LD/67/47

Mundela Service Cooperative Bank Ltd.

Vs.

Income Tax Officer

22nd May, 2018

80P deduction benefit should not be allowed on additions made under section 68 regarding unexplained cash credits.

The assessee is a primary agricultural credit cooperative society, registered under the Kerala Co-operative Societies Act, 1969. The assessee filed return for the assessment year 2011-12 declaring nil income. The AO assessed assessee's income at ₹28.51 crores. The AO denied exemption under section 80P(2) for their business income earned under section 80P(2)(a)(i), and interest income earned under section 80P(2)(d) by the assessee for their surplus funds deposited in the District Cooperative Banks. Further AO has brought to tax an amount of ₹27.67 crore as unexplained cash credits under section 68. Assessee preferred a stay petition before CIT(A). The stay was granted on a condition that the assessee shall pay 50% of the demand in six instalments. Aggrieved, the assessee preferred a writ petition before the Kerala High Court.

High Court noted that the assessee could make 'prima case' only for 2 issues; namely, availability of deduction under section 80P(2)(a)(i) and under section 80P(2)(d) in respect of interest income. High Court acknowledged that "Insofar as appeal is still pending, the only point arises for consideration is whether the petitioner has made out a prima facie case as regards the decision of the Assessing Officer to bring to tax the unexplained cash credits amounting to ₹27,67,41,372/- under section 68 of the Act."

High Court stated that Section 68 provided that where any sum is found credited in the books and the assessee offers no explanation about the nature and source thereof or offers unsatisfactory explanation offered, the sum so credited may be charged to income tax as the income of the assessee of that previous year. High Court noted that the assessee had credited in the books of account cash receipts to the tune of ₹27.67 crore and despite several notices assessee had not divulged the source thereof. As per the High Court, the AO was correct for having brought the said amount to tax under section 68.

High Court noted assessee's reliance on Cochin ITAT decision in *The Karad Merchant Sah Service Coop Bank Ltd [dated 28.2.2011]* and *Nagpur ITAT decision in Buldana Urban Cooperative Credit Society Limited [dated 23.11.2012]* and noted that if the said view by the aforementioned ITATs was accepted assessees who are entitled to the benefit of exemption under section 80P(2)(a)(i) would bring in illicit money into business without fear of consequences. High Court stated that profits and gains of business is a matter covered by Chapter IV of the Act whereas Section 68 fell under Chapter VI of the Act dealing with aggregation of income.

As per the High Court, the assessee had not made out a prima facie case as regards the income brought to tax by the AO under section 68. However, High Court directed CIT(A) to grant the assessee an opportunity to disclose the sources of the cash credits referred to in the assessment order. High Court held that if the assessee was able to prove that cash credits were deposits which came from explainable sources, the assessee would not have any liability on this count.

High Court stated that if the assessee was made to pay 50% of demand, the business of the assessee was likely to be crippled and in that event, the customers of the petitioner including their depositors would also suffer. High Court, thus directed the assessee to pay 20% of demand instead of 50%, in 6 equal monthly instalments and directed the CIT(A) to dispose-off the appeal preferred by the assessee on the merits as expeditiously as possible.

Sales Tax

LD/67/48

MRF Limited

Vs.

Commissioner of Trade and Taxes and Anr.

10th August, 2018

Pre-deposit sums which assessee's pay to seek recourse of appellate remedy are not 'tax'; Assessee is entitled to interest from the date when its appeal was allowed

The assessee succeeded partly in an appeal, which resulted in its claim for exclusion of certain amounts in its taxable turnover. This appeal was allowed by a detailed judgement and order of coordinate bench of High Court dated 14.05.2015.

Legal Update

Assessee's grievance was that while accepting the refund plea, the GST Authorities did not permit any interest. Assessee submitted that amounts paid during the interregnum period, i.e. rejection of the turnover discount claimed by the original assessment order resulting in pre-deposit of the amounts before the appellate authority did not amount to payment of tax as it did not bear such character. It is emphasised that the refund ought to have carried interest.

