Legal Update

High Court stated that describing the levy under section 234E as 'fee' would not invalidate the imposition made and that calling levy under section 234E a 'fee' cannot be the sole basis of judging the true nature or validity of the levy. High Court stated that fee imposed under section 234E is for all intents and purposes a 'late fee' payable for accepting the TDS statement/return at a belated point in time.

High Court observed that constitutional vires of Section 234E was upheld in rulings by *Rajasthan High Court Dunlod Shikshan Sansthan [(2015) 235 Taxman 446 (Raj)], Karnataka High Court in Lakshminirman Bangalore Pvt. Ltd.[2015 SCC OnLine Kar 7315*] and *Kerala High Court in Sree Narayana Guru Smaraka Sangam Upper Primary Supreme Courthool [2016 SCC OnLine Ker 30216].*

High Court, therefore, held that the provisions of Section 234E are not ultra vires the provisions of the Constitution. High Court thus ruled in favour of the Revenue.

Service Tax

LD/67/117

Meinhardt Singapore Pte Ltd.

Vs.

Commissioner of Service Tax, New Delhi

21/01/ 2019

Irrespective of any constraints faced by the assessee, assessee was duty bound to remit service tax amount collected; Imposition of penalty upheld

The assessee, registered under service tax, did not pay the entire service tax liability but discharged a part thereof and failed to pay the amounts due in time for the period from financial year 2006-07 to 2008-09 (April to September) due to some internal difficulties. Assessee claimed that amounts were not available with it at the relevant time. The assessee paid the tax dues in January 2009. Department levied a penalty for such late payment of service tax alleging suppression of material facts, under section 73(4) r/w Section 78 of the Finance Act, 1994. CESTAT ruled in favour of the Revenue.

High Court held that the order was justified and warranted in the circumstances stating that whatever be the constraint, the assessee was faced with, it was duty bound to remit amounts collected by it towards service tax, in a planned manner and as required by law. High Court clarified that depositing the amount on adhoc basis due to operation of centralised system was not a legitimate excuse. High Court noted that the assessee was duty bound to comply with the terms of the Finance Act and withheld the amounts collected from the clients as tax liability. A delay in deposit of amounts spanned over a period of two and half years amounted to misreporting of true and correct facts.

High Court referred to provisions of Section 78 and Section 73(4) of the Act and stated that there was no manner of choice and it is matter of course and the only mitigating factor for penalty would be to deposit the reduced amounts within 15 or 30 days of receipt of notice. In instant case, the reduced penalty amounts were not deposited by the assessee as per statutory requirement. High Court further stated that though the amounts were paid in the interregnum period, at a later stage, pursuant to the permission granted by this Court on account of pre-deposit order made by the CESTAT, that did not in any manner mitigate the assessee's liability.

High Court thus ruled in favour of the Revenue and upheld the penalty.

LD/67/118

M/s Dell International Services India Pvt. Ltd.

Vs.

Commissioner of Central Tax

(CESTAT, BANG)

13/12/2018

Tribunal held that mandatory pre-deposit required under section 35 of Central Excise Act, 1944 r.w. Section 85of Finance Act, 1994 can be made by making reversal of CGST credit in Electronic Credit Ledger.

Facts:

In response to defect memo issued by Tribunal registry raising objection regarding payment of mandatory pre-deposit of 7.5%/ 10% for filing of appeal, appellant submitted that the such pre-deposit is paid by them by making reversal of CGST (Central Goods and Service Tax) Credit in Electronic Credit Ledger, as also indicated in column 4B(2) of Form GSTR-3B. In this regard,

appellant relied upon Circular No. 58/32/2018-GST dated 04.09.2018 and also Circular No. 42/16/2018-GST dated 13.04.2018, stating that the arrears of Central Excise duty, Service Tax or wrongly availed cenvat credit under the existing law is permissible to be paid through the utilisation of amounts available in the electronic credit ledger.

Held:

Since in terms of aforesaid circulars the appellant was duly permissible to make payment of mandatory pre-deposit through CGST credit, Hon'ble Tribunal directed registry to admit present appeal and list the same for final disposal.

LD/67/119

M/s AKZO Nobal India Ltd.

Vs.

CCE&ST-Ludhiana

(CESTAT-CHD)

01/11/2018

Tribunal held that in case where machines installed at premises of dealers of assessee undertakes the processes so as to make assessee's product marketable, the repairs and maintenance of such machines be regarded as 'input service' consumed till place of removal and assessee is entitled to claim cenvat credit of the same.

