quashed since assessee had made full disclosure in form 3CEB filed by it and thus onus had shifted on the AO.

During the assessment proceedings for AY 2009-10, assessee's case was referred to the TPO under Section 92CA(1) for determination of the arm's length price (ALP) of assessee's international transaction with its associated enterprises (AEs). The TPO, vide order dated 27/12/2012 accepted ALP of the international transactions. Thereafter, AO completed the assessment vide order dated 25/02/2013 under Section 143(3) and assessed the total loss of the assessee after making certain disallowances. Subsequently, AO sought to reopen the assessment under Section 147 stating that he had reasons to believe that the assessee's income chargeable to tax had escaped. The AO dismissed objections filed by the assessee against such reopening, aggrieved by which the assessee filed the instant writ petition before the High Court.

Revenue submitted that the assessee proposed to start commercial production of vehicles in the year 2012 and noted that assessee was approaching the ICICI bank for obtaining a loan of ₹2,200/- crore for it. The AO observed that during instant AY 09-10 which was the pre-production period, the expenditure incurred by the assessee such as interest on loans, commitment charges, project appraisal fee, loan processing fees in whatever name it is called, formed part of capital employed in industrial undertaking. The Revenue submitted that the assessee had not fully and truly disclosed the material fact that they had not commenced its business during the year and mere production of the account books or other evidence before the AO would not necessarily amount to disclosure within the meaning of the explanation (1) of Section 147 of the Act. Revenue rejected assessee's stand that the required information was mentioned in Form 3CEB submitted before the TPO, stating that it was TPO's scope to go into Form 3CEB, and not the AO's.

As per High Court, mere escape of income is insufficient to justify the initiation of action after the expiry of four years. Such escapement must be by reason of the failure on the part of the assessee to truly and fully disclose the material facts necessary for the assessment. High Court remarked that the duty of assessee was only limited to fully and truly disclosing all the material facts and is not required to prepare a draft assessment order. High Court rejected Revenue's reliance on decision in *A.L.A Firm* case [1991 (55) taxmann 497 (SC)] stating that it was as per pre-existing law. High Court further rejected Revenue's contention that it was not necessary that the information based on which reopening was made, must be extraneous to the record. Further, High Court acknowledged that declaration of law in *A.L.A. Firm* was of the pre-existing law and the law as existed was dealt with in *Kelvinator of India*.

High Court noted that TPO considered this issue and while passing the order specifically recorded that the commercial production proposes to start in the year 2012. Assessee had argued that this material was available and considered by the AO as could be seen from the scrutiny assessment order of AO. High Court rejected Revenue's stand that it was not AO's duty to look into Form No. 3CEB and it is for the TPO, to take note of the same. High Court stated that even assuming that the Assessing Officer did not look into the Form No. 3CEB, he is bound to look into the order passed by the TPO, since he is required to see whether any other additions have been made, and further since order of TPO is binding on the AO.

High Court observed that Revenue had initiated the re-assessment proceedings purely based on existing information provided by the assessee in the course of original assessment and based on the return of income and documents filed for the subject year. Thus in the absence of any new material in the hands of the Assessing Officer or discovery of some materials or a new insight after the completion of the original assessment, the question of reopening does not arise. The impugned reopening proceedings was a clear case of change of opinion as there was full and true disclosure by the assessee at the time of scrutiny assessment/original assessment.

High Court thus ruled in favour of assessee.

Customs

LD/66/147

Royaloak Furniture India LLP

vs.

Additional Director General Directorate Revenue Intelligence

30th January, 2018

Tax payers have no right to choose their adjudicating authority

The assessee filed instant writ petition on the twin grounds of validity of provisions of Section

28(1) of Customs Act, 1962 and on the issue of lack of jurisdiction of Revenue to issue the said show-cause notice in that regard.

Assessee placed its reliance on SC ruling in case of *Commissioner of Customs vs. Sayed Ali* [2011 (265) E.L.T.17 (S.C.)] wherein it was laid down that it is only the officers of customs who have the jurisdiction to issue notice under Section 28, therefore the authorities belonging to the Intelligence Wing, who are the authorities assigned the function of preventing evasion of duty do not have the power of assessment under the Customs Act. Assessee submitted that Section 28(11) inserted w.e.f. 16/09/2011, does not remove this defect, and therefore as per the assessee, said provision of Section 28(11) of the Act itself is ultra vires and liable to be struck down by this Court.

