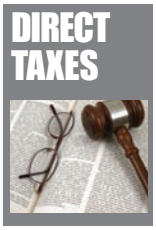
Legal Decisions[1]



Income Tax

LD/64/77

Commissioner of Income Tax vs. Amco Power Systems Ltd. 7th October 2015 (KAR)

Section 79, Income-tax Act, 1961-Carry forward and set off of losses-Change in voting power is relevant, not shareholding.

HC allows carry forward and set-off of business losses despite change in shareholding since effective control/voting power over the assessee company was unchanged; HC allowed Section 35AB deduction for expenditure incurred on acquisition of technical know-how, even though amount was payable at the end of relevant AYs and was paid in instalments on subsequent dates; Even if the amount is not actually paid but 'incurred', according to the method of accounting, the same would be treated as 'paid'.

The assessee is a company engaged in the manufacture and sale of storage batteries. During the relevant year, the assessee was granted the technical know-how and non-exclusive license under an agreement with 'ABL' (assessee's holding company), to manufacture and sell batteries on payment of lumpsum consideration of ₹5.00 crore for the licence and right to use the technology. ABL held more than 51% shareholding in assessee co. However, the same got reduced to 6% during AYs 2002-03 and 2003-04.

For AY 2003-04, assessee filed a return declaring nil income and claimed set off of losses brought forward from earlier years and also deduction u/s 35AB with respect to expenditure incurred for acquiring technical know-how, which was to be paid in installments between 1998 to 2006. The AO denied the deduction claimed u/s 35AB. AO also denied carry forward and set off of losses of previous year, considering the change in beneficial holding of 51% or more, as provided u/s 79. On appeals before the appellate authorities, the CIT(A) gave partial relief. ITAT ruled in favour of assessee and allowed the deduction claimed u/s 35AB and also set off and carry forward of losses for AY 2002-03 and 2003-04.

Aggrieved Revenue filed an appeal before Karnataka HC.

Issue arose as to whether the assessee would be entitled to carry forward and setoff of business loss for AY 2002-03 and 2003-04, though there was a change in shareholding as per Section 79.

Section 79 restricts carry forward and set-off of preceding year losses, against income of current year, when there is a change in shareholding of a Company, unless on the last day of the previous year the shares of the company carrying not less than 51% of the voting power were beneficially held by persons who beneficially held shares of the company carrying not less than 51% of the voting power on the last day of the year or years in which the loss was incurred. Revenue denied the set off of business losses to assessee. Revenue submitted that in AY 2002-03, the holding of ABL was reduced to 6% from 55%; the remaining 49% shares being transferred to a wholly owned subsidiary of ABL, namely AMCO Properties and Investments Limited ('the APIL'). On this basis, Revenue argued that as the holding company's shareholding was less than 51%, the set off of previous year losses could not be given.

Assessee submitted that because the "ABL" was holding 100% shares of APIL, which was a wholly owned subsidiary of ABL and fully controlled by ABL, even though the shareholding of ABL had been reduced to 6%, yet the voting power of ABL remained 51% and thus the restrictions of Section 79 were not attracted.

HC explained the motive behind Section 79 that the benefit of carry forward and set-off of business losses for previous years of a company should not be misused by any new owner, who may purchase the shares of the Company, only to get the benefit of set-off of business losses of the previous years, which may bear profits in the subsequent years after the new owner takes over the company.

HC stated that even though there was change in the shareholding in the assessment year 2002-03, yet, there was no change of control of the Company, as the control remained with the

[1] *Contributed by CA. Sahil Garud and ICAI's Editorial Board Secretariat & Indirect Taxes Committee.*
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ABL as the voting power of ABL, along with its subsidiary Company APIL, remained at 51%. HC thus allowed carry forward and set off of business loss for AY's 2002-03 and 2003-04. HC relied on SC court ruling in *CIT vs. Italindia Cotton Private Limited* [(1988) 174 ITR 160 (SC)] wherein it was held that Section 79 would be applicable only when there is change in shareholding in the previous year which may result in change of control of the Company and that every such change of shareholding need not fall within the prohibition against the carry forward and set-off of business losses.

Issue also arose as to whether the assessee was entitled to deduction u/s 35AB with regard to payment for transfer of technical know-how.

Revenue argued that since Section 35AB uses the phrase *'where the assessee has paid any lumpsum consideration',* the amount should actually be 'paid' in lumpsum and installment payments would not be eligible for benefit of Section 35AB. On the contrary, the assessee submitted that the liability to pay would arise on the date when technical know-how was transferred and merely because the payment had been deferred, it could not be said that the liability had not incurred on such date, as the assessee was following the mercantile system of accounting and not the cash system.

HC analysed the definition of "Paid" used in Section 35AB and stated that *"the expression 'lumpsum consideration' used in Section 35AB of the Act, would only mean that the liability to pay the entire amount or 'lumpsum consideration' had occurred on the date of the agreement and transfer of know-how, even though the payment may not have been made in lumpsum, but deferred over a period of time..."*

HC relied on SC ruling in *Taparia Tools Ltd. vs. JCIT* (2015) 372 ITR 605 (SC) wherein while considering the definition "paid" under sub-section(2) of Sec 43 of the Act, it was held that *"even if the amount is not actually paid but 'incurred', according to the method of accounting, the same would be treated as 'paid'".*

HC thus allowed deduction claimed u/s 35AB with respect to sum of ₹5 crore for transfer of technical know-how, even though the amount was payable and paid in installments on subsequent dates.

HC thus ruled in favour of assessee.

LD/64/78

Mangalore Ganesh Beedi Works
vs.
Commissioner of Income Tax, Mysore and Anr.
15th October 2015 (SC)

Section 32, Income-tax Act, 1961-IPR is 'plant' u/s 32, and therefore depreciation is allowed thereon.

SC allows depreciation u/s 32 for expenditure incurred on acquisition of trademarks, copyrights and know-how during AY 1995-96. The same falls under the ambit of 'plant' u/s 43(3); SC leaves the question of applicability of Sec 35A/35AB open and examines applicability of Sec 32; Definition of 'plant' u/s 43(3) is inclusive and must be given a wider meaning; Sec 32 as it stood at the relevant time, did not differentiate between tangible and intangible assets.

The assessee is a partnership firm which was reconstituted from time to time and the dissolution clause as per the latest deed provided that in case of dissolution, copyrights, trademarks and know-how (IPRs) owned by assessee would vest in the partner who pays off the highest price to the remaining two partners. Owing to disputes between partners, firm was dissolved by HC's order which directed sale of firm's assets as a going concern to the highest bidder amongst the partners. Three erstwhile partners formed an association of persons ('AOP'/ assessee) and emerged as highest bidder by bidding ₹92 crore for firm's assets. In the return filed, the assessee-firm claimed deduction of ₹12.24 lakh on account of legal expenses and also claimed deduction u/s 35A and 35AB towards acquisition of IPR. AO rejected the assessee's claim whereas the CIT(A) partly allowed assessee's appeal. ITAT allowed the assessee's claims. Subsequently HC restored AO's order. Aggrieved, assessee preferred an appeal before SC.

