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U.N. Marwah

Dear Readers,

The month of July was hectic for all tax practitioners and now I am sure everyone is looking forward to the long Independence Day weekend. We would like to take this opportunity to wish all proud Indians a happy Independence Day.

During the month of July, an article of Mr. Raghu Marwah, Partner was published in the Navbharat Times on July 17, 2008. The full text of the same is available on the website.

The slowdown in the industry caused by the international situation has been confirmed by the numbers of corporate India that have been announced for Q1. Further, the Prime Minister's Economic Advisory Council has downgraded GDP growth for year 08-09 to 7.7% and has said that inflation is expected to come down only by March 09 to 8-9%. We can therefore expect continued pressure on the financial numbers till March next year.

U.N. Marwah
Senior Partner
On behalf of the **RNM Alert** Editorial Team.

Provisional Attachment Of Property Under Service Tax Statute

The Central Government by **Notification No. 30/2008-Service Tax, dated:** 01.07.2008 has made "the Service Tax (Provisional Attachment of Property) Rules, 2008". Salient feature of the Rules is as follow:-

Procedure for provisional attachment of property. –

1. If the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, is satisfied that it is necessary or expedient, for the purpose of protecting the interest of revenue, during the pendency of any proceeding under section 73 or section 73A of the Act, to attach provisionally any property belonging to a person on whom a notice has been served under sub-section (1) of section 73 or sub-section (3) of section 73A of the Act, shall after due verification of the facts, and the circumstances of the case, forward a proposal for provisional attachment of property of such person, to the Commissioner of Central Excise, in the format annexed to these rules.

2. The Commissioner of Central Excise, on receipt of proposal as specified in sub-rule (1), or on his own, if he is satisfied that circumstances of case justify provisional attachment, may cause service of a notice on such person for provisional attachment, with reasons for initiating action under these rules and the details of property to be attached provisionally, giving opportunity to such person to make submissions in this regard, within fifteen days of service of such notice.

3. Upon consideration of submissions made by such person, in writing or in person or both, the Commissioner of Central Excise may pass an order in writing to attach provisionally any property belonging to such person:

   Provided no such order shall be issued to attach the personal property of Proprietor or Partners or Directors, as the case may be.

The property that can be attached-

1. Of the amount of pending revenue against such person.

2. The movable property belonging to such person shall be attached only if the immovable property available for attachment is not sufficient to protect the interest of revenue.

Obligations of person whose property has been attached provisionally

Where a property has been provisionally attached, the said person or his representative shall not mortgage, lease, transfer, deliver or

deal with the attached property in any manner except with the previous approval of the Commissioner of Central Excise.

Period for which order of provisional attachment of property remains in force-

1. Every such provisional attachment shall cease to have effect after the expiry of a period of six months from the date of the service of the order passed under sub-rule (3) of rule 3.

   Provided that the Chief Commissioner of Central Excise may, for reasons to be recorded in writing, extend the aforesaid period by such further period as he thinks fit, provides that the total period of extension shall not in any case exceed two years.

2. Notwithstanding anything contained in sub-rule (1), every such provisional attachment shall cease to have effect when the said person pays the pending revenue along with interest thereon.

N. B.:- "pending revenue" means any service tax that has not been levied or paid or has been short-levied or paid or erroneously refunded in respect of which a notice has been served under sub-section (1) of section 73 or sub-section (3) of section 73 A; "property" includes immovable property; "personal property" means any movable or immovable property belonging to a proprietor or partner or director, which is not in relation to business activity.

Delhi High Court Finds Inclusion of Value of Materials Supplied Free of Cost in Gross Amount is Contentious

Before the Hon'ble High Court of Delhi, the petitioner raised the issue that materials that are supplied free of cost by NTPC (the other contracting party) to the petitioner for the purpose of completing the contract cannot be included in the gross amount charged by the petitioner for the purpose of determining the service tax payable.