Revenue submitted as per provision of Section 30 of Delhi Sales Tax Act, 1975, assessee who wishes to claim refund of tax paid should approach the authority by filing form ST 21; and interest amount would be due only from the time that procedure was followed and not before.

High Court referred to the judgement in *Suvidhe Ltd. [1996 (82) ELT 177 (Bom)]*, wherein it was observed that such pre-deposit sums would not amount to depositing or paying excise duty but rather to avail remedy of an appeal. High Court, thus held that pre-deposit sums which the assessee is compelled to pay to seek recourse to an appellate remedy do not necessarily bear the stamp or character of tax, especially when it succeeds on the particular plea. That being the case, the insistence upon a procedural step, i.e. filing of a form which is purely for the purpose of administrative convenience cannot in any manner fix the period or periods of limitation when the amounts became due on the question of interest. High Court observed that amounts were due and payable from the date the appeal was allowed by the coordinate bench, and postponing the accrual of interest thereon was illogical.

High Court, thus held that the assessee was entitled to interest calculable from the date when its appeal was allowed by the Court.

High Court, thus ruled in favour of the assessee.

Service Tax

LD/67/49

M/s SAS Developers and Engineers

Vs.

Commissioner of Central Excise, Nagpur

(CESTAT-Mumbai)

9th August, 2018

Tribunal held that the services of 'renting of immovable property' covers within its ambit not only mere renting but any similar arrangement in respect of immovable property for use in furtherance of business or commerce. Fees received by appellant-assessee in terms of business agreement, wherein premises owned by appellant-assessee was made available to various companies for running departmental/ retails stores and fees payable to appellant were computed as pre-determined percentage of sales turnover of said departmental/retail stores, such fees were held to be in the nature of 'rent' and thus, liable to service tax.

Facts:

The appellant-assessee entered into business agreements with companies wherein, appellants provided necessary space to such companies for running a departmental store cum coffee shop, stores for retail sale of readymade garments and other household items, accessories etc., in the premises of building owned by appellant-assessee. Appellant received consideration from these companies, calculated as percentage on the basis of net sales turnover achieved by said companies. Revenue contended that amounts received by appellant in terms of said business agreements are nothing but rent for provision of space for setting up the said stores and thus, would be liable to service tax under category of 'renting of immovable property'.

While rebutting revenue's contention, appellant submitted that such agreements are profit sharing agreements and entered on principal to principal basis. Appellant submitted that said companies were sharing certain portion of their profit with appellant in lieu of various business activities under taken by appellant for assisting the said companies for conducting the business of retail sale from the said premises. As per agreement, the appellant was obliged to provide advisory assistance to these companies in selection of range of products, pricing of products, personnel policies of retail business, security management, interaction and liaisoning, advice relating to marketing strategies, procurement policies and documentation and information systems etc.

Held:

Hon'ble Tribunal noted that the appellants provided space to the said companies for conducting report

of business and for provision of the said space, appellant received certain 'fees' which cannot be said to be anything other than the charges for provision of space. It was observed that the agreements specifically provided that the companies shall be exclusively in charge of management and running of said business from the said premises. Tribunal further observed that the appellants are neither having any expertise/experience in the field of retail sales of products. Accordingly, Tribunal held that, the entire amounts received by the appellant assessee were held to be in the nature of rent for providing space for conducting the said retail business.

As regards appellant's submission of the said agreements being in the nature of profit- sharing arrangement, the Tribunal observed that under the service tax law, renting includes not mere renting, but any similar arrangement in respect of immovable property for use in furtherance of business or commerce. Tribunal held that the argument of agreements in question being in the nature profit sharing does not merit acceptance because the participation of appellant in business activity is limited to provision of space only. Further it was held that even if it is considered that this arrangement created the partnership/Joint Venture, then also the argument will not survive because appellants would definitely be a different legal entity from the said partnership or the joint venture and in that case, they would have provided these spaces on rent to the said partnership/ joint venture. Consequently, the Tribunal upheld impugned order and dismissed the appeal filed by the appellant.