Deduction of Depreciation on IPR:

HC had ruled in Revenue's favour by observing that by way of auction, only goodwill and not IPR was transferred. Revenue argued that assessee was already the owner of the trademarks, copyrights and technical knowhow and essentially the rights in the intellectual property might be included in goodwill, but these were not auctioned off but were relinquished in its favour. SC made a reference to ruling in *Bharat Beedi Works (P) Ltd. vs. CIT* [(1993) 3 SCC 252] to state that IPR has a value.

One valuation report from CA did not accord any value to IPR while the one obtained by the assessee from a different CA valued IPR at ₹14.4 crore as assessee's brand '501' had a brand name and value in national and international market. Beedis were not only known by the trademark, but also by the depiction on the labels and wrappers and colour combination on the package on which assessee was having copyright.

SC noted HC's order wherein benefit u/s 35A and 35AB was denied as HC was of view that no amount was spent by the AOP towards acquisition of trademarks, copyrights and know-how as what was auctioned off was only goodwill. In coming to this conclusion, reliance was placed by HC on a valuation report wherein it was stated that firms' assets were transferred as going concern and no trademarks, copyrights and know-how were acquired. With regards to the report obtained by the AOP from a different CA which assigned value to IPR, SC observed that HC had rejected the said report on belief that goodwill was split into know-how, copyrights and trademarks only for the purposes of claiming a deduction u/s 35A & 35AB.

SC took note of assessee's alternate claim of depreciation u/s 32 r/w Section 43(3) by claiming IPR as "plant". SC noted that though ITAT directed AO to capitalise the value of trademarks, copyright and technical know-how by treating the same as plant and machinery and granting depreciation therein, same was not considered by HC. SC thus kept the question of applicability of Sections 35A & 35AB open and proceeded to decide on assessee's claim u/s 32.

SC held *"for the purposes of a large business, control over intellectual property rights such as brand name, trademark etc. are absolutely necessary. Moreover, the acquisition of such rights and know-how is acquisition of a capital nature, more particularly in the case of the assessee. Therefore, it cannot be doubted that so far as the assessee is concerned, the trademarks, copyrights and know-how acquired by it would come within the definition of 'plant' being commercially necessary and essential as understood by those dealing with direct taxes".*

SC further observed that during the relevant time i.e. AY 1995-96, no distinction was made between tangible and intangible assets for the purposes of depreciation u/s 32 and thus, assessee was entitled to claim the benefit of depreciation on plant.

Deduction of Legal expense:

SC observed that legal expenses were incurred for defending business as a going concern after it was taken over, and so it could not be regarded as personal expense. SC remarked that there is no reason for HC to reverse this finding of fact particularly since nothing has been shown to conclude that the finding of fact was perverse in any manner whatsoever. That apart, if the finding of fact arrived at by the Tribunal were to be set aside, a specific question regarding a perverse finding of fact ought to have been framed by the High Court and that the Revenue did not seek the framing of any such question. SC thus set-aside HC's order and reinstated ITAT's order wherein ITAT had held that expenses incurred by the assessee were honest and reasonable and were incurred for the purposes of protecting firm's business as a going concern.

SC thus ruled in assessee's favour.

Service Tax

LD/64/79

Pearey lal Bhawan Association
vs.
M/s Satya Developers Pvt. Ltd.
20th October 2015 (DEL)

Section 83, Finance Act, 1994 r/w Section 12-B of Central Excise Act, 1944-Presumption that incidence of duty has been passed on to the buyer.

Service recipient is required to pay the Service Tax to the service provider even if the contract did not specifically mention it.

The plaintiff is the owner of premises which was given on lease by an agreement with the defendant in October 2006. Chapter V of the Finance Act 1994 was amended w.e.f. 01/06/2007 so as to levy service tax on renting of immovable property for business purposes. According to the plaintiff, the impugned tax was a levy on the service and was not in the nature of tax on property, and therefore had to be collected from the beneficiary. According to the defendant, it was the plaintiff who has to bear the incidence of the tax.

Defendant placed its reliance on ruling in case of Allahabad in *Thermal Contractors Association vs. Dir. Rajya Vidyut Utpadan Nigam Ltd.* wherein it was held that it is always open to the service provider to charge or not to charge the amount of service tax from its customers and to pay it from its own pocket. The collection of service tax from

beneficiary depended upon the contract between them. Defendant pointed out the relevant clause in the lease agreement which was as follows: *"That the lessor shall continue to pay all or any taxes, levies or charges imposed by the MCD, DDA, L&DO and or Government, Local Authority etc".*

HC analysed the provisions of Section 65(105)(zzzz) which explains definition of taxable service. Further, Section 83 r/w Section 12-B of Central Excise Act explains the presumption that the levy has been collected from the user.

HC observed that both the plaintiff and the defendant did not visualise that such kind of a levy would be made in respect of lease, or rental of commercial properties; it is also undisputed that the levy was made effective in 2007, after the parties had entered into the agreement. HC referred to SC ruling in *All India Federation of Tax Practitioners vs. Union of India* [(2007) 7 SCC 527] wherein the nature of service tax liability was explained.

HC noted that if the overall objective of the levy, as explained by the Supreme Court, were to be taken into consideration, it is the service which is taxed, and the levy is an indirect one, which necessarily means that the user has to bear it. The rationale why this logic has to be accepted is that the ultimate consumer has contact with the user; it is from them that the levy would eventually be realised, by including the amount of tax in the cost of the service (or goods).

HC referred to Section 64A of Sale of Goods Act 1930 which mentions that unless a different intention appears from the terms of the contract, in case of the imposition or increase in the tax after the making of a contract, the party shall be entitled to be paid such tax or such increase. HC observed that there was sufficient internal indication in the Act, through Section 83 read with Section 12-A and Section 12-B suggesting that the levy is an indirect tax, and the same can be collected from the user.

HC further ordered that the plaintiff was entitled to the declaration and injunctions claimed against the defendant to the effect that the latter is liable to pay and refund the service tax liability.

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LD/64/80

Gopala Builders

vs.

Director General of Central Excise Intelligence.

1st October 2015 (GUJ)

Section 87 of Finance Act 1994.

Revenue was incorrect in taking action u/s 87 of Finance Act 1994 of issuing notices to debtors of the petitioner by unilaterally working out the liability and further without issuing a demand notice. Recovery under section 87 of the Finance Act can be resorted to only after an amount of liability is adjudicated.

The petitioner is a firm providing services of industrial construction and is engaged in the business since 19 years and has got considerable goodwill in the market amongst clients. The petitioner carried out construction works for its clients on the basis of the works contract executed between them. In February 2014, search operations were carried out on the petitioner. As per the Revenue, the service tax liability of petitioner from the period between October 2009 to December 2013 was ₹4.25 crore as against ₹96.22 lakh paid by the petitioner.

The figure of ₹4.25 crore was arrived at unilaterally without affording any opportunity of hearing to the petitioner. No demand notice was issued in respect of the aforesaid liability computed by the first respondent. The petitioner was thereafter cooperated in the assessment proceedings and also paid an additional amount of ₹83 lakh during the course of investigation. In April 2014, notices were sent to debtors of the petitioner, with a direction that monies payable by the clients of the petitioner, instead of being paid to the petitioner, be deposited in the treasury of the Central Government. Aggrieved, the petitioner preferred the instant appeal.