High Court observed that the provisions of Section 28(11) of the Act were illegal or ultra vires, and the same were issued as per the well-settled legislation practice of undoing the effect of the judgments of the Constitutional Courts by removing the defects pointed out by the Courts of law in consonance with legislative objects sought to be achieved.

High Court referred to SC ruling in *Sayed Ali* case [supra] wherein it was held that if the Revenue's contentions that once territorial jurisdiction is conferred, the Collector of Customs (Preventive) becomes a "proper officer" in terms of Section 28 of the Act is accepted, it would lead to a situation of utter chaos and confusion, in as much as all officers of customs, in a particular area, be it under the Collectorate of Customs (Imports) or the Preventive Collectorate, would be "proper officers". High Court stated that since the Court found that the Revenue's contention that once the territorial jurisdiction is conferred, the Collector of Customs (Preventive) becomes a 'proper officer' in terms of Section 28 is not acceptable, the Parliament had no option, but to declare even these Anti-evasion Wing officials to be 'proper officers' to legally vest them with the jurisdiction to undertake the proceedings for assessment. Accordingly, provisions of Section 28(11) were inserted on 16/09/2011, soon after a decision of SC in *Sayed Ali's* case, otherwise, it would have resulted in quashing proceedings based on lack of jurisdiction and would have rendered several SCNs and proceedings liable to be quashed on the technical and narrow ground of lack of jurisdiction.

High Court stated that deeming of all designated officers to be 'proper officers' for undertaking the assessment proceedings, cannot be said to be unguided power conferred upon the authorities of concerned Revenue Department. It is left to the concerned Revenue Department itself to bifurcate, assign and divide its jurisdiction amongst its several designated officials. Nobody can deny that these authorities work for the ultimate object of implementation of the Customs Act, 1962. The tax payers have no right to choose their adjudicating authority. High Court noted that in view of multiple imports by the same assessee which may be in the different territories of India, the conferment of jurisdiction on all the authorities on pan India basis for the smooth functioning and discharge of their duties is not only necessary and essential but also appropriate.

High Court thus rejected striking down of Section 28(11) of the Act and left it to the concerned Commissioner to adjudicate the show-cause notice in accordance with law. Further, since the assessee had not filed any reply or objections to said show cause notice before Principal Commissioner/Commissioner of Customs, the challenge to such notice by the assessee was 'premature'.

VAT

LD/66/148
M/s J.C. Industries
vs.
State of Karnataka
16th January, 2018

Writ petitions challenging reassessment order under Section 39(1) quashed by High Court holding that there was no breach of natural justice principles.

The assessee had filed writ petition under Article 226 and 227 challenging the impugned re-assessment order under Section 39(1) of Karnataka VAT Act for the period of April 2012 to March 2013. The only ground raised before this Court is the alleged breach of principles of natural justice in as much as the adverse material was not confronted to the petitioner and merely on the basis of a Investigation Report, the disallowance of 'Input Tax Credit' was made by the Assessing Authority. Also, no opportunity had been given to controvert the issue whether the alleged selling dealer was bogus or not.

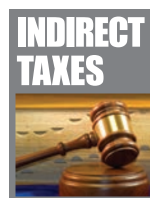
As per Revenue, there was a selling dealer which was bogus and non-existent and was indulging in only giving "sales invoices" and there was no actual movement of goods and sales to the assessee, who was engaged in the sale of Aluminium False Ceiling, Wall Cladding etc. and who had claimed ITC inter alia on the alleged purchases of PVC laminates, Fire rated door plain glass, pre-laminated sheets and Mineral Fiber Tiles etc. Hence, the reassessment order was passed by the assessing authority raising the demand.

Having heard the parties, High Court was of the view that the writ jurisdiction could not be invoked by the assessee in the current circumstances.