LD/67/50

T M Motors Pvt. Ltd.
Vs.
C.G.ST C & C.E., Alwar
22nd June, 2018

No service tax on Incentives/discounts, consumables / spare parts used during servicing by dealer agency of Car manufacturer; Receipt of such incentives / discounts cannot be deemed to be received for promotion and marketing so as to be made taxable as 'business auxiliary services'.

The assessee is a dealer of Maruti cars, and it not only sells cars but also undertakes the servicing thereof. During audit, it was found that the assessee had failed to pay the service tax on certain receipts. Accordingly, demand was raised under the category of 'business auxiliary service'. Demand was raised in respect of commissions received from various financial institutions for promoting their loan schemes; the discounts/rebates/incentives received on the basis of various targets achieved; and the price of various consumables/spare parts recovered from customers during servicing. Revenue also urged that the assessee availed cenvat credit on certain common input services and used the same for payment of service tax under the category of Authorised Service Station, and it ordered reversal of CENVAT credit in respect of common input services utilised in trading activity of Maruti cars.

CESTAT relied upon the decision in *Toyota Lakozy Auto Pvt. Ltd. [2017 (52) STR 299 (Tri.–Mumbai)]* wherein it was held only because some incentives/ discounts are received by the appellant under various schemes of the manufacturer cannot lead to the conclusion that the incentive is received for promotion and marketing of goods. It is not material under what head the incentives are shown in the Ledgers, what is relevant is the nature of the transaction which is of sale. All manufacturers provide discount schemes to dealers. Such transactions cannot fall under the service category of Business Auxiliary Service when it is a normal market practice to offer discounts/ institutions to the dealers. It was also observed in case that the incentive targets were as per the circular issued by MUL, they could not be treated as business auxiliary service. Further, with respect to issue regarding service tax on consumables and spares, CESTAT placed reliance upon ruling in *Krishna Swaroop Agarwal [2015 (37) STR 647 (Tri.–Del.)]* wherein it was held that the service tax was not required to be paid on sale of goods. Assessee was paying VAT on the spare parts/consumables sold to the customers while providing service and hence, there was no issue of service liability.

Additionally, CESTAT relied on the decision in *Helo Minerals Water Pvt. Ltd. [2004 (174) ELT 422 (Allahabad)],* wherein it was held that the subsequent reversal of credit amounts to non-taking of credit. CESTAT therefore held that the assessee need not pay any amount towards this.

Only on the issue of commission received from financial institution, CESTAT upheld the service tax demand. CESTAT thus partially ruled in favour of the assessee.

LD/67/51

M/s The Gem and Jewellery Export Promotion Council
Vs.
Commissioner of Service Tax, Mumbai-I
(CESTAT-Mumbai)
16th May, 2018

Fees/statutory levies charged by sovereign/ public authority while performing statutory functions cannot be regarded as 'provision of taxable service'.

Facts:

Appellant, an Export Promotion Council, is set up under the aegis of Ministry of Commerce and Industry. The appellant is primarily involved in introducing the Indian gem and jewellery products to the international market in order to promote its goods and to facilitate the export of diamonds. The appellant issues Kimberly Process Certificates (KP Certificates) to various exporters/importers of Gem and Jewellery to certify that the product is being exported and the same is issued on the basis of documents and information furnished by the applicant for the issue of KP certificates. Revenue, inter alia, alleged that the activity of issuing KP certificates would be liable to service tax under the category of 'technical inspection and certification services'.