HC observed that proceedings initiated against the petitioner were still at the stage of show cause notice and that there was no final adjudication in respect of the service tax liability. Revenue has issued notices to debtors of the petitioner u/s 87 of Finance Act 1994. HC referred to ruling in case of *Exman Security Services Pvt. Ltd. vs. Union of India* wherein it was observed that going by the language of Section 87 of the Finance Act, any amount payable means the amount adjudged after hearing the show cause notice, and this provision of Section 87 is one of the methods of recovery of the amount due and payable after adjudication is done. HC therefore noted that at the stage of show cause notice when the liability of the petitioner is yet to be crystallised, it was not permissible for the Revenue to resort to the drastic provisions of Section 87 of the Act.

Further, it was an admitted fact that no demand notice in respect of the impugned amount was issued to the petitioner and directly garnishee orders had been issued to the debtors of the petitioner. HC remarked that such course of action adopted by the Revenue, evidently, would bring the petitioner to disrepute and spoil its reputation in the business. Therefore, the action of the respondents of resorting to the provisions of Section 87 of the Act was not warranted.

HC thus allowed the petition.

LD/64/81

Commissioner of Central Excise & Customs
vs.
M/s Godavari Sugar Mills Ltd.
5th October 2015 (KAR)

Section 68 of Finance Act 1994 read with Rule 3(4)(e) of the Cenvat Credit Rules, 2004

As a recipient of service, assessee is permitted to utilise Cenvat credit for payment of Service tax on Goods Transport Agency service.

The assessee is a manufacturer of excisable goods and is holder of Central Excise Registration, and was also registered for payment of Service Tax under the category of Goods Transport Agency (GTA) services. The assessee had utilised the Cenvat Credit of input services availed under Cenvat Credit Rules towards payment of GTA services. It was the Revenue's contention that the assessee is a deemed provider of services only for the limited purpose of discharging service tax liability. Revenue opined that the act of the assessee of taking credit of service tax paid on GTA services and reutilising the same for payment of service tax on GTA services was not tenable. Accordingly notice was issued demanding recovery of cenvat credit, interest thereon and penalty u/s 76.

The Commissioner allowed appeal of the assessee based on circular issued by the Board dated 3.10.2005 and on an interpretation of Rule 2(p) and 2(r) as the said Rules stood prior to 19.4.2006. Further, the Tribunal also allowed assessee's appeal, aggrieved against which the revenue preferred the instant appeal.

HC noted that the instant matter was covered by the rulings of P&H HC in *Commissioner of Central Excise, Chandigarh vs. Nahar Industrial Enterprises Limited* [2012 (25) STR 129] and Delhi HC ruling in *Commissioner of Service Tax vs. M/s. Hero Honda Motors Limited* [2013 (29) STR 358 (Delhi)]. In those cases, the High Courts had relied on CBEC's Excise Manual of Supplementary Instructions. The said manual does not indicate any legal bar for the utilisation of Cenvat Credit for the purpose of payment of service tax on the GTA services. Apart from the above, as per Rule 3(4)(e) of the Cenvat Credit Rules, 2004, the Cenvat Credit may be utilised for payment of service tax on any output services. HC further analysed the legal fiction created by Section 68(2) of the Finance Act 1994 which reads as follows *"Notwithstanding anything contained in sub-section (1), in respect of any taxable service notified by the Central Govt. in the Office Gazette, the service tax thereon shall paid by such person and in such manner as may be prescribed at the rate specified in section 66 and all the provisions of this chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service."*

HC thus ruled in favour of the assessee.

LD/64/82

M/s Future Gaming and Hotel Service Pvt. Ltd.
vs.
Union of India.
14th October 2015 (SIK)

Section 65(105) (zzzzn) of the Finance Act, 1994-Section 66D of the Finance Act, 1994– Negative List of services.

Activity of facilitation of State Govt lottery is not 'service'; Amendment in 2015 Finance Act struck down.

Activity of promoting, organising or assisting in arranging sale of lottery tickets of State Govt. is not a taxable 'service' under Finance Act 1994, as amended by Finance Act 2015; Impugned activity does not establish relationship of a principal and agent but that of a buyer and seller on principal to principal basis, there being bulk purchase of lottery tickets by assessees from State Govt. at discounted price; TRU clarification under D.O.F. Circular dated May 19, 2015 that though lottery per se is not subjected to service tax, but services in relation to lottery will be taxable w.e.f. June 1, 2015, is clearly erroneous and therefore quashed, since Dept. has failed to take note of definition of 'service'; Rule 6(7C) only provides an optional composition scheme for tax payment which by itself does not create a charge and that same is only a piece of subordinate legislation that cannot

go beyond the provisions of Finance Act; Levy of reverse service tax vide Notification No.30/2012-ST as amended by Notification No.7/2015-ST on activity of assessees' selling/marketing agents holding that there is no privity of contract between the parties struck down.

The issue which fell for adjudication before the court was whether or not the activity of the Petitioners of promoting, organising or assisting in arranging the sale of lottery tickets of the Government of Sikkim is a taxable service falling within the purview of the Finance Act, 1994 as amended by the Finance Act, 2015. The petitioner is a private limited company engaged in the business of sale of paper and online lottery tickets respectively organised by the Government of Sikkim. Petitioner entered into an agreement in Jan 2015 whereby Petitioner procured lottery tickets in bulk from the Government and resold the same to the public at large through various agents, stockists, resellers, *etc*.

The amendment to the Finance Act 1994 sought to make service tax applicable to the petitioner w.e.f. 01.06.2015. Notices were issued to petitioner by the Revenue authorities with respect to taxing the service of lottery distributors and selling agents, under Rule 6(7C) of Service Tax Rules 1994. Petitioner submitted that activities involve purchase of lottery tickets in bulk from the State Government and selling them to stockists, resellers, *etc*., by adding a profit margin. The stockists, resellers, *etc.,* in turn sell these tickets to retailers which in turn sell them to the ultimate participants of the draw. The transaction by which tickets are sold to the Petitioner by the Government of Sikkim is one of sale and purchase of lottery tickets and not one of rendering services. Petitioner further submitted that tax cannot be imposed by a Parliamentary Law on lottery tickets in view of List II of Seventh Schedule of the Constitution of India under Entry 34 of which the subject-matter of "betting and gambling" and the subject-matter of "taxes on betting and gambling" under Entry 62, fall within the sole competence of the State Legislature and, therefore, the levy of service tax is *ultra vires* the Constitution of India.

After going through the arguments of Petitioners and Respondent, HC analysed the rulings in *Future Gaming Solutions India Private Limited vs. Union of India and Others [2014 (36) STR 733 (Sikkim)]* and *Future Gaming Solutions Private Limited vs. Union of India and Others [2015 (37) STR 65 (Sikkim)]*. In that case it was held that:

(i) That lottery consists of whole gamut of activities commencing from the buying and selling of lottery between the State Government and the Petitioners, between the Petitioners and the Stockists and then between the Stockists and the sellers, then between the sellers and the buyers and ultimately winning of the prize.