The court finds that "*prima facie it appears to us that the Respondent cannot include in the gross amount charged any material that is supplied free of charge by NTPC or by any other party in respect of a contract of service…we are of opinion that while the adjudication proceedings may go on and be concluded by the Respondents, they will not include for the purposes of determining the taxable service the supply of free material to the Petitioner and to this extent the Explanation appearing against Serial No.7 in the table given in the Notification dated 1st March, 2006 will not applied to the detriment of the Petitioner*"

[ERA INFRA ENGINEERING LTD. V. UOI, 2008 (11) STR 3 (Del.)]

Heads Of Accounts For Various Services Under Service Tax

The following services were brought under service tax net w.e.f. 16th May, 2008. Accounting code for these services has been notified, which is as follow:-

Sr. No.	Name of Service	Tax Collection	Other Receipts*
	Information Technology Software Services	00440452	00440450
2.	Investment Management Services Provided Under ULIP	00440430	00440431
3.	Stock Exchange Services	00440434	00440435
4.	Commodity Exchange Services	00440438	00440439
5.	Processing and Clearing House Services	00440442	00440443
6.	Right to use Tangible Goods Services	00440445	00440447

**The sub-head "Other receipt" is meant for interest, penalty leviable on delayed payment of service tax*

Primary Education Cess on all taxable services will be booked under 00440298 and Secondary and Higher Education Cess will be booked under 00440426.

Authorities, Including Tribunals, Have No Power To Impose Penalty Less Than The Minimum Prescribed By The Section

Following two questions arose before the Hon'ble High Court in this matter:-

1) Whether the Tribunal could reduce the penalty imposable under Section 76 of the Finance Act, 1994 as amended by the Finance Act, 1998 read with Rule 6 of the Service Tax Rules below the minimum limit prescribed under that section?

The Hon,ble Court was of the view that "if reasonable cause (for delay in payment) is not shown, and penalty is required to be levied, then, the minimum penalty prescribed cannot be further reduced, under the garb of any existing discretion, assumed to be vesting, with the authority, including the Tribunal. Where the two limits have been prescribed, being the minimum and upper limit, then obviously the free play is available between the two limits only, and the

discretion can be exercised, within those limits, but then, that does not mean, that the authorities have any power to impose penalty less than the minimum prescribed by the Section.

2) Whether the Tribunal could entertain an appeal on merits when the appeal before the Commissioner was rejected because of default by the Assessee in payment of pre-deposit required under Section 35-F of the Central Excise Act, 1994?

The Hon,ble Court held that the face of language of Section 35F, there is no escape from the conclusion, that the appeal was rightly dismissed by the learned Commissioner, and the learned Tribunal could not entertain the appeal on merits.

[UOI V. AAKAR ADVERTISING , 2008 (11) STR 5 (Raj.)]

[Case Laws]

The Tribunal held that the service provided by service provider which has no office in India becomes taxable with effect from 18-4-2006 with insertion of Section 66A of the Finance Act with effect from 18-4-2006. (Service tax on import of services can be imposed only from 18-4-2006.)

COMMISSIONER OF CENTRAL EXCISE, RAIPUR V. JINDAL STEEL & POWER LTD. , 2008 (11) STR 14 (TRI- DEL.)

In this matter the Appellant is engaged in export of taxable services and availed the Cenvat Credit on the inputs stage services. Refund claim was sought to be rejected by the lower authorities on the ground that provisions of Rule 5 of the Cenvat Credit Rules 2004 came into effect from 1-4-2006. Hence, no export services, which took place prior to 14-3-2006 could be considered for refund claim under the substituted provisions of Rule 5 of Cenvat Credit Rules, 2004.

In the case of WNS Global Services (P) Ltd. v. CCE, Mumbai, 2008(10) STR 273 (T)=2008-TIOL-228CESTAT-Mum. an identical issue and in respect of the very same rule, came up before the Tribunal in which the Tribunal held that any claim filed after 14-3-2006, even for earlier period, cannot be turned down if the claim satisfies other requirements. "This said ruling is binding on me" held the Tribunal in the present case.

CALIBER POINT BUSINESS SOLUTIONS LTD. COMMR. OF EX., BELAPUR, 2008 (11) STR 15 (Tri- Mumbai.)

