to a deceased individual. High Court stated that when notice was issued in the deceased assessee's name, it is inconceivable that she could have participated in the reassessment proceedings to be estopped from contending that she did not receive it. As per the High Court, the plain language of Section 292BB precludes its application, contrary to the revenue's argument.

High Court observed that the 'reasons to believe' were premised upon a transaction with one Varun Capital Services Ltd., regarding which the revenue later attempted to "correct" the "error" by changing the name of the entity. Such correction was neither innocuous nor innocent and was clearly aimed at improving what was a fatally defective reasons to believe and mask the reality, to wit, that the revenue authorities utterly failed to apply their minds to the facts and circumstances of the case. Relying on ruling in *Hotel Blue Moon [(2010) 321 ITR 362],* High Court held that the fatality attached to the completed reassessment in the absence of a notice under section 143(2), rendered the assessment void.

High Court thus quashed the reassessment proceedings ruled in favour of assessee.

GST

LD/67/104

M/S ETC Networks Ltd.

Vs.

Commissioner of Customs, Central Excise and Service Tax Mumbai

(CESTAT-MUM)

November 29, 2018

Even if services of organisation and management of event outside India, provided by foreign service provider to Indian service recipients results in increase in customer base of such Indian service recipients, it cannot be construed as operational assistance for marketing of Indian service recipient's business. Tribunal held that such services would constitute 'event management services' and not 'business support services'.

Facts:

Appellant engaged a foreign entity to organise events outside India and paid the consideration in foreign currency. Department alleged that such events organised outside India was a part of marketing strategy of appellant in promoting their channel and enlarge subscriber base, thus services received by them from organiser located outside India were 'business support services' and chargeable to service tax under reverse charge mechanism (RCM). While rebutting department's contention, appellant submitted that the entity located outside India was vested with organisation and management of event for appellant and they are not concerned with the benefit accruing to the appellant out of the said event. Thus, appellant submitted that services provided by them were 'event management services' and the same being rendered outside India, there wouldn't be any service tax liability.

Held:

Hon'ble Tribunal noted that neither in the agreement nor in the invoices, the object or purpose of the event reveals the role of the organiser was to promote the business or marketing of the appellant's channel. The organiser has carried out their job of organising the event as per the agreement and the outcome of the event, whether increased customer base of the appellant or otherwise, is not their concern. Tribunal held that there is no merit in the contention of revenue that by organising the event for the appellant, the organiser has rendered any operational assistance for marketing of their channel; it might have some effect on the increasing the viewer base of the appellant's channel, but it cannot be construed that the organiser has provided operational assistance in marketing of the channel of the appellant, since no such terms and conditions figured in the agreement nor in the proposal form. Therefore, it was held that since the appellant has received 'event management services' which were performed outside India, impugned order demanding service tax liability under RCM is liable to be set aside.

LD/67/105

M/S Hyundai Motor India Ltd.

Vs.

Commissioner of GST and Central Excise, Chennai Outer Commissionerate

(CESTAT-MAD)

September 17, 2018

Tribunal held that the sale of goodwill included in sale of business division, would not be

liable to service tax under the category of 'intellectual property services'.

Facts:

Appellant sold one of its business division as a going concern by entering into 'Business Transfer Agreement' with buyer and charged lumpsum consideration. Further, a separate Trade Mark Licensing Agreement was executed as per which the buyer was required to pay certain percentage of their annual domestic sales to the appellant as fee for trademark license granted to them for a period of 10 years. The buyer, in their books of accounts recorded, certain amount as 'goodwill' i.e. amount paid to appellant as consideration towards vendors and dealer network and goodwill based on valuation carried out by independent valuator. Department alleged that appellant would be liable to pay service tax under the category of 'intellectual property services' in respect of goodwill transferred to the buyer. Further, for the purpose of valuation, department considered the fees charged by the appellant towards trademark license to be value of goodwill and not the value recorded by the buyer in his books of accounts. Appellant submitted that the goodwill is not intellectual property right (IPR) and also, service tax liability arises only in case of IPR recognised under any other law in force in India.

Held:

Hon'ble Tribunal noted that though goodwill may be in the nature of intangible right, there is no law which recognises it as an intellectual property right. In fact, goodwill is attached to an ongoing business whereas IPR is not always so. Goodwill of a company may include the value of IPR held by him but not the vice versa. Further, Tribunal held that valuation of goodwill as adopted by the department is without any basis. Consequently, the impugned demand of service tax was dropped by setting aside impugned order.