(ii) That lottery is an actionable claim;

(iii) That "actionable claim" is defined under Section 3 of the Transfer of Property Act, 1882;

(iv) That actionable claim is left out from the purview of service tax in the negative list by virtue of Section 66D of the Finance Act, 1994, as amended by the Finance Act, 2010 and the Finance Act, 2012;

(v) That lotteries fall within the meaning of "betting and gambling" as provided in Entry 34 of List II following the jurisdiction in R.M.D. Chamarbaugwala Case (supra) and, therefore, by virtue of Entry 62, "taxes on betting and gambling" lies in the exclusive domain of the State Legislature;

(vi) That buying and selling of lottery tickets is nothing but actionable claim following the decision in Sunrise Associates Case (supra);

(vii) That in the garb of a Subordinate Legislation, i.e., Sub-Rule (7C) of Rule 6 of the Service Tax Rules, 1994, it is not permissible to charge service tax as it would be beyond the scope of the parent Legislation. All the more so as Sub- Rule (7C) of Rule 6 only provides an optional composition scheme for payment of service tax and that unless there is levy of service tax under the statutory provisions, the alternate scheme cannot be extended so as to provide for such levy.

HC further noted that in *Future Gaming 2015* case it was held that activities of the lottery distributors do not constitute a service and thus beyond the purview of "taxable service" as statutorily defined under clause (zzzzn) of subsection 105 of Section 65 of the Finance Act, 1994 as amended *vide* Finance Act, 2010.

With respect to amendments made in 2015, HC observed that Clause (31A) has been specifically inserted u/s 65B to include definition of "lottery distributor" or "selling agent". Under Clause (44) 'service' has been defined to mean any activity carried out by a person or another for consideration and includes a declared service but shall not include an activity which constitutes merely a transaction in money for actionable claim. It observed that

Explanation 2 appears to have been inserted to Clause (44) of Section 65B by which the transaction in money or actionable claim as provided under Clause (44) excluded any activity carried on for a consideration in relation to or for facilitation of, a transaction in money or actionable claim, including the activity carried out, *inter alia*, by a lottery distributor or selling agent in relation to promotion, marketing, organising, selling lottery or facilitating in organising lottery of any kind in any other manner. Similarly, in Section 66D which provide for the negative list of service, another Explanation is found to have been inserted by which the activity specified in Explanation 2 to Clause (44) of Section 65B has been specifically excluded. It also observed that Clause (44) of Section 65B of the Finance Act, 1994, defines 'service' that would require examination in order to ascertain as to whether the activity of the Petitioners would fall within the meaning of 'service' and, therefore, liable to levy of service tax under the Finance Act, 1994.

Further, in Future Gaming 2015 case, it was held that activity of the Petitioners comprising of promotion, organising, reselling or any other manner assisting in arranging the lottery tickets of a State Lottery does not establish the relationship of a principal and an agent but that of a buyer and a seller on principal to principal basis there being bulk purchase of lottery tickets by the Petitioners from the State Government on full payment on a discounted price as a natural business transaction and other related features and, of there being no privity of contract between the State Government and the Stockists, agents, sellers, *etc.*, under the Petitioner. HC perused the relevant portions of agreement dated Jan 2015 to verify whether there has been any change in such relationship.

HC remarked that it found no change in the circumstances by introduction of the new provisions by the Amendment Act of 2015 from that which existed earlier in Future Gaming Case 2015 (*supra*) and Future Gaming Case 2014 (*supra*). HC agreed with Petitioner's contention that it is trite that when a Legislature sets out to validate a tax declared by a Court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before the validation can be said to take place effectively.

HC further observed that since the selling and marketing agents purchase the tickets from the Petitioners/Distributors as goods on payment of price leaving the former charged with all the liabilities down the line to the second tier agents, it cannot be considered as an activity carried out for consideration in relation to or for facilitation of a transaction in money carried out by a lottery distributor or a selling agent in relation to promotion, marketing, organising, selling of lottery or facilitating in organising lottery of any kind in any other manner as provided under Explanation 2 to Clause (44) of Section 65B. There is no dispute of the fact that like the Petitioners/Distributors in the first tier who purchased the lottery tickets in bulk as goods for price from the State Government, the second tier comprising of the selling and marketing agents also purchased from the Petitioners/Distributors lottery tickets in bulk as goods on payment of price severing all other relations. There is no privity of contract between the Petitioners/ Distributors and the sellers and buyers down the line after the second tier. Thus, the levy of reverse service tax *vide* Notification No.30/2012-ST dated 20-06-2012 as amended by Notification No.7/2015-ST dated 01-03-2015 is clearly unsustainable and liable to struck down.

Ruling in favour of assessee, HC thus held as follows:

(i) The Petitioners in buying and selling the lottery tickets is not rendering service to the State and, therefore, their activity does not fall within the meaning of 'service' as provided under Clauses (31A) and (44) of Section 65B and, therefore, outside the purview of Explanation 2 to the said Section;

(ii) In any case, since by the Explanation the scope of Section 66D which is the main provision which is to be expanded, it would be ultra vires the Finance Act, 1994 and is accordingly struck down;

(iii) The impugned letters issued by the Revenue to the petitioners have been issued on an erroneous interpretation of Section 66D of the Finance Act, 1994, as amended by the Finance Act, 2015 requiring the Petitioners to pay tax under the Service Tax Rules, 1994, (as amended), in the absence of specific provision in the Finance Act and that Sub-Rule (7C) of Rule 6 of the Service Tax Rules, 1994, only provides an optional composite scheme for payment of tax and, therefore, does not create a charge of service tax and is a Subordinate piece of Legislation, hereby stands quashed. Resultantly, Circular under D.O.F. No.334/5/ 2015-TRU dated 19-05-2015 referred to in the aforesaid letters in the two Writ Petitions also stand quashed; and

(iv) The Respondents, their agents, servants, officers and representatives are restrained directly or indirectly, and in any manner whatsoever, from demanding any amounts by way of service tax or enforcing the provisions of the Finance Act, 1994 on the activity of the Petitioners in relation to lottery tickets.

Excise Law

LD/64/83

Commissioner of Central Excise
vs.
Fitrite Packers
7th October, 2015

Section 2(f) of the Central Excise Act, 1944.

Blank paper could be used as wrapper for any kind of product, however, after the printing of logo and name of the specific product, the end use is confined to only that particular and specific product of the said particular company/customer-Printing, is not merely a value addition but has now been transformed from general wrapping paper to special wrapping paper-End use has positively been changed as a result of printing process undertaken by the assessee-printing has resulted into a product, i.e., paper with distinct character and use of its own which it did not bear earlier-activity amounts to manufacture and CE duty payable under 4811.90.

The main question before SC was whether the goods in question, i.e., printed GI paper are classifiable under Chapter heading 4811.90, as claimed by the Revenue or they were to be classified under Chapter heading 4901.90 as the product of printing industry, as per the stand taken by the assessee.

The assessee purchased GI paper from the market which was already duty paid base paper. On this paper, process of printing was carried out by the assessee according to the design and specifications of the customers depending on their requirements. This printing was done in jumbo rolls of GIP twist wrappers. Bulk orders were received from Parle, which needed the said paper as a wrapping/packing paper for packing of their goods. On the paper, logo and name of the product was printed in colorful form. After carrying out the printing as per the requirement of the customers, the same was delivered to the customers in jumbo rolls without slitting.

Revenue contended that, no doubt, paper in question was meant for wrapping/packing of the goods of the customer but that was not the determinative factor and a vital feature/aspect which was missed by the Tribunal was that after printing the said GI paper rolls, it was used for specific purpose which was not possible with the plain paper. In support, some decisions of this Court were cited. Countering the same, the assessee argued that approach of the Tribunal was perfectly justified which was in consonance with the principle laid down by SC in *J. G. Glass Industries* [1998 (97) ELT 5 (SC)]. Assessee further contended that the Tribunal had rightly held that the primary purpose for which GI paper was used in the wrapping/packaging and even after GI paper was printed, the essential functioning of this paper remained the same, namely, wrapping and had not changed by the process of printing.