Appellant submitted that the KP certificates are issued in terms of international convention and as mandated by EXIM policy, in absence of such certificates, no import or export of diamonds is allowed. Appellant further submitted that they are recognised as authority for scrutiny of documents for issue of KP certificates in terms of Circular No. 53/2003-Cus dtd. 23.06.2003. Also, appellant pointed out that the goods exported or imported are liable for confiscation in absence of KP certificates and thus, issue of KP certificates is a statutory requirement and not a service provided by the appellant. Alternatively, the appellant submitted that even if the said service is not treated as a statutory function, the same cannot be called as 'technical inspection and certification service' because the said service envisages inspection or examination of goods or process or material etc. whereas the appellant does not undertake inspection or examination of goods at the time of export for issue of KP certificate and even in case of export, the goods are not examined, but only documents are seen for the issuance of the said certificates. However, revenue argued that since the appellant is not created under the Act or any other Acts of the Central Government or State Government, but under the aegis of Ministry of Commerce and Industry, appellant cannot be regarded as a government body and activity of issuance of KP certificates cannot be considered as sovereign functions.

Held:

Tribunal noted that the appellant issues 'KP certificates' to various exporters/ importers of Gem and Jewellery to certify the product being exported and the same is issued on the basis of documents and information furnished by the applicant for the issue of KP certificate. There is no 'inspection or examination of goods or (process or material or information technology software) or any immovable property'. Further, it was observed that there is no contest to the said averment that the entire process of certification does not involve any inspection of goods or processes and it is done only on the basis of documents. The process of certification is provided at the website of the appellant and the entire certification can be obtained online by submitting the necessary information/ documents. Tribunal held that since the duty of issuing the KP certificates has been expressly and exclusively by law, given to the appellant and they're a body created under the law, it cannot be denied that the issue of KP is a mandatory and statutory function.

Therefore, it was held that no service tax liability would sustain against the appellant in light of Circular No. 89/7/2006-ST dated 18.12.2006 clarifying that an activity performed by a public/ sovereign authority, which is purely in public interest and is being undertaken as mandatory and statutory function, such activity cannot be regarded as provision of taxable service. Consequently, impugned demand was set aside by allowing the present appeal.

LD/67/52

M/s Vision Pro Event Management
Vs.
Commissioner Of Central Excise and Service Tax, Chennai
(CESTAT-Madras)
28th March, 2018

Tribunal held that the event management services received by SEZ unit, though outside the geographical location of SEZ unit, would be regarded as 'consumed within SEZ' and thereby, exempted from service tax, especially in light of Section 26 and Section 51 of SEZ Act, 2005.

Facts:

The appellant is engaged in providing 'event management services'. As regards such services provided to a unit located in SEZ, the appellant claimed benefit of exemption provided under service tax law wherein services consumed for authorised operations in SEZ or by unit located in SEZ were exempted from whole of service tax leviable thereon. Accordingly, no service tax was charged in respect of value of services provided to such SEZ unit. Revenue alleged that since such services are rendered completely outside the geographical location of SEZ, said services cannot be said to be consumed within SEZ and thus, benefit of exemption notification is not allowed.

Held:

Hon'ble Tribunal noted that Section 26 of the SEZ Act, 2005 provides various exemptions/concessions to SEZ units/developers, Section 51 of said Act, lays down that SEZ Act will have overriding effect over any other Act for the time being in force and exemption notification under erstwhile service tax law exempts any service provided for consumption within SEZ unit from whole of service tax leviable thereon. Tribunal observed that the intention of the notification as well as Section 26 of the SEZ Act, is to exempt the taxes/duties payable on goods and services provided to SEZ unit/developer, the supply of goods and services to SEZ being deemed exports. Therefore, taking into consideration the impact of Section 51 of the SEZ Act which provides for overriding effect over any other law, it was held that the benefit of tax exemption cannot be denied by giving a restrictive interpretation to exemption notification i.e. such exemption is available only if services are consumed within geographical location of SEZ. Tribunal noted that there may be services which are wholly consumed within the geographical location of SEZ or partially consumed in the SEZ.

In the present case, the appellants provided event management services to the SEZ unit, which was a co-sponsor for the event which helped advertising of product of SEZ. The event was held outside the SEZ unit. Tribunal noted that even if the event is held outside, since the services were for advertisement of product of SEZ, the services provided are to be considered as consumed within SEZ. Tribunal further held that since for availing the services, the SEZ has to get such services approved by the Development Commissioner, revenue cannot contend that such services are not eligible for refund since these are not consumed within SEZ. Accordingly, impugned order was set aside.