High Court observed that on a perusal of the Proposition Notice itself it is clear that the Respondent-authority has specifically mentioned the purported disallowance of Input Tax Credit in respect of the purchase invoices. It was noted that seller had not filed any returns with the Dept. and therefore construing the same to be a bogus dealer, the ITC was proposed to be disallowed in the hands of the assessee. From the investigation by the Revenue, the assessing authority had come to the conclusion that the seller existed only on papers and there were no actual sales of goods to the assessee. Thus, the Revenue had sufficiently discharged their burden while disallowing concerned ITC in respect of sales invoices and the onus entirely shifted on the assessee to remove such suspicion, by producing the said dealer during the assessment proceedings. The burden in such cases could not be assumed to be lying upon the Assessing Authority in this regard, since the enquiry conducted by them resulted in the conclusion that such a dealer did not even exist. There could not be said to be any breach of principles of natural justice in the course of such assessment proceedings resulting in the disallowance of the ITC in the hands of the assessee, if the selling dealer himself was shown to be non-existing.

High Court observed that the State cannot be expected to give credit of Input Tax Credit unless on a verification that the selling dealer is not only shown to be existing but such actual sales attracting such liability is established in the hands of the selling dealer and such tax has been deposited by the selling dealers with the State in due discharge of his obligations under the provisions of the KVAT Act, 2003 or at least he exists to undertake the discharge of such tax obligation on his part. Such false Input Tax Credit given in the hands of the purchasing dealer like the present assessee cannot only result in false credits to be allowed in the hands of the dealers which causes loss to the public revenue to the State, but in such cases, the Revenue Authorities are of course empowered to undertake such verification process to its logical end and the petitioner-assessee cannot be held entitled to cut short such process of investigation particularly by invoking the writ jurisdiction of this Court.

Ruling in favour of Revenue, High Court held that the instant petitions of the assessee were misconceived, and thus dismissed the same.



Service Tax

LD/66/149

Union of India

vs.

M/s Intercontinental Consultants and Technocrats Pvt. Ltd.

7th March, 2018

Hon'ble Apex court held that prior to 14.05.2015, 'reimbursement of expenditure' would not form part of 'gross amount charged' as envisaged u/s. 67 and thus, not includible in value of service, chargeable to service tax.

Facts:

The present appeal was filed by revenue against the decision of Hon'ble Delhi High Court in writ petition decided vide 2012-TIOL-966-HC-DEL-ST. Said writ petition was filed by respondent assessee challenging vires of Rule 5 of Service Tax (Determination of Value) Rules, 2006. Hon'ble HC noted that the charge of service tax under Section 66 has to be on the value of taxable services rendered by service provider to the service recipient, that can be brought to charge and nothing more; the quantification of value of services can, therefore, never exceed the gross amount charged by service provider, for the services provided by him. Accordingly, High Court held that the scope of Rule 5 goes beyond Section 67. In the process, the High Court observed that the expenditure or cost incurred by the service provider in the course of providing the taxable service can never be considered as the gross amount charged by the service provider 'for such service' provided by him, and illustration 3 given below Rule 5 which included the value of such services was a clear example of breaching the boundaries of Section 67.

Aggrieved by decision of HC, in present appeal, revenue contended that the expression 'gross amount charged' would clearly include all the amounts which were charged by the service provider and would not be limited to the remuneration received from the customer; the very connotation 'gross amount charged' denotes the total amount which is received in rendering those services and would include the other amounts like transportation, office rent, office appliances, furniture and equipments etc.; this expenditure cost would be part of consideration for taxable services, hence, that essential input cost had to be included in arriving at gross amount charged by a service provider. Revenue further submitted that since Section 67 specifically lays down the principle of gross amount charged by a service provider for the services provided or to be provided, Rule 5 cannot be said to be contrary to Section 67 as it only mentions what is the meaning of gross amount charged.

The respondent-assessee pointed out that in terms of amendment to Section 67 w.e.f. 14.05.2015, explanation has been added which lays down that consideration includes the reimbursement of expenditure or cost incurred by the services provider. It was therefore submitted that, for period prior to amendment, the term 'consideration' was having limited sphere, viz, it was only in respect of taxable services provided or to be provided. Further, respondent assessee also relied on para 2.4 of Circular/Instructions F. No. B-43/5/97-TRU dated June 6, 1997 wherein it is clarified that *"...various other reimbursable expenses incurred are not to be included for computing the service tax".*

Thus, the core issue before Hon'ble SC in present appeal was as to whether Section 67 of the Act permits the subordinate legislation to be enacted in the said manner, as done by Rule 5 of Valuation Rules, 2006 i.e. whether reimbursable expenditure also forms part of 'gross amount charged' as referred in Section 67.