SC asserted that in order to discern the principles that were to be applied for ascertaining as to whether a particular process amounts to manufacture within the meaning of Section 2(f) of the Central Excise Act, 1944, it was not necessary to refer to various case laws on the subject. Our purpose would be served by referring to a recent decision, which was rendered by SC, in the case of *Servo-Med Industries Pvt Ltd vs. CCE* (319) ELT 578]. SC reasoned that in the said decision, many earlier judgments were taken note of, considered and principles laid down therein were culled out. SC reiterated elaborate discussion on the aspects covering (i) Distinction between manufacture and marketability (ii) circumstances when transformation did not take place and (iii) essential character of the product do not undergo change there would be no manufacture.

SC further explained that the principle that where there was no commercial user without further process then the said process would amount to manufacture labelling it as 'test of no commercial user without further process'.

SC observed the process of printing and asserted that GI paper is meant for wrapping and the use thereof did not undergo any change even after printing as the end use was still the same, namely, wrapping/packaging. SC further held *"No doubt, the paper in-question was meant for wrapping and this end use remained the same even after printing. However, whereas blank paper could be used as wrapper for any kind of product, after the printing of logo and name of the specific product of Parle*

thereupon, the end use was now confined to only that particular and specific product of the said particular company/customer."

Thus, SC held that the printing is not merely a value addition but has now been transformed from general wrapping paper to special wrapping paper. In that sense, end use has positively been changed as a result of printing process undertaken by the assessee. SC opined that the process of aforesaid particular kind of printing has resulted into a product, i.e., paper with distinct character and use of its own which it did not bear earlier.

SC emphasised that there had first to be a transformation in the original article and this transformation should bring out a distinctive or different use in the article, in order to cover the process under the definition of 'manufacture'. SC held that these tests were satisfied in the present case.

Thus, SC allowed the appeal of Revenue setting aside the order of Tribunal and restoring the Order-in-Original passed by the Adjudicating Authority.

LD/64/84

Spentex Industries Ltd

vs.

CCE

9th October, 2015 (SC)

Rule 18 and 19 of the Central Excise Rules, 2002.

In case of Rebate of duty paid-Both inputs and final products are entitled for rebate-"OR" means "AND".: Rule 18 stipulates that the Central Government may, by notification, grant rebate of duty paid on such excisable goods OR duty paid on material used in the manufacturing or processing of such goods. The word 'OR' which is used in between the two kinds of duties in respect of which rebate can be granted is the bone of contention and it is to be interpreted whether it postulates grant of one of the two duties or both the duties can be claimed.

Interpretation of word 'OR' occurring in Rule 18: The only inevitable consequence is this: the word 'OR' occurring in Rule 18 cannot be given literal interpretation as that leads to various disastrous results and, therefore, this word has to be read as 'and' as that is what was intended by the rule maker in the scheme of things and to carry out the objectives of the Rule 18 and also to bring it at par with Rule 19.

The basic question of law which arose for consideration was as to whether or not the manufacturer/exporter was entitled to rebate of the excise duty paid both on the inputs and on the manufactured product, when excise duty was paid on a manufactured product and also on the inputs which have gone into manufacturing the product and such manufactured product was exported.

The assessee was engaged in the manufacturing of polyester cotton blended yarn and polyester viscose blended yarn and both these products fell under Chapter 55 of the Schedule to the Central Excise Tariff Act, 1985. For manufacture of the aforesaid product, the assessee had used the raw material which was an intermediate product and paid excise duty thereupon. The final products were also cleared on payment of excise duty on those finished products. The assessee had exported these goods on payment of central excise duty in the CENVAT account and, thereafter, filed as many as forty-five rebate claims in the months of November and December, 2004. These rebate claims were filed under the provisions of Rule 18 of the Central Excise Rules, 2002.

On receipt of the aforesaid rebate claims, the Department issued SCN dated 11th January, 2005 whereby the assessee was called upon to show cause as to why the rebate claimed by the assessee be not rejected as it was contrary to the provisions of Rule 18 of the Rules read with Section 11B of the Act and the Notification issued thereunder, i.e., Notification No. 19/2004-CE(NT) dated 6th September, 2004. After considering the reply that was given by the assessee, the Dy. CCE rejected the rebate of duty paid on the final product exported as well as the claim of rebate of duty paid on inputs contained therein by passing Order-in-original dated 28th January, 2005. Aggrieved by this order, the assessee filed the appeal before the CCE (Appeals) wherein it was held that in terms of Rule 18 of the Rules, the assessee was entitled to one of the two claims for rebate, i.e., either rebate of duty paid on exported goods or the duty paid on inputs used in the exported goods, and not on both of them. He, thus, remitted the case back to the Deputy Commissioner to decide the claim of the assessee after granting personal hearing to the assessee and taking its option as to which of the two claims assessee wanted to prefer.

Still not satisfied with this partial relief given by the Commissioner (Appeals), as the assessee wanted rebate on both types of excise duties paid, assessee

challenged the order of the Commissioner (Appeals) by filing Revision Application before the Joint Secretary to the Government of India u/s. 35EE of the Act. This Revision Application of the assessee was decided in its favour as the Joint Secretary held that the assessee was entitled to rebate both on the exported goods as well as inputs used in the exported goods. It was now the turn of the Department to feel dissatisfied with the aforesaid outcome and, therefore, it challenged the aforesaid revision order by filing the writ petition before Nagpur bench of Bombay HC. This writ petition had been decided in favour of the Revenue whereby the view taken by the Joint Secretary to the Government of India was reversed and that of Commissioner (Appeals) was upheld holding that out of the two excise duties, Rule 18 of the Rules permits rebate only qua one of them and not on the both duties. Aggrieved, Special Leave Petition against this judgment of the Bombay High Court was preferred by the assessee in which leave was granted.

SC held that it was to be borne in mind that it was the Central Government which had framed the Rules as well as issued the notifications. If the Central Government itself was of the opinion that the rebate was to be allowed on both the forms of excise duties the government is bound thereby and the rule in-question had to interpreted in accord with this understanding of the rule maker itself. Law in this respect was well settled and, therefore, it was not necessary to burden this judgment by quoting from various decisions. SC relied on its own ruling in *R & B Falcon (A) Pty Ltd. vs. CIT* [(2008) 12 SCC 466] wherein interpretation given by the Central Board of Direct Taxes (CBDT) to a particular provision was held binding on the tax authorities.

