s Shree Chanakya Education Society

05th September, 2018

Bombay High Court upheld CESTAT order which had set aside demand under "Commercial Training or Coaching Centre" for extended limitation period and penalty imposed on the educational charitable trust

The assessee is a Public Charitable Trust rendering services of imparting education and was also exempted from Income Tax. The revenue had filed the present appeal on the ground of whether CESTAT was justified in setting aside the demand for an extended period and consequent penalty under section 78 of Finance Act, 1994. The assessee was under an impression that it was not liable to service tax. Revenue, however, issued a show-cause notice dated to recover the service tax under the head "Commercial Training or Coaching Center" for the period July 01/07/2003 to 31/03/2008 and also sought to impose penalty under section 78.

Relying on the ruling in case of *Great Lakes Institute of Management Ltd [32 STR 305], CESTAT* confirmed that assessee was liable to service tax though it was charitable institutions engaged in rendering educational service. However, CESTAT held that the show-cause notices were beyond the normal limitation period and thus deleted the penalty imposed under section 78. This was on the ground that the issue whether a charitable institution could be brought to tax under the Act was a debatable issue and finally came to be resolved by the Tribunal in *Sri Chaitanya Educational Committee (SCEC) vs. Commissioner Customs and Service Tax, Guntur [2016(41) STR 241].* In this case, it was held that even charitable institution rendering the service of commercial training or coaching is chargeable to tax under the Act. Further, it was recognised that this issue was not free from doubt as was evident from reference to the third member. Consequently, the demand in Sri Chaitanya Educational Committee (supra) has restricted to the normal period of limitation and penalty was also deleted.

High Court observed reference of the above issue to a third member in Sri Chaitanya Educational Committee itself evidences that fact that prior to its decision, a party could have a bonafide belief that a charitable institution rendering service of Commercial Training and Coaching is not chargeable to service tax. Thus as per High Court, no fault could be found in the order given by the CESTAT restricting the demand to the normal period of limitation and deletion of penalty u/s 78 of the Act. High Court stated that the case did not give rise to any substantial question of the law, and thus dismissed the Revenue's appeal.

LD/67/66

The Commissioner of Service Tax, Mumbai

Vs.

Zapak Digital Entertainment Limited

05th September, 2018

CENVAT credit of service tax charged by broadcaster held to be allowed to assessee engaged in 'selling space and time for advertisement'; CESTAT order upheld by the High Court

In the present appeal before the High Court, the Revenue had urged the question whether the assessee is entitled to take the input service credit on Agency Commission as well as the Service Tax charged by the media/broadcasters as shown in the said invoices. The assessee is engaged in providing services of "selling spaces and time for advertisement" promoting business by placing advertisements on various forms of media through the advertising agency such as M/s. Optimum Media Solutions (Mudra Radar). The advertising agency facilitates the transaction between the broadcaster and advertiser of such Appellant. The broadcaster raises invoices wherein the name of the assessee as the advertiser or that of the advertising agency is also clearly mentioned. The amount discharged by the broadcaster is paid by the advertising agency and subsequently reimbursed by the advertiser. On the basis of the invoices issued by the broadcaster, the assessee claimed CENVAT credit.

As per the Revenue, the assessee was not entitled to claim CENVAT credit of service tax paid in respect of the invoices raised by the broadcaster in the name of the agency.

CESTAT held that invoices clearly showed that the agency had merely acted as an agent for transfer of money from the broadcaster and assessee was therefore entitled to avail CENVAT credit. High Court observed that the order of CESTAT has rendered a finding of fact that the invoices issued by the broadcaster are in the name of the assessee and held that the advertising agency is merely shown as an agent of the assessee. This finding of fact is not shown to be perverse

High Court thus dismissed the Revenue's appeal stating no substantial question of law arose.

Transfer Pricing

LD/67/67

Jaso Private Limited

Vs.

Deputy Commissioner of Income Tax

28th September, 2018

ITAT rejects assessee's foreign associated enterprise as a tested party; Based on the functional comparison, assessee held to have the least complex functions.

The assessee was engaged in supplying cranes and mechanical equipments to Indian customers and had a well-established distribution and marketing network in the infrastructure industry. The assessee was thus easily able to identify potential purchasers and procure the order for cranes and mechanical equipment. The assessee acquired cranes and allied parts from an associated enterprise (AE) JASO Spain so as to further supply to the clients.

The TPO adopted TNMM as the most appropriate method for benchmarking assessee's international transactions. An adjustment of ₹2.48 crores was made by the TPO. Before DRP, the assessee submitted that that Resale Price Method should be adopted as most appropriate method. TPO rejected assessee's claim to select AE as tested party, however TPO did not reject assessee's contention on selection of Resale Price Method as most appropriate method. DRP rejected Resale Price Method on the ground that assessee was creating intangibles/signed markets for the products and delivering quantitative additions.

Aggrieved, assessee filed an appeal before the ITAT.

ITAT noted that in assessee's TP study, it had itself stated that resale price method is not the most appropriate method and that assessee should be selected as the tested party since its functions were the least complex. Further, assessee also made another contrary submission whereby it stated that its foreign AE should be selected as the tested party, on the ground that the AE had the least complex functions as compared to the assessee. As per ITAT, assessee sought to alter the conclusions drawn from its TP study by making submissions before the TPO.

ITAT observed that the assessee takes the marketing risk, price risk, credit risk, warranty risk and foreign exchange risk and hence this was not a simple case of marketing intangibles, being the only reason for not adopting Resale price method. Further, the assessee also claimed to perform the function of market research, customer mining, order program from customers, requirement analysis, quality checks, apart from the marketing, price, credit, bad debt, warranty, forex, inventory and manpower risk. As per ITAT, the assessee thus had a complicated work profile, due to which resale price method was not the appropriate method. ITAT stated that even if RPM is taken as the most appropriate method, adjustments would have to be made for these various risks being taken by the assessee. ITAT thus rejected selection of resale price method as the most appropriate method.

Separately, ITAT observed that the criterion for selecting the 'tested party' is to select the party which has the least complex functions. AE was a leading manufacturer and supplier of wide range of lifting and transport systems and also provided required technical support, custom designs, drawings, training, and managerial advice and supervises activities of the Indian partner. Further, the AE has a notable presence and leadership in international markets and therefore ITAT noted that these functions when compared with distribution and marketing function of the assessee, leads us to a conclusion that assessee is the party which has the least complex functions. ITAT, therefore, rejected assessee's contention that the assessee's foreign AE should be selected as a tested party.