LD/67/106

Philips Electronics India Ltd.
Vs.
Commissioner of Service Tax, Chennai
(CESTAT-MAD)
August 07, 2018

Tribunal held that payments made towards share of cost of maintenance of information technology infrastructure shared amongst

group entities, cannot be regarded as consideration for providing services of 'information technology and database access retrieval services'.

Facts:

Appellant entered into several agreements with their overseas group entity in Netherlands, in terms of which the said entity provided the computer infrastructure by way of internet connectivity and associated services for the appellant to manage its various information technology requirements such as email services or accessibility of owned data or information or communication among its various entities across the country and outside. Department alleged that appellant received 'online information and database access or retrieval services' (hereinafter referred as OIDAR services), and thus, liable to pay service tax under reverse charge mechanism on consideration charged to foreign entities.

Held:

Hon'ble Tribunal noted that the entity in Netherlands provided IT infrastructure services to all its associated entities located worldwide. Tribunal observed that for a service to fall under classification of OIDAR services, the services provided should facilitate not only online information but also database access or retrieval. It was noted that in present case, the infrastructure services provided by the entity in Netherlands is nothing but a spider web group which connects entity in Netherlands to all its locations worldwide through WAN of internet protocol. For such services, appellant makes payment to Netherlands entity on the basis of invoice raised towards maintenance of portal/server, license fees, server software maintenance cost, infrastructure for global platform, hiring of web space for storing data, management and maintenance of web portal, license cost for access for wireless WAN environment, directory services for listing etc. Some of these services which can be availed by the appellant locations and its employees are of the nature of Calendaring and Scheduling Directory, Philips e-mail, file back-up etc. Therefore, Tribunal held that all the infrastructure services received by the appellant are only in the nature of providing intra connectivity between appellant's locations worldwide and the payments made are obviously then for sharing of the maintenance costs between appellant's units and not as fees for supply of online information or retrieval of data from the portal. Accordingly, by holding that impugned infrastructure services provided by the appellant cannot be brought within the fold of OIDAR services, tribunal set aside impugned demand and allowed present appeal.

LD/67/107

Commissioner of Service Tax-VII Mumbai

Vs.

Reliance Communication Infrastructure Ltd.

(CESTAT-MUM)

May 11, 2018

Tribunal held that amounts received on account of sale/assignment of receivables cannot be said to be chargeable to service tax as consideration for providing taxable services on account of which such receivables has accrued, because such assignment of receivables does not contemplate provision of taxable service by assignor to its customers.

Facts:

Respondent entered into assignment agreement with assignees wherein respondents, for a consideration of ₹ 297 crores, unconditionally and irrevocably sold, transferred and assigned, the title, the right and interest in their receivables amounting to ₹ 1,212 crores in favour of the assignees. The amount of ₹ 297 crores was reflected by respondents in their books of accounts as "Other Operating Income' arisen on account of assignment of debts. These amounts were to be received by respondents from their customer for the services provided by them and were inclusive of service tax. Department alleged that said transition between respondent assessee and assignees was liable to service tax under category of 'Online Information and Data Retrieval'.

Held:

Tribunal noted that the outstanding receivables in the books of accounts of respondent pertained to

sale of goods or services provided by them to their customers. These amounts which were shown as receivables to the extent of ₹ 1,212 crores in the books of accounts have been assigned by the respondent to the assignees for a consideration of ₹ 297 crores. Tribunal noted that the transaction per se between the respondents and assignee for which a consideration of ₹ 297 crores has been received is not in respect of telecom services provided by the respondents to its customers, however, department sought to levy the tax on the transaction of assignment of the receivables by the respondents to the assignee, in garb of services provided by the respondents to its customer. It was held that the transaction between the respondents and assignee is one of the assignment/ sale of receivables for a consideration and not one of providing the taxable service under the category of "Online Information and Data Retrieval" services and though such receivables may have arisen on account of some taxable services provided by the respondent to their customers, but the sale of assignment of the said receivables cannot be said to be in respect of the provisions of the said taxable services. Thus, appeal filed by the Revenue was dismissed.

VAT

LD/67/108

Ricoh India Ltd.
Vs.
The State of Maharashtra
December 20, 2018

Multi-function printer not an IT product and it should be classified under residual entry, taxable at 12.5%

Assessee was engaged in the business of importing and selling electronic and Information Technology (IT) products such as printers, computers, projectors, etc. With an intention of obtaining clarity with regard to the rates of tax applicable to the goods sold by the assessee in Maharashtra, the assessee made an application under section 56 of MVAT Act. The application involved issue regarding rate of tax on the sale and leasing of Multi-Function Printers, its spares and regarding inclusion of the refundable security deposit in the assessable-value on the leasing of Multi-Functions Printers.