SC opined that that another principle of interpretation of statutes, namely, principle of *contemporanea expositio* also became applicable which was manifest from the act of the Government in issuing two notifications giving effect to Rule 18. This principle was explained by the Court in *Desh Bandhu Gupta and Co. and others vs. Delhi Stock Exchange Association Ltd.* [(1979) 3 SCR 373]. While discussing Interpretation of word 'OR' occurring in Rule 18, SC held that the word 'OR' occurring in Rule 18 cannot be given literal interpretation as that lead to various disastrous results pointed out in the preceding discussion and, therefore, this word has to be read as 'and' as that is what was intended by the rule maker in the scheme of things and to carry out the objectives of the Rule 18 and also to bring it at par with Rule 19. SC further held that these two words normally 'or' and 'and' are to be given their literal meaning in unless some other part of same Statute or the clear intention of it requires that to be done. However, wherever use of such a word, viz., 'and'/'or' produces unintelligible or absurd results, the Court has power to read the word 'or' as 'and' and *vice-versa* to give effect to the intention of the Legislature which is otherwise quite clear. This was so done in the case of *State of Bombay vs. R.M.D. Chamarbaugwala* [(1957) 1 SCR 874].

SC relied on *Mazagaon Dock Ltd. vs. CIT* [(1959) 1 SCR 848] wherein it was held that the word 'or' occurring u/s. 42(2) of the Income-tax Act, 1922 was construed as 'and' when the Court found that the Legislature 'could not have intended' use of the expression 'or' in that Section.

Thus, SC held that the exporters/appellants were entitled to both the rebates under Rule 18 and not one kind of rebate.

LD/64/85
CCE
vs.
Ispat Industries Ltd.
7th October, 2015 (SC)

Section 4 of the Central Excise Act, 1944-Valuation of excisable goods.

By virtue of a transit insurance policy in the name of the manufacturer, excise duty is not liable to be recovered on freight charges incurred for transportation of goods from the factory gate to the buyer's premises, treating the buyer's premises as the place of removal.

The respondent, Ispat Industries Ltd, was engaged in the manufacture of H.R. sheets/coils, C.R. sheets/coils, and Galvanised/colour coated/ sheets, falling under Chapter 72 of the First Schedule to the Central Excise Tariff Act, 1985. Intelligence revealed that respondents were indulging in evasion of central excise duty by a mis-declaration that their factory gate was the place of removal, and not the buyer's premises, consequent to which freight charges recovered from their buyers was sought to be added in determining the amount of central excise duty payable by them.

The period involved in the present appeal is from 28.9.1996 to 31.3.2003. Five show cause notices were issued to respondent stating that the property in goods manufactured by them remained with Ispat

while the goods were in transit as Ispat had taken out an insurance policy to cover the risk of loss or damage to the goods while in transit. Purchase orders as well as agreements with transporters did not suggest that the transporters were taking delivery on behalf of the buyers. All this was corroborated by a statement made by Deputy General Manager stating that the ownership of the goods in transit remained with Ispat. It was thus stated that the buyer's place or the place of delivery should be treated as the place of removal of the goods for the purpose of Section 4 of the Central Excise Act, and this being so, the necessary consequence would be that the freight charges paid by the buyers to Ispat ought to be included in the excise duty payable by Ispat.

In reply to the five show cause notices, respondent stated that all their prices were ex-works, and that the goods were cleared from the factory on payment of central or local sales tax. Most of their sales were against Letters of Credit opened by the customer or through Bank discounting facilities. Invoices were prepared at the factory directly in the name of the customers, and the name of the Insurance company as well as the number of Transit Insurance Policy were both mentioned. Based on the details mentioned in the invoice, the lorry receipt was prepared by the transporter and was in the buyer's name. This receipt carried a caution notice as well a notice to the effect that deliveries were to be made to the buyer alone, and to nobody else. Respondent further stated that these transactions were entered in their sales register and were booked as sales, the stock or inventory of finished goods being reduced by such sales. In the event that there was an insurance claim, recovery was credited to the customer's ledger account against the recovery due from the customer in respect of the sale of the said goods.

The Commissioner held that as the insurance agreement with the transporter was entered into by Ispat who had taken out an Insurance Policy to cover risk to the loss or damage of the goods while in transit, the property in goods remained with Ispat and was not transferred to the buyer at the factory gate. The Commissioner further held that in the order acceptance form, it was mentioned that the transport would be by Ispat.

On appeal before CESTAT, it was held that the payment terms were 30 days after receipt of the materials and that the order acceptance form shows that it was the obligation of Ispat to arrange transportation of goods to the buyer's premises, were beyond the show cause notices issued as no such charge was leveled against Ispat in any of the five show cause notices.

On appeal, SC observed that provisions of Section 4 dealt with Valuation of excisable goods for purposes of charging of duty of excise. SC held *"three important changes have been made in the amended Section 4 so far as the present case is concerned. First, the value of excisable goods is deemed to be the "normal price" thereof that is the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade. Where the goods are sold at different prices to different classes of buyers, each such price shall be deemed to be the normal price. "Place of removal" has been defined for the first time to mean not only the premises of production or manufacture of excisable goods but also a warehouse or any other place or premises wherein such goods have been permitted to be deposited without payment of duty and from where such goods are ultimately removed."*

SC held that where the price at which goods were ordinarily sold by the assessee was different for different places of removal, then each such price would be deemed to be the normal value thereof and sub-clause (b)(iii) was very important and made it clear that a depot, the premises of a consignment agent, or any other place or premises from where the excisable goods were to be sold after their clearance from the factory were SC further held that the expression "any other place or premises" referred only to a manufacturer's place or premises because such place or premises was stated to be where excisable goods "are to be sold". These were the key words of the sub-Section. The place or premises from where excisable goods were to be sold could only be the manufacturer's premises or premises referable to the manufacturer.

SC relied on its own ruling in *Bombay Tyre International* [1984 SCC (Tax) 17] wherein it was held that *"In our view the Commissioner of Central Excise and CEGAT erred in drawing an inference that the ownership in the property continued to be retained by the assessee till it was delivered to the buyer for the reason that the assessee had arranged for the transport and the transit insurance. Such a conclusion is not sustainable."*

SC observed that most of the orders placed with respondent were by the various government authorities. One such order i.e. order dated 24-6-1996 placed by Kerala Water Authority is on record.

On going through the terms and conditions of the said order, it became clear that the goods were to be delivered at the place of the buyer and it was only at that place where the acceptance of supplies was to be effected. Price of the goods was inclusive of cost of material, central excise duty, loading, transportation, transit risk and unloading charges, *etc*. Even transit damage/breakage on the assessee account which would clearly imply that till the goods reach the destination, ownership in the goods remain with the supplier, namely, the assessee. As per the "terms of payment" clause contained in the procurement order, 100% payment for the supplies was to be made by the purchaser after the receipt and verification of material. Thus, SC held that there was no money given earlier by the buyer to the assessee and the consideration was to pass on only after the receipt of the goods which was at the premises of the buyer. SC held that sale of goods did not take place at the factory gate of the assessee but at the place of the buyer on the delivery of the goods in question.

SC distinguished its own ruling in *Escorts JCB Ltd.* [(2003) 1 SCC 281] and *Emco Ltd.* [2015-TIOL-163-SC-CX] on facts.

Thus, SC dismissed the appeal preferred by the Revenue.

Customs Law

LD/64/86

Union of India and Anr

vs.

M/s Jayshree Metal Corporation

6th October, 2015 (SC)

Section 111(d) and 111(m) of Customs Act, 1962-Confiscation of improperly imported goods.

Imported 'scrap' is assessable based on highest auction bid received.

Report obtained by Department based on value prevailing in Indian market, assesses product incorrectly and is 'extraneous', hence, same cannot be accepted; Once said value was discarded and Department had no other evidence to show how these goods could be valued, going by highest bid received was the only alternative.

