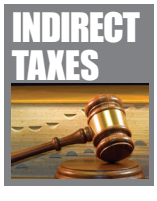
High Court noted that Co-ordinate bench in *Merchem Ltd.* had considered the Supreme Court ruling and after that had held that the belated payment of employees' contributions will not qualify for deduction. High Court noted that Explanation to Section 36(1)(va) deals with due date for employee contribution and Section 2(24)(x) treats the employees' contribution not remitted to fund as income and Section 43B(b) deals with employers' contribution, therefore, held that the Act treats employer and employee contribution differently.

According to High Court , employees' contribution is regulated by Section 2(24)(x) and Section 36(1)(va) and would not be affected by Section 43B. High Court held that by virtue of Explanation to Section 36(1)(va), no deduction could be claimed if the contribution has not been paid, after collection from the employees by way of deduction from their salaries, within the due date under the EPF & MP Act. High Court held that if the employee's contributions, which the employer deducts from the salary of the employees, is not remitted into the fund within the due date, the employer not only has defaulted the stipulation in the labour legislation but has received an income; albeit an illegal enrichment.

High Court, thus concluded that the payment of employees contribution to PF/ESI beyond due date specified under Section 36(1)(va) would not be deductible. High Court, thus ruled in favour of the Revenue.



Service Tax

LD/67/31

N & N Chopra Consultants Pvt. Ltd

Vs.

Principal Commissioner, Goods & Service Tax & Central Excise

24th July 2018

Simultaneous penalties under Section 76 & 78 upheld; Payment of tax before issuance of notice would not help the assessee to avoid penalty.

The assessee was engaged in providing commercial coaching and training services. The assessee had not paid his service tax liability for the period of 09-09-2004 to 31-03-2008 and had filed returns stating that there was no service tax liability. The Income Tax Search and Seizure proceedings apparently triggered investigations by the Service Tax Authorities. The assessee in these circumstances offered to pay service tax dues and filed returns on 02-03-2009. In the meanwhile, a show cause notice was issued on 23-06-2009. For a later period, the assessee again approached the Service Tax Authorities, conceding its liability and offering to pay up its dues. The show cause notice culminated in order in original dated 06-01-2012. Besides the tax liability penalties were also imposed by the Commissioner. Assessee's appeal to CESTAT was rejected, who declined to interfere with the findings and the penalties imposed by Commissioner (Appeals). Hence, it approached the High Court.

The assessee submitted that it deposited the additional amount of ₹ 5 lakhs (approx) after the issuance of notice and had paid ₹ 34 lakhs prior to that. The assessee therefore argued that imposition of penalty under Section 76 was unjustified. Assessee referred to the High Court rulings in *Raval Trading Company vs. Commissioner of Service Tax [(42) STR 210 (Guj)], First Flight Courier Ltd. [2011 (22) STR 622] and Commissioner of Central Excise vs. Pannu Property Dealers, Ludhiana [2011 (24) STR 173 (P&H)].*

High Court noted that the assessee was aware about its service tax liability and yet, it filed returns claiming no liabilities and when it smelt investigation and adverse orders, it approached the service tax authorities and deposited the amounts that were admittedly liable to be paid. As per the High Court, such case of foreknowledge, itself is an important factor that ought to have been and was taken into account by the lower revenue authorities which lead to the imposition of recovery of dues assessed as well as imposition of penalty under Section 78. High Court thus was of the opinion that invocation of Section 78 could not be faulted with having regard to facts of this case. As per the High Court depositing the amount due before issuance of notice per se, does not absolve the assessee of its responsibility to file the returns, since the option of imposing other penalty under Section 76 was exercised.

High Court further also rejected assessee's contention about the amendment to Section 78 being retrospective and that imposition of penalties under Section 78 and 76 was mutually exclusive. High Court referred to the ruling in case of *Bajaj Travels Ltd. vs. Commissioner of Service Tax [2012 (25) STR 417]* wherein it was held that the amendments are prospective in nature.

High Court, thus ruled in favour of Revenue and upheld imposition of penalties under Section 76 and 78 of the Finance Act, 1994.

Legal Update

LD/67/32

National Insurance Academy
Vs.
Commissioner of Service Tax, Pune-III
(CESTAT-Mumbai)
21st June 2018

'Masters in Business Administration programme' cannot be said to be covered within scope of 'vocational training' so as to exclude the same from the service tax liability.

Conducting examination for member constituents is held to be not chargeable to service tax under category of 'business auxiliary services'.

Consideration received for submission of project reports by students, would not attract service tax under 'management and business consultancy services' since it cannot be treated as services by professional business consultant.

Facts:

The appellant is a society registered under Societies Act, 1860 and Bombay Public Trust Act, 1950 with Life Insurance Corporation, General Insurance Corporation along with its four subsidiaries and the Government of India as members and offers various courses. The allegation pertaining to non-payment of tax on 'commercial training or coaching service' pertains to the fees charged from candidates registered for the 'Masters in Business Administration' programme. Appellant contented that impugned service tax liability does not arise as they are not in the business of providing education but are a public institution under Government of India. It also contended that since it is recognised by AICTE, as evident from various mandatory approvals obtained by them, the absence of affiliation to a university does not in any way alter their eligibility for exclusion from taxability. Further, the appellant submitted that the course being one that prepares the students for professional employment or self-employment is a vocational course that was excluded from tax during part of period under consideration.