Held:

Hon'ble SC held that for valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing 'such' taxable services, and hence, any other amount which is calculated not for providing such taxable service cannot be a part of that valuation as that amount is not calculated for providing 'such' taxable service. That is the plain meaning which is to be attached to Section 67. Thus, on this interpretation to be given to Section 67, Hon'ble SC held that High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider 'for such service' and the valuation of taxable service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service . The decision of High Court that Rule 5 went much beyond the mandate of Section 67, was upheld by Hon'ble Supreme Court.

Hon'ble Supreme Court further held that the aforesaid view gets strengthened from the manner in which the Legislature itself acted; realising that Section 67, dealing with valuation of taxable services, does not include reimbursable expenses for providing such service, the Legislature amended by Finance Act, 2015 with effect from May 14, 2015, whereby clause (a) of explanation to Section 67 which deals with 'consideration' is suitably amended to include reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, thus, only with effect from May 14, 2015, by virtue of provisions of Section 67 itself, such reimbursable expenditure or cost would also form part of value of taxable services for charging service tax. Hon'ble Apex Court also held that such substantive change brought about with amendment to Section 67 has to be prospective in nature. Accordingly, revenue's appeal was dismissed.

LD/66/150

Commissioner of Service Tax

vs.

M/s Bhayana Builders (P) Ltd. ETC

19th February, 2018

Apex court held that value of goods/materials, supplied free of cost, by recipient of service to the service provider, is not includible in "gross amount charged" u/s. 67, being neither monetary or non-monetary consideration paid by or flowing from service recipient accruing to the benefit of service provider.

Facts:

Respondent assessee, being engaged in the business of construction, duly discharged service tax liability on 33% of the gross amount charged to service recipients for whom the construction was carried out. Some of the goods/materials were supplied by the service recipient. Since these materials were

to be utilised in the projects meant for service recipients themselves, obviously, no cost thereof was charged from respondent assessee. Department alleged that the value of such goods or materials even when supplied or provided free should be included, while calculating the "gross value" u/s. 67 and 33% thereof be treated as value for the purpose of levying service tax. Vide decision dated 06.09.2013, the larger bench of Hon'ble Delhi Tribunal decided the issue in favour of assessee, correctness whereof was challenged before Apex Court in this appeal. The issue before Hon'ble SC was as to whether the value of goods/materials supplied or provided free of cost by a service recipient and used by service provider for providing the taxable services of construction of commercial or industrial complex, is to be included in the computation of gross amount charged by the service provider, for the valuation of taxable services.

Held:

Hon'ble SC noted that in terms of Section 67 unless an amount is charged by the service provider to the service recipient, it does not enter into the equation for determining the value on which service tax is payable. Any amount charged which has no nexus with the taxable service and is not a consideration for the service, does not become part of the value which is taxable under Section 67. The cost of free supply goods provided by the service recipient to the service provider is neither an amount "charged" by the service provider nor can it be regarded as a consideration for the service provided by the service provider. In fact, it has no nexus whatsoever with the taxable services for which value is sought to be determined. Thus, SC held that a plain meaning of the expression *'the gross amount charged by the service provider for such service provided or to be provided by him'* would lead to the obvious conclusion that the value of goods/material that is provided by the service recipient free of charge is not to be included while arriving at the 'gross amount' simply because of the reason that no price is charged by the assessee/service provider from the service recipient in respect of such goods/materials.