The Revenue passed an order holding that rate of tax applicable on the sale/ lease of multi-functional printers would be 12.5% opposed to 4% claimed by the assessee. Further, it was also held that refundable security deposit taken from the customer at the time of leasing of multi-functional printers would be included in the sale price for discharging MVAT liability. Assessee's appeal before the Maharashtra Sales tax Tribunal (MSTT) was dismissed.

Before the Bombay High Court the assessee submitted that the printer is sold and marketed as a printer with additional capabilities such as copying, fax, and scanning, therefore any person can purchase multifunctional printer with additional capability rather than the buyer to invest in four separate machines viz printer, scanner, fax and copier. The Revenue submitted that Entry 56 of Schedule C appended to MVAT pertaining to IT products taxable at 4%, does not include the product in question. Revenue stated that in assessee's own case, Delhi High Court while construing a similar entry, has held that the multi-functional machines/printers will not fall under a specific sub-heading, but would fall under the subject heading, namely, 84.71 i.e. "others".

High Court stated that Note 5A to Chapter 84 of HSN Explanatory Notes defines expression "automatic data processing machine" to mean machines capable of storing the processing programme or programmes and at least data immediately necessary for execution of programme. Further, the High Court noted that, other Notes, namely, 5(B) and 5(C) to Chapter 84.71 of HSN Explanatory Notes are relied upon to urge that multi-function printers sold by assessee satisfy Chapter Note 5C and are hence units of ADP machines. Further, the bill of entry shows clearance under Heading 84716029, which covered 'other category'. High Court stated that when any commodities are described in heading or as the case may be sub-heading and the aforesaid description is different in any manner from the corresponding description in the Central Excise Tariff Act, 1985, then only those commodities described as aforesaid

will be covered by the scope of this notification and other commodities though covered by the corresponding description in the Central Excise Tariff will not be covered by the scope of this notification. High Court upheld the interpretation of MSTT stating it to be consistent with Entry C-56 and the notification.

High Court stated that while it is true that Central Excise Tariff Heading is referred in Notification under MVAT Act, but notes below same cannot be ignored. Revenue found that description given against heading notified for purpose of MVAT Act does not include "other" category and the description given against the notified entry is specific. It does not include digital multi-functional unit in it and that is why the product is not covered by Schedule Entry C- 56 and is taxable at 12.5%.

High Court noted that entry C-56 which refers to IT products also says the expression 'as maybe notified by the State Government from time to time'. Thus though multifunctional printers are classifiable under Entry 84.71 of the IT products notification as 'automatic data processing machine', but insofar as the subject notification is concerned, they have not been included. High Court, therefore, held that the product was to be classified at 12.5% rate as done by the Revenue.

High Court thus ruled in favour of the Revenue.

Excise

LD/67/109

Vaibhav Global Ltd.

Vs.

CGST & CE, Jaipur

December 04th, 2018

Refund claim filed under Rule 5 of CENVAT Credit Rules (CCR), in respect of accumulated CENVAT on inputs/input services used in manufacture of exported goods, allowed by CESTAT

The assessee was engaged in manufacturing and exports of gems and jewellery. The assessee had filed a refund claim under Rule 5 of CENVAT Credit Rules, 2000 r/w Notification No. 27/2012 CE dated June 18, 2012 in respect of CENVAT taken on input services used in the manufacture of the finished goods which were subsequently exported by the assessee. Revenue found that the appellant is engaged in manufacture of an excisable goods i.e. gems and jewellery falling under Chapter 71 of the first Schedule to the Central Excise Tariff Act, 1985 and cleared the same for DTA as well as exported the goods out of the country. However, the goods being exempted under Notification No. 12 of 17.03.2012, the appellant is denied eligibility to avail Cenvat credit on input services due to being exclusively used for exempted goods as per Rule 6(1) of CCR, 2004.

Assessee stated that the refund claim was filed of accumulated cenvat on inputs/input services used for export under Rule 5 of CCR, 2004 read with Notification No. 27 dated 18.06.2012 and the Revenue wrongly considered the goods of the appellant as being excisable goods and that the appellant was not registered as the manufacturer thereof. Assessee submitted that being a manufacturer the services are eligible to be input services for the purpose of CENVAT credit availment and such credit can be utilised for payment of duty of other products. Nevertheless as per the assessee, it was entitled to refund under Rule 5 of CCR which does not provide any condition or pre-requisite that the person who exports taxable goods or services to claim refund of CENVAT credit on input services or input.