The Appellant filed a refund claim with the Department to the tune of Rs. 9,87,235/- on the ground that the services rendered by them amounts to Export of Services in terms of Rule 3(2) of the Export of Services Rules, 2005 and, therefore, they are entitled for the refund of the Service Tax already paid by them. The Appellant actually book orders for their Principal in USA/UK/ other countries. The orders are booked in India and after the orders

are booked, the parties concerned directly gets in touch with the foreign suppliers. Once the foreign suppliers export the goods to India and receive their payments, a commission is paid to the appellant. Thus the service is provided from India and used outside India.

The Tribunal held that "I am convinced that the services rendered by the appellant have been exported in terms of Rule 3(2) of the Export of Service Rules, 2005. Hence, the appellant are entitled for the refund of the service tax already paid.

BLUE STAR LTD. V. COMMISSIONER OF CENTRAL EXCISE, BANGALORE, 2008 (11) STR 23 (Tri- Mumbai.)

In this matter assessee was asked to pay penalty under sections 76, 77 and 78 under revision order, while the Assistant Commissioner had not imposed penalty under above said Sections upon power vested under Section 80 of the Finance Act. The Assistant Commissioner gave the reason as under:

"However, at the earlier stage, the noticee was not aware of the levy of service tax on the consignment agent falling under the category of C&F agent. When they came to know the levy of service tax on them, they got themselves registered with the department and started paying service tax thereafter. Thus, I find that the failure on the part of noticee was not voluntarily but due to the unawareness of the law. Thus, I take a lenient view against the noticee in the power vested with me under Section 80 of the Finance Act, 1994."

The court held that "in view of the above finding of the Assistant Commissioner of Central Excise, the finding of the Commissioner of Central Excise in revision application is not sustainable. So, the imposition of penalty in revision order is unwarranted and accordingly it is set-aside."

R.K. ASSOCIATE V. COMMISSIONER OF C. EX. JALANDHAR, 2008 (11) STR 33 (Tri- Del.)

In this case the Tribunal found that "the appellant was actually supplying labour to M/s. Hindalco and the scope of their work is limited to the work assigned to them by M/s Hindalco inside the factory premises. The revenue has not produced the contract and shown the relevant provisions to show that the appellants were coming within the ambit of cargo handling service. They had simply enumerated the number of activities supposed to have been carried out by the appellant. That is not sufficient. There is no evidence to show that the appellant had actually handled the cargo. The semi-finished goods inside the factory cannot be considered as cargo…..the labourers had carried out the instructions of M/s Hindalco in handling semi-finished or semi processed material inside the factory. that alone would not constitute cargo handling services."

S.N. UPPAR & CO. V. COMMISSIONER OF C. EX ., BELGAUM, 2008 (11) STR 34(Tri- Bang.)

In this case the Respondent undertake heat treatment/repair of old LPG cylinder under rate contract for oil companies. The Revenue demanded service tax under "Management, Maintenance & Repair Services". The Tribunal held that the respondent is only undertaking repair of the old cylinders. Contract for maintenance is distinct from a contract for repair. The respondent was only repairing old gas cylinder and for taking such repair, they have entered into a rate contract. This contract for repair cannot be treated as a contract for maintenance. Further, the Board's circular dated 27-7-2005 which has been relied by the Commissioner (Appeals) clarifies that when only repair work was undertaken without a maintenance contract then service tax was not attracted for the period prior to 16-6-2005.
COMMR. OF C. EX., JAIPUR-I V. BHIWADI CYLINDERS PVT. LIMITED, 2008 (11) STR 37 (Tri- Del.)

In this matter the Tribunal held that "I am of the view that the sub-broker is not liable to pay service-tax when the service tax has been discharged by the main Stock Broker."
(similar view was expressed by the Tribunal Delhi in the case of Vijay Sharma & Company v. Commissioner of Central Excise, Chandigarh [2007(7) STR 518 (Tri-Del.)])
SHAKTI SECURITIES V. COMMR. OF C. EX., 2008 (11) STR 39 (Tri- Bang.)