Facts:

The appellant, manufacturer of paints, installed Automatic Dispensing Machines, at the premises of its dealers, to mix the colour and white paint to obtain specific colour of the paint. The Cenvat credit availed by the appellant in respect of repairs and maintenance of said machines, was sought to be denied by the Revenue on the ground that since such machines are installed beyond the place of removal, Cenvat credit would not be available to appellant in terms of Rule 2(l) of Cenvat Credit Rules, 2004.

Held:

Hon'ble Tribunal noted that such Automatic Dispensing Machines are used to obtain the desired mix of colours, the goods manufactured by appellant are not marketable and consequently,

not excisable. Since any activity/services availed by the assessee till the product become excisable is entitled for input services credit in terms of Rule 2 (l) of Cenvat Credit Rules, 2004 and the said rule provides that any service directly or indirectly availed in relation to manufacture of final product is an input service, Tribunal held that the services availed by appellant before the stage at which paints manufactured by it becomes marketable would be regarded as eligible input services. Therefore, impugned order was set aside by allowing appeal with consequential relief.

LD/67/120

Kishore Kumar Compmay Pvt Ltd.

VS.

Commissioner of Central Excise and Central Tax

(CESTAT-BANG)

26/09/2018

When the Indian exporter receives export proceeds, including commission of agent in convertible foreign exchange, but makes payment of commission to the agent in Indian Rupees, such commission shall be construed as received in free foreign exchange only and not in INR and thus, services provided by agent to the foreign buyers for which commission is paid, would constitute 'export of services'.

Facts:

Appellant are acting as purchase agents, for overseas buyers of processed sea foods, looking after sourcing the seller, negotiating price on behalf of foreign buyer, checking the quality of the processed food and supervision of the packing and dispatch. They receive commission as a percentage of purchases. The principal takes a decision and places order and the appellants place the purchase order on respective Indian exporters. The foreign principal opens a Letter of Credit (L/C) in the name of appellant. The appellants then transfer the L/C to the exporter with an instruction to the Banker and the exporters that the amount of L/C includes the commission of the appellant. After export, the exporter transfers the commission to the appellants in INR. In some cases, the foreign buyer remits the commission to appellants in freely convertible foreign exchange. Department alleged that since appellant did not receive consideration in convertible foreign exchange, appellant cannot be said to be exempted from payment of service in respect of 'business auxiliary services' provided to foreign buyers.

Held:

Hon'ble Tribunal noted that since the services were rendered by the appellant to the beneficiaries located outside India, such services were required to be treated as 'export of services' for a harmonious construction of erstwhile legal provisions. It was also noted that the commission due to appellant was received by them either directly in foreign exchange from foreign clients or in Indian Rupees from Indian exporters from the export proceeds. Accordingly, relying on decisions in *National Engineering Industries Ltd. vs. CCE, 2009 (15) STR 68 (Tri.), ETA Travel Agency Pvt. Ltd. vs. CCE, Chennai, 2007 (7) STR 454 (Tri. Bang.) and Nipuna Services Ltd. vs. Commr. of C.Ex., Cus. & S.T. (A-II), Hyderabad, 2009 (14) STR 706 (Tri. Bang.),* Tribunal held that since the remittance is received by the appellants is nothing, but a portion of the export proceeds received by the exporter, though paid to the appellants in Indian Rupees, it is to be considered as receipt in foreign exchange only. Therefore, Tribunal allowed present appeals with consequential relief.

LD/67/121

National Internet Exchnage of Inida

Vs.

Commissioner of Service Tax, Delhi

(CESTAT-DEL)

27/07/2018

When the registry set up by Department of Information Technology for setting up and operating internet domain name registry in India, entered into 'Registrar Accreditation Agreements' with various registrars, who were appointed to register the domain names in the registry, Tribunal held that the charges collected by registry from such registrars for registration of domain name cannot be said to be chargeable to service tax under category of 'franchisee services'.

Facts:

The appellant is a M/s National Internet Exchange of India (NIXI for short) is a not for profit company registered under section 27 of the Companies Act, 1957 and is engaged in Domain Name Business in India i.e. for providing efficient interconnectivity of internet in India and for setting up of internet domain name operations and related activities. For the purpose, the appellant has been entrusted by the Department of Information and Technology under the Ministry of Communication and IT, Government of India vide its policy framework dated 28.10.2004, with the responsibility of setting up top level domain name (TLD) and for operating as registry for '.in' domain name in India. Appellant entered into 'registrar accreditation agreement' with various registrars to register the domain names and collected charges per domain name registered by the said accredited registrar per year as registration charges, transfer charges, renewal charges, etc. under the mandate of policy framework of Government of India to receive the same as accreditation fee. Department alleged that the appellant provided 'franchisee services' to such accredited registrars and thereby, demanded service tax on accreditation fees received by appellant.