Note:

Similarly, in *Commisioner of Service Tax, Chennai vs. Southern Cyber Logistics Pvt Ltd, (CESTAT-Mad)* the Tribunal held that the services provided by the cab operator to IT/ITES SEZ companies by way of picking and dropping the employees would be exempted from service tax because such services are in effect consumed by SEZ unit and whether services commenced outside the unit/or ended outside unit is of no consequence, especially in light of Section 26 and 51 of SEZ Act, 2005.

LD/67/53

M/s Evalueserve Com Pvt. Ltd.
Vs.
Commissioner of Service Tax, Gurgaon
(CESTAT-Chandiagrh)
27th February, 2018

Tribunal held that the services provided on behalf of foreign entity to the customers of such foreign entity, would not fall within ambit of 'intermediary services' covered under Rule 2(f) of POPS Rules, 2012 and thereby, Rule 9 of POPS Rules cannot be applied to determine place of provision of such services.

Facts:

The appellant entered into an agreement with foreign entity i.e. client of appellant, wherein appellant is required to provide services to customers of said foreign entity in accordance with requirements as specified by foreign entity.

The client passes the customer requirements and details of deliverables to appellant and then, appellant directly interacts with customers of client, as and when required and hence would provide services to such customers of client on behalf of the client in close co-ordination with the client's team. Further, appellant, on the basis of its research, is required to prepare report in the format specified by the client, which has been pre-agreed upon by it with client's customers. The client would closely monitor the assignment and appellant shall forward such reports directly to the customers of client, upon which the obligations of appellant come to an end. The consideration for such services is paid by foreign entity to appellant in convertible foreign exchange. Treating such services to be 'export of services' in terms of rule 6A of Service Tax Rules, 1994, the appellant filed refund claim of unutilised Cenvat credit for the period 'April 2015 – September 2015' under Cenvat Credit Rules, 2004 r.w. Notification No. 27/2012 dated 18.06.2012.

Revenue alleged that the appellant has provided intermediary services to the customers of foreign entity and thus in light of Rule 9 of Place of Provision of Service Rules 2012 (POPS Rules, 2012), the place of provision of services rendered by the appellant would be India. Therefore, alleging that such services provided by the appellant cannot be regarded as 'export of services', revenue rejected refund claim filed by the appellant. During the appeal proceedings, the first appellate authority held that in terms of Rule 9 of POPS Rules, 2012, the location of the service provider is place of provider of service, hence the appellant was required to pay service tax under reverse charge mechanism and cannot claim refund of unutilised Cenvat credit. Being aggrieved, appellant filed the present appeal.

Held:

Hon'ble Tribunal noted that the appellants are themselves engaged in providing of services to their client and facilitating their clients for providing those services by the third party. Tribunal held that the first Appellate Authority has fell in error holding that the appellant provided services on behalf of foreign entity. Tribunal observed that appellant has provided services to the customers of client and having no direct nexus with the customers of the client. Further, it nowhere has facilitated or arranged for the services provided to their client by the third party. Furthermore, since the appellant has themselves provided the services to their client as the main service provider on principal to principal basis, the Tribunal held that the activity undertaken by the appellant do not qualify intermediary as defined in Rule 2(f) of POPS Rules, 2012. Reference was made to advance rulings in *Universal Services India Pvt Ltd-2016 (42) STR 585 (AAR) and GoDaddy India Web Services PvtLtd-2016 (46) STR 806 (AAR).* Accordingly, Tribunal held that appellants are not liable to pay service tax being provider of service in India in terms of Rule 9 of POPS Rules, 2012 and thus, demand against appellants are not sustainable. Consequently, Tribunal held the refund claim filed by appellant are admissible.