[Direct Tax]

Cushman Wakefield AAR Judgement

In the case of M/s Cushman & Wakefield (S) Pte. Ltd., Singapore (in short, **CWS**) before the Authority for Advance Ruling (AAR) it was held that the referral fee paid by its Indian associate to CWS was not subjected to tax in India.

The brief facts of the case are as follows:-

Briefly stated, the applicant, a foreign company incorporated and based in Singapore, offers a full range of real estate services to its local and international clients. As stated in the statement of facts, Cushman & Wakefield India Pvt. Ltd. (in short, **CWI**) is, a wholly owned subsidiary of Cushman & Wakefield Mauritius, which, in turn, is a subsidiary of Cushman & Wakefield, Asia. The applicant is, as per averment, engaged in the business of rendering services in connection with acquisition, sales and dealings in real estate and other services such as advisory & research facilities management, project management etc. in the field of real estate. The applicant states that it has also developed certain international client relationships and in accordance with the global policy, various offices provide referral services to other Cushman and Wakefield (C&W) offices, wherein one C&W Office would refer client to other C&W office, depending on the requirements of the clients. In respect of such

referrals, as per the applicant, each serving C&W Company is liable to pay a 'referral fee' to referring group company in accordance with the international fees sharing rules of C&W group. In consonance with this very general policy, the applicant entered into an agreement dated 1st January, 2005 with CWI, as per which, the applicant CWS shall refer/recommend the potential customers, desirous of obtaining real estate consultancy and associated services in India, to CWI. As per the terms of the agreement, CWI will pay the applicant a percentage of amount charged by the applicant (CWS) on the referred customers as referral commission after it (CWI) has realized in full the amount from the customers. Further, withholding of tax on the referral commission paid has to be deducted by CWI. As mentioned in the statement of facts, the applicant is neither involved in persuading the customers to avail services of CWI, nor in negotiating or collecting fees charged by CWI from the customers referred to by CWS. It has further been stated that they (CWS) simply refer the potential customers for real estate transactions and give some details (locations etc.) about the property in question.

Placed in the above factual matrix and in relation to the tax liability of the amount of referral fees/commission received or to be received from CWI, the applicant has sought rulings from the Authority on the following questions :-

i.) Whether the referral fee received by Cushman & Wakefield, (S) Pte. Ltd. (the applicant) from Cushman & Wakefield India Pvt. Ltd., in terms of the referral agreement dated January 1, 2005 is liable to be taxed in India in accordance with the provisions of the Income-tax Act, 1961 ('the Act') read with Double Taxation Avoidance Agreement between India and Singapore?

Held that on the facts and in the circumstances of the case the receipt on account of the referral fee arising to the applicant would <u>not</u> be taxable in India having regard to the provisions of the Act and the provisions of the DTAA either under the head business income, or royalty income or income by way of FTS.

ii.) Whether the referral fee received by Cushman & Wakefield (S) Pte. Ltd., from Cushman & Wakefield India Pvt. Ltd. in terms of the referral agreement dated January 1, 2005 is liable for deduction of tax at source in the hands of the payer?

Held on the facts and circumstances of the case and in view of ruling on question No.(1) above, the payer is not required to withhold any tax under section 195 of the Act, while making remittance to the applicant.

iii.) Whether the applicant can be said to have a business connection in India under the provisions of section 9(1)(i) of the Indian Income-tax Act ('Act') by virtue of its agreement with Cushman & Wakefield India Pvt. Ltd.?

Held on the facts and in the circumstances of the case, the applicant does not have a ‘business connection’ in India under the provisions of the Act.

iv.) If the answer to question (iii) above is in the affirmative, whether the whole or any part (if yes what proportion) of referral fee could be attributed to India in terms of explanation to Section 9(1)(i) of the Act and would constitute income accruing or arising in India?

Held in view of ruling on question No.(3) above, this question, being academic, requires no ruling.

v.) If the referral fee is held to be taxable, whether the same can be classified as Royalty under section 9(1)(vi), fee for technical services under section 9(1)(vii), or “income from business or profession” under the Act read with the Double Taxation Avoidance Agreement between India and Singapore and what is the rate of tax applicable?