As regards revenue's contention that in terms of Explanation to Section 67, payment received in any form and any amount credited or debited, is to be included for the purpose of arriving at gross amount charged and is leviable to service tax, Hon'ble Supreme Court noted that the definition of "gross amount charged" given in clause (c) of Explanation to Section 67 only provides for the modes of the payment or book adjustments by which the consideration can be discharged by the service recipient to the service provider. It does not expand the meaning of the term "gross amount charged" to enable the Department to ignore the contract value or the amount actually charged by the service provider to the service recipient for the service rendered. The fact that it is an inclusive definition and may not be exhaustive also does not lead to the conclusion that the contract value can be ignored, and the value of free supply goods can be added over and above the contract value to arrive at the value of taxable services. The value of taxable services cannot be dependent on the value of goods supplied free of cost by the service recipient. The service recipient can use any quality of goods and the value of such goods can vary significantly. Such a value, has no bearing on the value of services provided by the service recipient. Thus, Hon'ble Supreme Court held that, a value which is not part of the contract between the service provider and the service recipient, has no relevance in the determination of the value of taxable services provided by the service provider. Further, Hon'ble Supreme Court noted that the explanation contained in the erstwhile notification, which prescribed 33% of the value to be attributable to provision of service in case of construction contracts, only explained that gross amount charged shall include the value of goods and materials supplied or provided or used by the provider of construction service. Thus, though it took care of the value of goods and materials supplied by the service provider/assessee by including value of such goods and materials for the purpose of arriving at gross amount charged, it did not deal with any eventuality whereby value of goods and materials supplied or provided by the service recipient were also to be included in arriving at "gross amount charged".

Accordingly, upholding decision of larger bench of Tribunal, present appeal by revenue was dismissed by the Supreme Court.

LD/66/151
Concord India Pvt. Ltd.
vs.
Commissioner of Service Tax
11th January, 2018

Tribunal held that once an activity is exempted by virtue of its inclusion in exemption notification,

no service tax can be demanded from service recipient in respect of such activity by resorting to reverse charge mechanism prescribed u/s. 68(2) of FA, 1994.

Facts:

The appellant, a business entity with 'nil' turnover, paid service tax on inward legal services rendered by advocates during 'March 2012 to March 2013' under reverse charge mechanism in terms of Notification No. 30/2012-ST dated 20.06.2012 (i.e. RCM Notification). On realising that said services were exempted from service tax in terms of Sr. no. (6) of Notification No. 25/2012-ST dated 20.06.2012 (i.e. Exemption Notification), appellant filed refund claim for service tax paid by them under RCM, which was rejected by the lower authorities on the ground of non-submission of challans for payment of service tax liability/ST-3 returns and also on principles of unjust enrichment. Aggrieved by said order, appellant filed appeal before Commissioner (Appeals) which was rejected on the ground that refund claim is barred by limitation. Consequently, appellant filed present appeal.

Held:

Tribunal held that once an activity is exempted under Section 66B in terms of Mega Exemption Notification No. 25/2012-ST, the question of invoking Notification No. 30/2012-ST issued u/s. 68(2), for fastening service tax liability on service recipient under reverse charge mechanism does not arise at all. Further, relying on decision of Hon'ble Bombay HC in case of *P.C. Joshi vs. UOI 2015 (37) STR 6 (Bom)* holding that Notification No. 30/2012 does not override Notification No. 25/2012 and that the exemption from levy of service tax is very much available to small entities with turnover of less than Rs. 10 lakhs in respect of the advocate services, Tribunal held that appellant would be entitled to refund of service tax mistakenly paid by them under RCM in respect of exempted services.

As regards rejection of appeal by Commissioner (Appeals), Tribunal held that findings of Commissioner (Appeals) that claim is barred by limitation is not sustainable as the lower authority has categorically held that refund claim is not barred by limitation and also, even the revenue has not challenged the findings of the authority that refund is not barred by limitation, by filing appeal.

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LD/66/152

M/s Compucom Software Ltd. vs. Commissioner of Central Excise

29th November, 2017

Tribunal held that the input services rendered by foreign vendors outside India would be chargeable to service tax under reverse charge mechanism because though such services are used by Indian person while rendering output services abroad, place of consumption would be India as such services are used by Indian entity while providing its output services.

Facts:

Appellant provided software services to their clients located in USA i.e. outside India. It engaged various other vendors in USA in order to help them in rendering software services to their main client in USA. Revenue contended that in respect of payments made to such vendors, appellant is liable to pay service tax under reverse charge mechanism being importer of such services. While rebutting the same, appellant submitted that onsite service provided by the appellant outside India were facilitated by these vendors, who are also located outside India, as these services are fully rendered outside India, there is no liability on the appellant to pay tax on reverse charge basis as no service is received by appellant in India.