CESTAT observed that a conjoint reading of above Circular along with requirements of Rule 5 of CCR makes it clear that a manufacturer who clears a final product or an intermediate product for export without payment of duty under bond or letter of undertaking which is exported without the payment of service tax shall not be an exempted good and as such shall be allowed refund of Cenvat credit in view of Rule 5. CESTAT observed that Notification 12 of March 7, 2012 was not applicable in case of export of excisable goods.

Rejecting Revenue's stand about assessee being unregistered for manufacture of excisable goods, CESTAT observed that Rule 3 of CCR prescribes that CENVAT credit can be taken by a manufacturer or provider of service and there is no requirement of the registration at all. It was further noted by CESTAT that assessee was having centralised service tax registration for a 100% EOU unit and the other

DTA unit situated at Jaipur and in view of the said admission for the clearance of excisable goods for domestic area, assessee was well registered.

Regarding Revenues allegation of non-distribution of credit, CESTAT observed that the goods of the appellant are excluded from the scope of "exempted goods" Rule 7(b) of CCR, 2004 as has been relied upon by the Commissioner (Appeals) to reject the refund is not applicable.

CESTAT therefore quashed the Revenue's order rejecting refund claims and thus ruled in favour of the assessee.

Transfer Pricing

LD/67/110

Broadbridge Financial Solutions India Pvt. Ltd

Vs.

The Deputy Commissioner of Income Tax

November 29, 2018

Time frame to go for appeal as per Section 144C commences from the fresh order from the TPO irrespective of past rounds of appeal of the same assessment; Assessee can go to DRP after matter remanded is back from ITAT

Assessee, company engaged in the business of IT Services and IT Enabled Services. Regular assessment proceedings were initiated for AY 08-09 and a draft assessment order under section 144C(1) incorporating the TP-order on 14/12/2011 was passed. The final assessment order was passed on 12/10/2012 incorporating the directions from DRP. Assessee preferred an appeal before ITAT where it contended that assessee was into ITES services as well as IT activities and TPO/DRP had wrongly categorised the assessee as only ITES Company. Thereafter vide order dated 29/11/2013, ITAT remitted the matter back to TPO to consider the submissions of the assessee in re-characterisation of the category of the assessee and decide the issue afresh.

Subsequently on certain issues, the assessee preferred an appeal before the High Court on certain issues who remanded the matter back to the ITAT. Based on these directions of High Court, ITAT passed revised order on 20/03/2015. Subsequently, the TPO passed order giving effect to the ITAT's revised order on 30/01/2016, in which, the TPO has accepted the re-characterisation of the assessee and held that assessee is into IT as well as ITES segments. TPO carried out separate benchmarking analysis for IT and ITES segments and proposed TP adjustments individually to each segment. TPO proposed ALP adjustment in respect of ITES segment of ₹ 1.92 crores and of ₹ 4.83 crores for IT segment, vide his order dated 30/01/2016. Based on this order of TPO, AO passed second draft assessment order on 29/03/2016.

Aggrieved by this draft order, assessee again preferred an appeal before the DRP. DRP, however, rejected appeal of the assessee. As per DRP, when the AO passes an order giving effect to the ITAT Order, provisions of Section 144C are not applicable as Section 144C(l) provides that the Assessing Officer shall forward the draft assessment order "in the first instance". The term "first instance" means when the AO is passing the order for the first time for the relevant assessment year. Further DRP stated that Section 144C would be attracted only where a variation is proposed to the income returned by the assessee, and in the present case, the AO was not making any variation to the income returned and was only concerned with the re-computation of assessed income, pursuant to the order of ITAT. DRP, therefore, held that order passed by AO giving effect to specific directions of the ITAT, did not come under the purview of the provisions of Section 144C(1) of the Act.

Aggrieved, assessee filed an appeal before ITAT against the rejection of appeal by the DRP.

ITAT held that the first instance referred by the DRP is the first instance available to the assessee on an order passed by the TPO. When the TPO passed earlier order, for that particular order, the first instance was applied by the assessee to go for the subsequent appeal. When the TPO passed second order, the first instance in relation to that order is available with the assessee to proceed with the appeal proceedings since the TPO has passed fresh order after separate benchmarking analysis undertaken for IT and ITES segments. Therefore, the assessee cannot be denied its rights to appeal before higher forum and the time frame to go for appeal as per Section 144C commences from the fresh order from the TPO irrespective of past events relating to the same assessment.

ITAT, therefore, directed the DRP to consider assessee's appeal in accordance with the law and thus allowed assessee's appeal. ■