Held this question requires no ruling in view of ruling on question No.(1) above.

vi.) Whether the applicant can be said to have a Permanent Establishment in India in having regard to the provisions of the Double Taxation Avoidance Agreement between India and Singapore by virtue of its agreement with Cushman & Wakefield India Pvt. Ltd.?

Held on the facts available in the application, the applicant does not have a P.E. in India.

vii.) If the answer to 6 above is in affirmative, whether the whole or any part thereof (if so what part) can be attributed to the Permanent Establishment?

Held in view of ruling on Question No. (6) above, this question requires no ruling.

[Leading I.T. Case Laws]

Recently, the Income-tax Appellate Tribunal (ITAT), Bangalore, passed a favourable decision in the ***Mphasis Ltd case, granting relief to the assessee in respect of the deduction under Section 10B of the Income-Tax Act, 1961.***

According to the Tribunal, where the assessee is not involved in providing technical services, expenses incurred in foreign currency need not be excluded from the export turnover.

Section 10A, 10B

Most software companies claim deduction under Section 10A/10B of the Act, which postulates deduction in respect of the profits and gains derived from the export of computer software. The deduction would be in the proportion that the export turnover of the undertaking bears to the total turnover of the undertaking.

'Export turnover' is defined in Section 10A/10B. The definition provides that telecommunication, insurance and freight attributable to the delivery

of software outside India would be required to be excluded from the export turnover. Further, expenses incurred in foreign exchange in providing technical services outside India should also be excluded.

Facts of the case

The assessee, a company involved in software development, claimed deduction under Section 10B. The assessee took a position that since it is not involved in providing technical services, it need not exclude foreign currency expenditure from the export turnover for computing the deduction under Section 10B. The assessee took an alternative argument that, if excluded from export turnover, such expenses should also be excluded from the total turnover.

The arguments

The assessing officer (AO) took a call that the expenditure incurred in foreign currency was in respect of the assessee's personnel deputed outside India for providing technical services outside India and concluded that expenses incurred in foreign currency should be excluded from the export turnover.

Further, as total turnover is not defined in the Act, the AO did not make similar exclusions from the total turnover. The Commissioner Appeals confirmed the AO's action as being correct.

On appeal before the Tribunal, the assessee explained that the expenses incurred in foreign currency in respect of the assessee's personnel deputed outside India were in connection with the development of software and software development services provided by the assessee from India. The assessee is not engaged in the business of providing technical services outside India, the Revenue was not able to dispute these facts.

The Tribunal's observations

The Tribunal relied on the Bangalore ITAT's decision in the *Infosys Technologies Ltd* case, and concluded that since the assessee is not involved in the business of providing technical services outside India, expenses incurred in foreign currency for providing software development outside India need not be excluded from the export turnover.

Further, the ITAT also emphasised that incentive provisions should be construed liberally and in a manner so as to promote the object and not frustrate it.

In respect of exclusions to be made from total turnover, the ITAT, relying on the Infosys and Tata Elxsi decisions, held that based on the parity of basis between export turnover and total turnover, the exclusions made from export turnover should also be made from total turnover.

A good precedent

The ITAT had analysed the fact pattern before delivering its judgment on the interpretation of law.

In these types of cases, it is important for the assessee to substantiate that it is engaged only in software development and software development services that do not involve any element of rendering technical services.

Typically, the statement of work (SoW) and contracts with clients go on to illustrate the true facts of the case. The fact is that many software companies are predominantly involved in offshore delivery and onsite work only for data collation and installation. Hence no technical services are being rendered. The same may not be true of a product company which may be involved in customisation of the same, which would tantamount to technical services.