Held:

Tribunal noted that admittedly the appellant engaged various vendors as service providers, which facilitated them to provide onsite service to their clients based outside India. However, even if the vendors are located outside India, the appellants, located in India, did benefit and consumed the services of the vendors, which in turn helped them to provide the services to the clients based aboard. Thus, it was held that the appellant's services to the main client, which is not being taxed being exported service, is facilitated and supported by services of these vendors and thus, covered under the tax entry "Business Auxiliary Service". Further, Tribunal also concurred with revenue's contention that present case is a reverse case of the ratio laid down in *Microsoft Corporation (I) Pvt. Ltd. 2014-TIOL-1964-CESTAT-DEL* and *Paul Merchants Limited 2013 (29) STR 267 (Tri. Del)* and as affirmed by the Hon'ble Delhi High

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Court in *Verizon Communication India Pvt. Ltd. -2017-TIOL-1863-HC-DEL-ST*. Tribunal held that since the destination has to be decided on the basis of the place of consumption, not the place of performance of service, as such, service tax liability on appellant was upheld in respect of services received by them abroad from various vendors located outside India.

International Tax

LD/66/153

Production Resource Group (401 ITR 256)

Authority for advance ruling (AAR) rules on fixed permanent establishment (PE) and disposal test in a service arrangement and held that Applicant had a fixed PE in terms of the on-site space provided to store its equipments

Facts:

The Applicant is a company incorporated in Belgium and is engaged in the business of providing technical equipment and services for events, including lighting, sound, video and LED technologies.

The Applicant entered into an agreement to furnish lighting and searchlight services during the opening and closing ceremonies of the Commonwealth Games in India in 2010, on a turnkey basis.

The technical scope of work included installation, maintenance, dismantling and removal. It required an ongoing presence available on call, to service, rectify or repair any equipment supplied by the Applicant.

For provision of the services, the Applicant undertook all related activities, such as obtaining all authorisations, permits and licenses, engaging personnel with the requisite skills, ensuring their availability, procuring and/or supplying all necessary equipment for its business, subcontracting, shipping and loading, insurance etc.

For carrying on the above activities, the Applicant was provided with an office space, as well as an on-site space for storing its tools and equipment inside the stadium where the Games were held, under a lock.

The Applicant's employees and equipment were present in India for a period of 66 days for preparatory, installation and dismantling of the equipment.

The Applicant was of the view that its income was not taxable in India.

Income did not amount to FTS since the services provided were standard in nature and there was no "rendering" of services, which implied a continued provision of specified, identified services, and not merely an end result. Also, by invoking the MFN clause, the restricted scope of the make available condition under the India-Portgual DTAA can be applied in the present case. Since the make available condition was not met, the income did not qualify as FTS. There was no transfer of any IP or right to use any IP by the Applicant to the OCCG. Hence, the royalty definition was not triggered.

The Applicant did not have a PE in India in the absence of any fixed place of business in India to which it could enter or make use as a matter of right.

The Applicant's presence was only transient; it didn't satisfy the characteristics of a PE of continuity, regularity and stability.

The Tax Authority alleged that the Applicant had a fixed PE in India at the premises of the OCCG, since it had a comprehensive physical presence, through its key personnel on the ground, throughout the period of the Games. Furthermore, Tax Department contended that applicant's income also qualified as Fees for Technical Services (FTS) and Royalty as per Indian Tax Laws (ITL) as well as under the DTAA.

Aggrieved by the above, the Applicant sought an advance ruling on the issue of taxability of its income from the OCCG, under the DTAA.

Issue:

Whether, in the facts of the case, applicant is having fixed place PE in India?

Held:

In view of the overall facts and the terms of the Agreement, the AAR held that the Applicant had a fixed permanent establishment (PE) in terms of the on-site space provided to store its equipment under a lock. AAR observed as follows:

The provision of a lockable space for storing its tools and equipment inside the stadium implies that the Applicant had access to and control over this