The assessee imported Zinc Die Cast Scrap and claimed classification under Chapter Sub-Heading 7902 of Customs Tariff Act, 1975. On the basis of an expert opinion, it was found that, goods imported were actually articles of zinc such as door handles, door lock nobes, water tap handles or shower handles and bathroom fitting covers of virgin quality and of serviceable nature. Few pieces were found to be scrap and balance all items were found to be unused and they were serviceable.

Consignment was seized under a belief that the same was misdeclared for description and value and were liable for confiscation u/s 111(d) and 111(m) of Customs Act, 1962 (The Act). Subsequently, Show Cause Notice (SCN) was issued u/s 124 of the Act relating to confiscation of goods, levy of duty on valuation done by valuer and levy of penalty. Commissioner upheld all the allegations in SCN. On an appeal, CESTAT upheld the order in original but set aside the penalty on proprietor.

Assessee's petition was upheld by the High Court. High Court held that what was imported was nothing but scrap and further, it was sold as scrap even by the Department and in two rounds of auction, the highest bids received for the same were ₹11,75,000/- and ₹13,55,555/-; therefore, the value of this scrap could not have been higher.

Based on the 'Inspection Report' obtained by Department, SC stated that goods imported were nothing but scrap and there was no mis-declaration by assessee. SC observed that Dept. did not value the product correctly and was based on the value as prevailing in the Indian market which alone is 'extraneous'. SC noted that, exporter in USA who had exported these items to assessee herein itself was a scrap dealer and these items were treated as scrap in USA and were exported from USA to India which was bought by assessee as scrap. When valuation was itself discarded, Department had no other evidence to show how these goods could be valued and the burden to show that the valuation was on Department and in the absence of any such evidence produced by Department, High Court had no option but to go by the highest bid that was received while auctioning these goods. SC thus dismissed Revenue's appeal.

LD/64/87

M/s Star Industries

vs.

Commissioner of Customs, (Imports), Raigad

7th October 2015 (SC)

Section 3(1) of Custom Tariff Act, 1975.

CVD exemption denied; 'Concentrate' held to be different from 'Ore.'

Note 2 to Chapter 26 deals with mineralogical species used in metallurgical industry, and after

insertion of Note 4 in 2011, concentrate was to be treated as different product; Harmonious construction of both Notes indicate that when Ores become a different product, they cease to be 'Ores'; If imported concentrates not subjected to 'CVD', interest of domestic manufacturers will be sub-served, since such an interpretation militates against domestic producers' interests and plain language of Notification.

The assessee, Star Industries is engaged in manufacture of Ferro-Alloys falling under Chapter 72 of Central Excise Tariff. Assessee has been regularly importing Ore Concentrate and claiming benefit of Notification No.4/2006-CE and Department has been extending the benefit. No CVD was levied u/s 3(1) of Custom Tariff Act, 1975. The Directorate of Revenue Intelligence (DRI) received some information indicating that assessee was misdeclaring the product as 'Molybdenum Ore' or 'Roasted Molybdenum Ore' and on that basis, seeking benefit of exemption under Notification No. 4/2006-CE. According to them, Roasted Molybdenum Ore was, in fact, Ore Concentrate which was different from 'Ores' and therefore benefit of said Notification No. 4/2006-CE was not available to the assessee.

Examination of certain detained consignments of the assessee revealed that in respect of B/E No.4567406 bags in which goods were packed contained labels/marking which read as 'Roasted Molybdenum Concentrate' and in respect of other B/E the markings were 'Molybdenum Sulfide (MoS2) Roasted. Samples were sent for chemical examination and on that basis goods consignment was seized u/s 110 of Customs Act on the plea that they were liable for confiscation.

Upon investigation, it was revealed that assessee had imported identical goods earlier under 14 B/E's by declaring the goods as 'Molybdenum Ore/Roasted Molybdenum Ore' and had availed CVD exemption totally amounting to ₹3,10,73,035/- during March, 2011 to July, 2011. Show Cause Notice (SCN) was issued proposing to confiscate 59,000 kgs of Roasted Molybdenum Ore Concentrate seized, valued at ₹6,12,61,048/- and 2,75,000 kgs of the said goods valued at ₹28,57,49,418/- imported earlier under 14 Bills of Entry, u/s 111(d) and 111(m) of Customs Act, 1962. Demand of differential duty was also proposed amounting to ₹66,61,664/- on the seized goods and ₹3,10,73,035/- on the goods imported earlier u/s 28(1) of Customs Act along with interest u/s 28AA apart from penalties u/s 114A and 112(a) of Customs Act.

Demand for March 2011 to September 2011 was confirmed, importation seized and realised earlier provisionally was confiscated u/s 111(d) and 111(m) of Customs Act with an option to redeem the same on payment of fine of ₹1 crore u/s 125 of the said Act and those imported earlier was liable for confiscation under the same provisions in respect of which differential duty demand of ₹66,61,664/- and ₹3,10,73,035/- were confirmed by denying the benefit of CVD exemption along with interest u/s 28AA of the Customs Act. A penalty of equivalent amount was also imposed u/s 114A. On an appeal before CESTAT partial relief was granted only to the effect that confiscation of goods u/s 111(d) of the Customs Act was improper and order to that extent was set aside with consequential order of setting aside the imposition of redemption fine u/s 125 and penalty u/s 112(a)/114A of the Customs Act.

Another appeal was tagged with the instant appeal i.e. *Commissioner of Customs (Imports) vs. M/s. Hindustan Gas and Industries Ltd.* related to period 2nd September, 1998 to October, 1999. Facts in the said case were the same where adjudicating authority stated that, after Molybdenum Ore was subjected to process of concentratic and roasting, it had become a different product, namely, Molybdenum Oxide and did not remain 'Ore' and, therefore, was not entitled to benefit of exemption notification which applied only to 'Ore'. On an appeal, CESTAT set aside the order of adjudicating authority and held that, even after Molybdenum Ore had undergone process of Roasting, it remained Ore and there was no difference between Ore and Concentrate which were one and the same product.

CESTAT in *Hindustan case* held that roasting of an ore to obtain concentrate, does not amount to manufacture, as it only removed impurities and the recoverable content of metal oxide is enhanced thereby. Thus, ore and concentrate are one and the same as concentrate remains ore and only impurities were removed therefrom. Tribunal relied upon decision in *Minerals and Metals Trading Corporation vs Union Of India and Others (MMTC)* and stated that, 'Ore' is genus and 'Concentrate' is species. The Tribunal further held that, mention of ores and

concentrates separately in Heading 26.03 does not go against the above arguments.

SC analysed Chapter 26 of Central Excise Tariff Act 1985 (CETA) which deals with 'Ores, Slag and Ash Notes. Item 2601 thereof gave the description of goods falling in the said item as 'Iron Ores and Concentrates including Roasted Iron Pyrites'. SC took note of Note 2 *"For the purposes of headings 2601 to 2617, the term "ores" means minerals of mineralogical species actually used in the metallurgical industry for the extraction of mercury, of the metals of heading 2844 or of the metals of Section XIV or XV, even if they are intended for non-metallurgical purposes. Headings 2601 to 2617 do not, however, include minerals which have been submitted to processes not normal to the metallurgical industry."* Further, there was an amendment in the year 2011, where Chapter Note 4 was added which reads as *"In relation to products of this Chapter, the process of converting ores into concentrates shall amount to "manufacture" but Tariff Item 2601 remained the same."*

SC perused Notification No. 4/2006 and further observed that, amendment which was carried out in 2011 was basically related to addition of Chapter Note 4 as per which the process of converting Ores into Concentrates was treated as 'manufacture'. With respect to orders passed by CESTAT in Hindustan Gas & Industries, SC noted that, Chapter 4 was not there at the relevant time when the decision was rendered in 2006.