Charitable or religious trust
Kanhya Lal Punj Charitable Trust v. Director of Income Tax (Exemption) (Delhi) [2008]171 TAXMAN 134 (DELHI)

Assessment year 1997-98- Assessee trust had advanced huge amounts to a company 'P', which had substantial interest in trust, without any security and adequate interest- Whether Act is intended to eliminate any possibility of trust's funds being used for benefit of any interested party and since in instant case, a benefit had directly or indirectly reached interested person, namely,'P', there was a clear violation of sections 13(1)(c) and 13(2)(a)- Held, yes- Whether, therefore, provisions of section 11 and 12 would not operate so as to exclude income of trust from total income of previous year and, consequently, all receipts of trust either by voluntary contribution or from income derived from its property would be an income of trust, chargeable to tax- Held, yes.

CIT v. Paras Cotton Co. [2008] 170 Taxman 431 (Raj.)

Fact:-

- Assessee was a partnership firm whose assessment was completed u/s 143(3).
- Commissioner issued a notice using his powers u/s 263 alleging that assessee had been wrongly allowed deduction on account of salary u/s 40(b)(v)without there being any agreement to that effect.
- Assessee submitted that payment of remuneration to partners had been specified in partnership deed copy of which had been submitted to AO.
- Commissioner however disallowed deduction on the ground that partnership deed was antedated and was only prepared to claim deduction.

Held:-

- Held that by producing partnership deed containing terms & conditions for payment of remuneration to partners and quantifying amount to be

paid to each partner in deed itself deduction can be claimed.

- Held that no partnership deed produced by assessee could have been assumed to be not genuine or antedated in absence of any enquiry having been conducted in this regard.
- Held that assessee's claim for deduction u/s 40(b) was valid.

Sec 37—Shriram Pistons & Rings Ltd (2008) 171 Taxmann 81(DEL)

Business Exp. –Assessee entered into a Technical Collaboration with a Japanese concern which was valid for 5 yrs. The said Technical collaboration Agreement, included therein the Right to sub-lease after written approval from the Japanese concern. Technical know-how fee paid under the Agreement was disallowed as a business expense by the lower authorities on the ground that it was a case of sale. On Appeal the Tribunal allowed the assessee's claim and held there was no sale of technical know-how allowing revenue deduction.

Sec. 80- 1A- ACIT vs. Goldmine Shares & Finance Pvt. Ltd. (2008) 113 ITD 209 Ahd – SB

Whether in view of specific provisions of section 80-IA(5), profit from eligible business for purpose of determination of quantum of deduction under section 80-IA has to be computed after deduction of notional brought forward losses and depreciation of eligible business, even though they have been allowed to be set-off against other income in earlier years – Held, yes

Sec. 37 (1)-Styler India Pvt. Ltd., vs. JCIT 2008 113 ITD 55 (Pune-TM)

Business expenditure – Assessee company was set-up as a 100% subsidiary of a foreign company for rendering technical consultancy service to Automobile Industry in India- assessee claimed expenses under **building, repair and renovation and** under head exhibition / launch expenses. In respect of repair/renovation expenses assessee had taken along lease and in order to carry on its business had conducted repairs/ renovation.

In respect of exhibition / launch expenses it took a stall and participated Auto Expo exhibition to promote its business interest. A.O. disallowed on ground business had not set-up as no revenue receipts- held business set-up. Expenditure on renovation held at capital expenses and those relating to exhibition as revenue.

Deductions

Profits and gains from industrial undertakings other than infrastructure development undertakings

- Assessment year 2002-03 - Assessee-firm was engaged in manufacture and sale of jewellery - It had head office at Mumbai and branch office (Unit) at Hyderabad - It claimed deduction under section 80-IB in respect of its branch office/unit located at Hyderabad stating that branch office had got jewellery manufactured by Mumbai office, and sale of jewellery had been done by Hyderabad unit itself which was registered as a small-scale industrial unit (SSI Unit) - Assessing Officer denied deduction under section 80-IB holding that assessee's branch office located at Hyderabad was not an industrial undertaking inasmuch as it was not engaged in manufacturing of ornaments - Commissioner (Appeals), however, allowed assessee's claim - On instant appeal, it was noted that assessee's unit located at Hyderabad was getting its jewellery manufactured at Mumbai under supervision and control of its employees through help of Mumbai office - Besides all other conditions laid down under section 80-IB had been satisfied by assessee and particularly artisans were external parties - Whether, in aforesaid circumstances, assessee was entitled to deduction under section 80-IB as claimed - *Held,* yes - *Dy. CIT* v. *Tribhovandas Bhimji Zaveri* (Mum.) (URO)