Held:

Hon'ble Tribunal noted that in terms of Registrar Accreditation Agreement no right, power or authority to operate or manage '.in' registry was granted to registrar. Further, the agreement clarifies that except for the assigned role or purpose, no other use of the '.in' registry's name or website is licensed to the registrar by the appellant. The registrar is prohibited from assigning or sublicensing his services. The agreement also includes the supervisory authority of '.in' registry upon its registrars empowering appellant to even take the penal actions against registrars who otherwise are prohibited from selling WHOIS check (name available look out) data. Tribunal noted that the agreement makes it abundantly clear that the roles of appellant and the registrar are separately assigned to both parties and the Registrars are accredited for discharging such particular functions of the appellant for which they are accredited by the appellant. Accordingly, Tribunal noted that the registrars are the entities which contract with the registered name holders as well as the appellant-registry and collects registration data about registry name holders and submit the same to the appellant-registry for entering in the database maintained by the appellant-registry. Since the appellant-registry and registrars are independent entities operating on principal to principal basis, Tribunal held that appellant cannot be said to be providing 'franchisee services' to such registrars. It was also held that issue in present case is squarely covered by *Direct Internet Solutions Pvt. Ltd. vs. CST, Mumbai, - 2014-TIOL-1505-CESTAT-MUM* i.e. agreement between ICANN, the corresponding registry at international level. Consequently, the impugned demand was set aside.

LD/67/122

M/s Allied Blenders and Distillers Pvt. Ltd.

Vs.

CCE&ST AURANGABAD

(CESTAT-MUM)

25/06/2018

Salaries paid to whole time directors of the company who are employees of the company, cannot be regarded as 'sitting fees paid to directors' and thus, not liable to service tax under reverse charge mechanism.

Facts:

The short question for consideration in present appeal was whether salaries paid by appellant-assessee to its whole-time directors, who are the employees of the company, can be regarded as sitting fees paid to directors and thereby liable to service tax under reverse charge mechanism in terms of *Notification No. 30/2012-Service Tax dated 20.06.2012.*

Held:

Hon'ble Tribunal observed that the amounts were paid by the appellant to the directors as salaries as evidenced by deduction of tax at source on salaries under Income Tax Act and issuance of Form-16, contribution to Employees Provident Fund as required under Employees Provident

Funds Act, 1952 and non-payment of sitting fees to any of the directors. Tribunal observed that the directors concerned with the management of the company, were declared to statutory authorities as employees of the company and complied with all the provisions of the respective Acts, Rules and Regulations indicating the director as employees of the company. It was also observed that department could not bring anything on record to show that the Directors, who were employees of the appellant received amount which cannot be said as 'salary' but fees paid for being Director of the company. Consequently, Tribunal held that impugned order demanding service tax under reverse charge mechanism on the salaries paid by appellant to its whole-time directors, is liable to be set aside and allowed the appeal.

CUSTOMS

LD/67/123

Commissioner of Customs

Vs.

M/s Atul Automations Pvt. Ltd

24/01/ 2019

Redemption of goods which were restricted and not prohibited, allowed though import was made in violation of Foreign Trade Policy.

The assessee imported Multi-Function Devices (Digital Photocopiers and Printers) (MFDs) in October-November 2016. These imports were detained by the customs authorities opining that the imports had been made in violation of the Foreign Trade Policy framed under Foreign Trade Act 1992 and the Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016. Redemption fine was imposed under section 125 of the Customs Act, 1962 and the consignment released for re-export only. Penalty was also imposed under section 112(a) along with penalty under section 114AA of the Customs Act as also penalty was imposed on the Directors. CESTAT held that MFDs did not constitute "waste" under Rule 3(1)(23) of the Waste Management Rules and had a utility life of 5 to 7 years, as certified by the Chartered Engineer thereby ordered release of the consignment under section 125 of the Customs Act as the assessee were held to have substantially complied with the requirements of Rule 13 of the Waste Management Rules.

High Court held that the MFDs were not prohibited but restricted items. The order for release of the goods was upheld subject to execution of a simple bond without sureties for 90% of the enhanced assessed value.