As regards another demand raised under category 'business auxiliary services' in respect of examinations conducted by the appellant for its constituent members, the appellant submitted that, appellant and its members are not in client principal relationship.

Further, as regards various project reports submitted by the student of appellants to outside bodies, which were prepared as part of curriculum, revenue alleged that consideration received from outside bodies for such project would attract service tax under category of 'management and business consultancy services'.

Held:

As regards first issue, the Tribunal noted that as emerging from various judicial pronouncements, the consideration received from students enrolled for education are, owing to legislative intent, indeed taxable and that, to the extent of specific exclusion in the taxable entry, conformity with the description therein has to be strictly adhered to. It is undisputed that appellant is provider of commercial training and coaching services. Tribunal held that despite the inclusion of 'commercial' in the description of the taxable service, the absence of a profit motive, does not, of itself, alter the tax liability. It suffice that earnings are received for an activity to be commercial. Non-availability of an affiliation for the award of a degree at the end of the course would take the activity out of the exclusion. Reliance was placed on decision in *Sadhana Educational and People Development Services Ltd. vs. Commissioner of Central Excise, Pune-III [2014 (33) STR 575 (Tri. - Mumbai)] - 2013 - TIOL - 1830-CESTAT-MUM,* wherein it was held that the professional management course cannot be considered as vocational course that imparts skill to enable the trainee to seek employment or self-employment after said course. Following the said decision, the Tribunal rejected appellant's plea that 'business administration course' shall be considered 'vocational training' and upheld impugned demand.

As regards demand under 'business auxiliary services' on amounts received from constituent members for conducting examinations, it was held that for the consideration to attract tax liability under said category, the appellant would have to promote a service provided by client or provide any customer care service on behalf of client. Tribunal held that it cannot be said that the conduct of an examination was with a third party service provider as a recipient or promotion of any activity of the constituent members. Accordingly,

impugned demand in this regard was set aside.

Further as regards demand under 'management and business consultancy services', the Tribunal observed that the consideration was received for various reports which were submitted by students of appellant to outside bodies upon conclusion of various projects as a part of curriculum of the course. Tribunal held that though the said reports may be of use to outside entities, but since they are not a product of a professional business consultant, demand under 'management and business consultancy' would not sustain.

LD/67/33

Infinity Infotech Parks Ltd & Anr
Vs.
Union of India & Ors
(Kolkata-HC)
9th July 2018

Hon'ble HC quashed the notice of audit issued in terms of Rule 5A(2) of Service Tax Rules, 1994.

Facts:

The petitioner challenged the notice dated 16-02-2015 issued by the department for conducting audit of records of petitioners by invoking Rule 5A(2) of Service Tax Rules, 1994. The petitioner sought declaration from Hon'ble HC that the said Rule 5A(2) as substituted by notification no. 23/24/ST dated 25th December, 2014 is arbitrary and in conflict with the provisions of Section 72A of the Finance Act, 1994 and also, the provisions of Section 94(2)(k) of Finance Act, 1994 is unguided and gives uncontrolled power of delegation. Petitioner also prayed that during the pendency of appeal proceedings before Hon'ble SC against the order of *Hon'ble Delhi HC in 2014-TIOL-1304-HCDEL-ST Travelite (India) vs. Union of India and 2016-TIOL-1061-HC-DEL-ST Mega Cabs Pvt. Ltd. vs. Union of India,* wherein said provisions have been struck down, the impugned notice issued to petitioners be quashed.

Held:

Hon'ble HC held that since the appeals are pending against the judgement and order passed in *Travelite (India)* (supra) as well as *Mega Cabs Pvt. Ltd.* (supra), till such time there is a decision in the appeals, the provisions stand struck down by the Delhi High Court. Therefore, it would be iniquitous to allow the respondents to proceed on the basis of provisions struck down by a High Court, against the petitioner. Accordingly, HC held that the impugned notice dated 16th February, 2015 is, therefore, quashed. Further, it was held that so far as the declaration of ultra vires of sub-rule (2) of Rule 5A of the Service Tax Rules, 1994 as substituted by the notification dated 5th December 2014 is concerned, it would be appropriate to follow *Mega Cabs Pvt. Ltd. (supra).*

International Taxation

LD/67/34

HM Publishers Holdings Limited
(New Delhi)

Non-compete fee received by UK based company, as a part of consideration for transfer of shares, shall not be taxable in India in the absence of PE

Facts:

HM Publishers Holdings Limited (Applicant) is a UK based company. It is the holding company of MPS Ltd., (MPS) a leading international publisher incorporated in India.

Applicant and ADI BPO services private limited, (ADI), an Indian company, entered into a share purchase agreement (SPA) whereby ADI will purchase all the shares held by the applicant in MPL.

Due to the nature of its association with MPS, the applicant has confidential and proprietary information relating to the business and operations of MPS. This information is material to the business of MPS and shall continue to be so after the completion of the transactions contemplated in the SPA. Disclosure of this information to others, especially competitors of MPS, or the unauthorised use of this information by others would cause substantial loss and harm to MPS and its shareholders. Hence, in addition to the share purchase price, separate consideration as non-compete fee was agreed to be paid for not competing with business of MPS in India for a period of 3 years.