Income escaping assessment

Non-disclosure of primary facts

- Assessment year 1997-98 - Assessee-company was engaged in business of manufacturing and bottling of soft drinks - It filed its return for assessment year 1997-98 which was completed by Assessing Officer under section 143(3) - Subsequently, Assessing Officer reopened said assessment by issuing a notice dated 5-4-2004 under section 148 for reasons that assessee had manipulated expenses on account of advertisement and sales promotion expenses and, thus, income chargeable to tax had escaped assessment - However, it was found from records that assessee had filed details in respect of advertisement and sales promotion expenses before Assessing Officer and even placed all relevant information at time of completion of original assessment - Whether since there was no failure on part of assessee to disclose primary facts for completion of assessment and moreover, notice under section 148 was issued on 5-4-2004, *i.e.*, after expiry of four years from end of assessment year 1997-98, it could be said that notice issued under section 148 was time-barred and, therefore, reassessment proceedings initiated against assessee were not justified and deserved to be annulled - *Held,* yes - *Nasik Enterprises (P.) Ltd.* v. *Asstt. CIT* (Mum.)

Wilful attempt to evade tax, etc.

- Assessment year 1995-96 - While completing assessment, Assessing Officer found that out of

seven unsecured loans shown by petitioner/assessee in its books of account, four were ingenuine - He, therefore, levied penalty on petitioner under section 271(1)(*c*) - On appeal, Commissioner (Appeals) confirmed levy of penalty - Thereafter, complaint was filed under section 276C/277 to punish petitioner - In meanwhile, petitioner filed an appeal before Tribunal against penalty levied and contended that since appeal was pending before Tribunal, its prosecution was illegal - Whether prosecution under sections 276C/277 and 278B was maintainable during pendency of appeal before Tribunal, but continuation of same would depend on decision of Tribunal as in case Tribunal would give its judgment in favour of petitioner, prosecution might not be maintainable - *Held,* yes - Whether therefore, proceedings against petitioner were not liable to be quashed during pendency of appeal before Tribunal; however, prosecution proceedings should remain stayed till a decision was rendered by Tribunal - *Held,* yes - *Prabhava Organics (P.) Ltd.* v. *Dy. CIT* (AP)

For concealment of income

- Assessment year 1997-98 - In his return of income, assessee had shown certain amount which he claimed to have received as a gift from one 'S', a non-resident, through a cheque from his NRE account maintained with a bank in India - After making enquiries, Assessing Officer held gift transaction as a sham and a devise to launder unaccounted money of assessee as gift and, accordingly, added amount of gift to income of assessee - Assessee did not press his appeal before Commissioner (Appeals) and, therefore, addition had become final - Assessing Officer also levied penalty under section 271(1)(*c*) upon assessee holding that he had failed to discharge onus cast on him under *Explanation 1* to section 271(1)(*c*) - Whether since nothing was brought on record by Assessing Officer to show that amount of gift belonged to assessee himself, mere surrender of amount of gift by assessee did not tilt scales in favour of revenue that amount of gift was income of assessee - *Held,* yes - Whether, therefore, levy of penalty upon assessee was not justified and deserved to be deleted - *Held,* yes - *Asstt. CIT* v. *Vishan Narayan Khanna* (*Delhi - Trib.*)

Mandatory E-Payment Of Taxes

CIRCULAR NO. 5/2008, DATED 14-7-2008

The Central Board of Direct Taxes, vide notification S.O. No. 493(E), dated 13.3.2008 have notified the categories of taxpayers who are mandatorily required to electronically pay taxes on or after the 1st day of April, 2008. The taxpayers who are required to pay taxes by the prescribed mode are - (i) a company; and (ii) a person (other than a company), to whom provisions of section 44AB of the Income-tax Act, 1961 are applicable.