Supreme Court noted that the concerned goods are restricted items importable against authorisation under Clause 2.31 of the Foreign Trade Policy. As the assessee did not possess the necessary authorisation for their import, Supreme Court stated that the customs authorities therefore prima facie cannot be said to be unjustified in detaining the consignment. Supreme Court opined that there exists a fundamental distinction between what is prohibited and what is restricted. Supreme Court therefore upheld High Court's order that assessee was entitled to redemption of consignment on payment of market price at reassessed value by customs authorities with fine under section 112(a) of Customs Act, 1962.

Supreme Court noted High Court's reference to Section 11(8) and (9) r/w Rule 17(2) of the Foreign Trade (Regulation) Rules, 1993 which provides for confiscation of goods in the event of contravention of the Act, Rules or Orders, but which may be released on payment of redemption charges equivalent to the market value of the goods. Further, as per Section 125, discretion has been vested in the authority to levy fine in lieu of confiscation. Therefore, as per Supreme Court, a harmonious reading of the provisions of the Foreign Trade Act Customs Act will therefore not detract from the redemption of such restricted goods imported without authorisation upon payment of the market value.

Supreme Court further upheld classification of MFDs by High Court as "other wastes" under Rule 3(1)(23) of the Waste Management Rules considering that they had utility at the time of import. Supreme Court noted that assessee have been found to be substantially compliant and requirement for the country of origin certificate has been found to be vague by High Court whereas Form 6 has rightly been held to be not applicable to subject goods.

Supreme Court noted that Rule 15 of Waste Management Rules dealing with illegal traffic, provides that import of "other wastes" shall be deemed illegal if it is without permission from Central Government under the Rules and is required to be re-exported and Customs Act does not provide for re-export. Since MFDs have a utility period, the Extended Producer Responsibility would arise only after the utility period was over. Supreme Court dismissed appeal of Revenue finding no error in the penultimate direction to the assessee for deposit of bond without sureties for 90% of the enhanced valuation of the goods leaving it to the DGFT to decide whether confiscation needs to be ordered or release be granted on redemption at the market value, in which event the assessee shall be entitled to set off.

Accordingly, Supreme Court ruled in favour of the assessee.

LD/67/124

Commissioner of Customs

Vs.

Shiva Khurana

14/01/ 2019

Where due diligence was made, custom house agent cannot be penalised where exports were found dubious and exporters were fictitious/non-existent

Assessee a custom house agent was issued a notice by the Revenue which stated that the export of goods facilitated by it was dubious and that the concerned parties, upon investigation and inquiry were found to be non-existent upon investigation and inquiry. A penalty of ₹ 50 lakhs under section 114 of Customs Act, 1962 was imposed on the assessee. Assessee submitted that it facilitated the consignments in question at the behest of one of its employees who had in the past too, brought clients. CESTAT ruled in favour of the assessee, aggrieved by which the Revenue filed an appeal with the High Court.

Revenue submitted that as per Regulation 13 of the Customs House Agent Regulation, 2004, the assessee should exercise due diligence and care and thus a duty was cast upon it to ensure that the documents submitted by it on behalf of its clients were reflected as genuine export transactions and were not sham, meant to be conduit for smuggling over-valued goods.

High Court observed that the reference to the verification of "antecedents and correctness of Importer Exporter Code (IEC) Number" and the identity of the concerned exporter/importer, in the opinion of this Court is to be read in the context of the agent's [assessee's] duty as a mere agent rather than as a Revenue official who is empowered to investigate and enquire into the veracity of the statement made orally or in a document. If one interprets Regulation 13(o) reasonably in the light of what the agent [assessee] is expected to do, in the normal course, the duty cast is merely to satisfy itself as to whether the importer or exporter in fact is reflected in the list of the authorised exporters or importers and possesses the Importer Exporter Code (IEC) Number. As to whether in reality, such exporters in the given case exist or have shifted or are irregular in their dealings in any manner (in relation to the particular transaction of export), can hardly be the subject matter of "due diligence" expected of such agent unless there are any factors which ought to have alerted it to make further inquiry.

High Court stated that in the absence of any indication that the assessee-custom-house-agent was complicit in the facts of a particular case, he cannot ordinarily be held liable. High Court thus ruled in favour of the assessee.

Transfer Pricing

LD/67/125

Principal Commissioner of Income Tax

Vs.

KSS Limited (formerly known as K Sera Sera Productions Ltd)

26/11/ 2018

Transaction of routing money through associated enterprise for specific purpose of acquisition of distributorship from a third party held to be not an international transaction.