Excise

LD/67/54

Balkrishna Industries Ltd.
Vs.
CGST, C and CE, Alwar
(CESTAT-Delhi)
26th June, 2018

Tribunal held that when manufacturer procured certain accessories and sold them along with goods manufactured i.e. as an integral part of such goods, such activity cannot be construed as 'trading of goods' so as to attract reversal of Cenvat Credit on common input services pertaining to exempted services as envisaged in Rule 6(3) of Cenvat Credit Rules, 2004.

Facts:

Appellant manufacturer of tyres, procured bought out items such as flaps, tube and 'O' ring etc. and such accessories are cleared along with the tyres in the form of tyre sets. Revenue alleged that such activity of procurement of various accessories i.e. tubes, flaps etc. and selling of the same subsequently amounts to the trading of goods. Since trading of goods is being considered as 'exempted service', the revenue alleged that the appellant would be required to pay an amount at the rate of 5%/ 6% of the value of exempted services in terms of Rule 6 (3) (i) of the Cenvat Credit Rules, 2004 (CCR 2004) in respect of Cenvat credit of common input services.

Held:

Hon'ble Tribunal noted that such accessories are procured by the appellant with the object of supplying the same along with tyres manufactured by them and these are packed/fixed inside the tyre and are sold in the form of 'tyre set'. It was observed that it's nobody's case that tyres can be used without such accessories. Further, Tribunal noted that appellant paid excise duty on the tyre set including value of such accessories. Therefore, the Tribunal refused to accept the view taken by the lower Adjudicating Authority that procurement and subsequent sale of accessories along with tyres by appellant constitutes trading. Further, Tribunal observed that since the common input services have been used in the manufacture and clearance of tyres along with its accessories, it cannot be said that common input services have been used by the appellant for trading as well as manufacture and clearance of tyres. Also, as regards reliance placed by the lower authorities on decision of Hon'ble Kerala HC in *CCE vs. Appollo Tyres Ltd. 2010 (259) ELT 194 (Kerala)* holding that the tubes and flaps purchased from outside and supplied along with tyres do not make the transaction anything different from trading, the Tribunal distinguished the same for being rendered in different factual circumstances. Accordingly, impugned demand was set aside by allowing present appeals.

International Taxation

LD/67/55

MasterCard Asia Pacific Pte. Ltd. (Singapore)

AAR rules on the determination of PE in the case of Master Card

Facts

The applicant, a tax resident of Singapore, was in the business of providing transaction processing and payment related services pertaining to credit cards/ debit card.

The Applicant has a subsidiary in India, namely Mastercard India Services Private Limited (I Co), which provides support functions exclusively to the Applicant in respect of its India operations.

During the relevant year, some of the employees of the Applicant visited India to understand the future requirement, to provide information about new products and to monitor the efficiency of the operations etc. The presence of employees in India was for a period of more than 90 days.

The Appellant carries out transaction processing activity, which consists of electronic processing of payments between Merchant's bank and Cardholder's bank through the use of Mastercard Worldwide Network (Network).

The transaction data are transmitted over the Network with the help of an automated equipment called Mastercard Interface Processor (MIPs) which are placed at the Customer banks' premises in India. While the MIPs are owned by I Co, the software embedded in MIP is owned by the Applicant and upgraded through processing centers situated outside India.

The transaction processing services provided by the Applicant involves below steps:

(i) Facilitating authorisation of transaction including fraud check:

- A Cardholder makes a purchase with a Merchant and uses the card for payment either online or through card swipe machine
- The Merchant forwards the transaction to its banker i.e. Merchant's bank for authorisation.
- The MIP located at Merchant bank's premises undertakes preliminary validation of information (such as PIN processing, validation of card codes, name and address verification, etc.) and alerts the Merchant's bank for correction of details in case of errors.
- Upon successful validation, Merchant bank's MIP transfers the data to the Cardholder bank's MIP via the Network, which in turn directs the data to the cardholder bank for further processing and verification.
- Simultaneously, Mastercard processing center (situated outside India) processes the data for securing transaction flow, exercising fraud checks, validation check, etc.
- Upon verification, the Cardholder's bank sends an approval message to the Merchant's bank and accordingly payment is made to the Merchant.