2. Further, payment of tax electronically has been defined to mean payment of tax by way of - (i) internet banking facility of the authorized bank: or (ii) credit or debit cards.

3. In this context, representations have been received from some of the foreign assessee highlighting the difficulties being faced by them in complying with the provisions with regard to mandatory e-payment of taxes. It has been pointed out by such foreign assessee that they do not have a presence in India and, therefore, are not able to meet the 'know your customer norms' of the banks. This has resulted in their inability to open bank accounts and make payment of taxes, through the electronic mode. Representations have also been received from the resident taxpayers highlighting difficulties in availing internet banking facilities of the authorized banks. A clarification has also been sought as to whether payment of tax deducted at source by a deductor will fall within the meaning of 'tax' for the purpose of the impugned notification.

4. With a view to facilitating electronic payment of taxes by different categories of taxpayers, it is hereby clarified that, - an assessee can make electronic payment of taxes also from the account of any other person. However, the challan for making such payment must clearly indicate the Permanent Account Number (PAN) of the assessee on whose behalf the payment is made. It is not necessary for the assessee to make payment of taxes from his own account in an authorized bank. Further, it is also clarified that payment of any amount by a deductor by way of tax deducted at source (TDS) or tax collected at source (TCS) shall fall within the meaning of 'tax' for the purpose of the rule 125 of the Income-tax Rules, 1962.

SC to decide on foreign Co's advance tax liability issue

The Supreme Court will decide whether a non-resident company is liable to pay advance tax on fee charged by it for providing services in India.

The issue had been raised in an appeal filed by the income tax department challenging the sectoral tribunal's ruling which held that PricewaterhouseCoopers (PwC), being a non-resident firm, was not liable to pay advance tax even if the entire payment made to it by its clients in India was subject to TDS under Section 195 of the Income Tax Act.

A bench headed by Justice S H Kapadia is hearing the appeal filed by the department seeking its interference on the issue whether other statutory provisions charging interest can be applied to the assessee which had failed to pay advance tax.

The Revenue department has also sought the apex court's directions on whether an assessee like PwC whose entire taxable receipts were subject to TDS was liable to pay advance tax and if the same was paid then whether interest was chargeable on it under Section 234A, 234B and 234C of the Act.

The US-based accountancy and consultancy firm had disclosed consultancy fee aggregating to more than Rs 5.88 crore during 2001-02 arising from various services rendered to its clients in India.

PwC, a limited liability partnership firm, had filed return declaring total income of Rs 5.88 crore on which the tax was worked out to be more than Rs 2.02 crore.

CBDT Relaxes Norms For Scrutiny Of Company Tax Returns

In what could be a major relief to the corporate sector, the revenue department has decided not to scrutinize the tax returns of over 1000 top companies, provided no major disputes are pending against them they had been complying with laws. "The annual returns of tax complying companies would be not be scrutinized this year. The decision has been taken by the Central Board of Direct Taxes (CBDT) to encourage better tax compliance among the corporate," a senior finance ministry official said. Last year, the CBDT took a decision to scrutinize tax returns of about 200 `A` group companies listed on the Bombay Stock Exchange BSE, 500 National Stock Exchange companies and all non-banking finance companies. The tax returns of all the banks and public sector units were also checked by the income tax officials.

[FEMA]

RBI Master Circulars

The following Master Circulars were issued by the Reserve Bank of India on July 1, 2008 in regard to Foreign Exchange :-

- Master Circular – Direct Investment by Residents in Joint Venture (JV)/Wholly Owned Subsidiary (WOS) abroad
- Master Circular – Export of Goods and Services
- Master Circular – External Commercial Borrowings and Trade Credits
- Master Circular – Foreign Investment in India
- Master Circular – Import of Goods and Services
- Master Circular – Miscellaneous Remittances from India – Facilities for Residents
- Master Circular – Non-Resident Ordinary Rupee (NRO) Account
- Master Circular – Remittance Facilities for Non-Resident Indians/Persons of Indian Origin / Foreign Nationals
- Master Circular – Risk Management and Inter-Bank Dealings

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