SC observed that since ores include concentrates, assessee claimed exemption from payment of CVD under Notification No. 4/2006-CE and in support of claim even after roasting, concentrates remain ores only on the plea that, ores is genus and concentrates is specie thereof assessee referred to literature on chemical technology. SC relied upon *Hindustan Gas & Industries Ltd.* cited by assessee where the decision proceeds on the basis that roasting of an ore to obtain concentrate does not amount to manufacture specially when roasting is a process by which impurities in the ore are removed and recoverable content of metal oxide is enhanced.

SC further stated that, with the addition of Note 4, a legal fiction was created treating the process of converting ores into concentrates as 'manufacture' and once this was treated as manufacture, all the consequences thereof, as intended for creating such a legal fiction, would automatically follow. Further, it was observed that Molybdenum Ore was different from concentrate. Referring to definition of manufacture u/s 2(f) of Central Excise Act, SC stated that, purpose of treating concentrate as manufactured product out of ores was to make concentrates as liable for excise duty. Otherwise, there was no reason to deem the process of converting ores into concentrates as manufacture.

SC further stated that Notification No. 4/2006-CE which exempts only ores would not include within itself 'concentrates' also because of the reason that after the insertion of Note 4, the concentrate is to be treated as a different product than ores, in law for the purposes of products of Chapter 26. It was observed that Chapter 2 was retained even after Chapter Note 4 as per Chapter Note 2, 'ores' means minerals of mineralogical species actually used in the metallurgical industry for the extraction of mercury, of the metals of heading 2844 or of the metals of Section XIV or XV, even if they are intended for non-metallurgical purposes and as per this note, metals of Section XV would be included in the term 'ores'.

SC further stated that Note 2, when seen along with Note 4, has to govern itself in limited territory. SC observed that, once process of roasting of 'ore' amounts to manufacture, it creates a different product known as 'Concentrate', for the purpose of exemption notification, which exempts only 'Ores' and therefore, Concentrate will not be covered by exemption notification and therefore, harmonious construction of Note 2 and Note 4 would lead us to hold that, in those cases when Note 4 applies and Ores becomes a different product, it ceases to be Ores.

SC stated that, the Tribunal rightly concluded that, by virtue of Note 4, concentrate has to be necessarily treated as different from ores which is deemed as manufactured product after Molybdenum Ores underwent the process of roasting. SC accepted Revenue's contention that, exemption notifications are to be construed strictly and even if there is some doubt, benefit thereof shall not be available to the assessee but would be given to Revenue. SC relied upon *Novopan India Ltd., Hyderabad vs. Collector of Central Excise and another [1994 (73) ELT 769 (SC)]*.

Taking note of the basic objective behind levy of CVD and relying upon SC ruling in *Hyderabad Industries Ltd. vs. Union of India* (108 ELT 321), Tribunal had stated that object of levy has to be kept in mind while interpreting notification No. 4/2006-CE for the purposes of levy of CVD on concentrates.

Tribunal stated that, if the domestic manufacturer of concentrates is liable to pay excise duty on conversion of 'ores' into 'concentrates' in terms of Note 4 to Chapter 26, can his interests be sub-served when concentrates imported into India are not levied to CVD at the same rate by interpretation of Notification No. 4/2006 so as to construe that ores includes 'concentrates' and, therefore, no CVD is leviable. It stated that such an interpretation militates against the interests of domestic producers and also the plain language of the notification.

SC rejected assessee's contention that the entire exercise was Revenue neutral since the assessee would get CENVAT credit of the duty paid. SC stated that the argument goes against the assessee. If the exercise was Revenue neutral, then there was no need even to file appeal and it is always open to assessee to claim such credit.

Accordingly, SC dismissed assessee's appeal.

LD/64/88

CC, Air Port & ACC, Bangalore
vs.
Pfizer Products India P. Ltd.
13th August, 2015 (Kar.)

Section 27A of the Customs Act, 1962.

Assessee is entitled to cost or compensation for high handedness of Department in not refunding amount initially for 12 years and then refusing to pay interest by dragging the litigation upto High Court. Department directed to pay additional interest @ 9%, besides notified rate, on interest accruable as on date of grant of refund, till its actual date of payment.

This appeal was filed by the Commissioner of Customs, Bangalore against the CESTAT order that allowed appeal filed by the respondent-company with regard of payment of interest under Section 27A of the Customs Act, 1962.

The respondent company had imported certain goods which were cleared on payment of duty. Later, the respondent realised the mistake of having deposited the duty as the goods which were imported were exempt from customs duty. The respondent company filed claim for refund on 24-12-1998 for refund of customs duty of ₹10674049/- that was deposited on 04-06-1998. The Deputy Commissioner rejected the refund claim stating that the goods imported were not exempt. On appeal to Commissioner of Customs (Appeals) by the respondent company, the Commissioner (Appeals) by order dated 16-10-2002 held that the respondent was eligible for exemption and ordered refund of amount but after holding that the respondent company had not been able to show that the burden of duty had not been passed on directly or indirectly to some other person, rejected the claim on the ground of unjust enrichment, and directed the said amount to be credited to Consumer Welfare Fund. Challenging the said order of Commissioner (Appeals), the respondent filed an appeal before Tribunal which was allowed with consequential relief on 27-07-2005 after holding that the claim of refund was not hit by unjust enrichment. Aggrieved by the said order of the Tribunal, the appellant filed an appeal before the High Court which was dismissed on 01-04-2010. Further, a Special Leave Petition (SLP) was filed by the appellant before the Supreme Court, which was also dismissed on 21-02-2011. It was only after dismissal of the SLP that by order dated 13-4-2011, the Assistant Commissioner of Customs sanctioned refund but denied claim of interest made by the respondent-company under the provisions of section 27A of the Customs Act, 1962.

Being dissatisfied with non-payment of interest, appeal was filed before Commissioner of Customs (Appeals) which was dismissed by order dated 13-1-2012 holding that the respondent-company was not eligible for interest since the refund was sanctioned within three months from the date of the judgment of the Supreme Court as also on the ground that the amount to be refunded was with the Consumer Welfare Fund for substantial period. Aggrieved by the said order, the respondent-company filed a further appeal before the Tribunal, which by a detailed reasoned order, allowed the appeal on 21-5-2014. Challenging the said order of the Tribunal, this appeal has been filed by Revenue. Hon. High Court of Karnataka, dismissed the appeal filed by the revenue holding that no substantial question of law arises in this appeal. Hon. High Court also directed that besides the payment of interest from 24-03-1999, (which is three months after the date of application for refund of customs duty filed by the respondent) till the actual date of payment, which shall be at such rates as notified from time to time, the appellant shall further be liable to pay additional interest at the rate of 9% per annum (besides the notified interest) on the amount which is found liable for payment as on 13-04-2011, till its actual payment. ■