the transactions that were not covered by the other method, the assessee used the TNMM. AO rejected the use of the other methods in totality and proceeded to apply the TNMM method in totality. The DRP remanded the matter in the first instance and thereafter even proceeded to reject the AO's remand report as perverse. However, it confirmed the adjustments made. In appeal, ITAT remanded the issue with the observation that *"we did not find any reasons stated therein for the change in the approach of the assessee for this year and further this aspect is also not dealt with in the order of the ld TPO/ld DRP."*

The instant case is with respect to the applicability of the other method for benchmarking international transactions under Section 92C for which the assessee claimed applicability of Rule 10B (brought into force w.e.f. 2012-13).

HC observed that the TP study report clearly claimed that the 'other method' was the most appropriate method and also outlined why the revisions for its adoptions in certain transactions even while using the TNMM for others. HC observed that this aspect was not dealt with by the ITAT-and also apparently by the DRP- hich had at the same time rejected the AO's remand report. Since the other method was introduced for the first time and also there did not appear to be much judicial thinking on the application of the other method as most appropriate method and all the considerations should weigh to the tax administrators in this regard vis-a-vis revenue and cost allocation, HC opined that the ITAT should have proceed with the matter afresh instead of having remanded the matter totally to the TPO, as it did in the circumstances.

Thus, HC directed the ITAT to go into the matter afresh and return the findings both on the question of law and the facts afresh. HC stated that all rights and contentions of the parties on the jurisdiction of the ITAT are reserved, and that nothing stated in this order shall preclude the exercise of jurisdiction of the ITAT in any manner, to seek such remand reports as are necessary.

Excise

LD/66/130

Commissioner of Central Excise and Service Tax

vs.

Ultra Tech Cement Limited

01st February, 2018

CENVAT credit on GTA service availed for transport of goods from place of removal to buyer's premises is not admissible to assessee, post amendment to Rule 2(l) of CENVAT Credit Rules in 2008

The core issue involved in the present case is with regard to the admissibility or otherwise of the Cenvat Credit on Goods Transport Agency service availed for transport of goods from the place of removal to buyer's premises. The assessee is involved in packing and clearing/forwarding of cement classifiable under Chapter sub-heading 25232910 of Central Excise Tariff Act. It gets finished goods (cement) from its parent unit on stock transfer basis and sells the same in bulk form and packed bags. According to Revenue, the transport agency service used by the assessee for transportation of product from their premises to customers premises cannot be considered to have been used directly or indirectly in relation to clearance of goods from the factory viz., place of removal in terms of Rule 2(l) of the Rules and as such cannot be considered as input service to avail Cenvat credit.

A show cause notice was issued, *inter alia*, stating that on scrutiny of ER- 1 return for the said period, it was noticed that assessee had wrongly availed credit and therefore, was liable to recovery of ₹25.66 lakhs (approx.) alongwith penalty.

The Adjudicating Authority held that once the final products are cleared from the factory premises, extending the credit beyond the point of clearance of final product is not permissible under Cenvat Credit Rules and post clearance use of services in transport of manufactured goods cannot be input service for the manufacture of final product. Accordingly, the demand was confirmed with interest and penalty. The Commissioner (Appeals), CESTAT and HC all ruled in favour of assessee, aggrieved by which the Revenue approached the SC.

SC analysed definition of "input service" under Rule 2(l) of CENVAT Credit Rules and observed that only those services are included which are used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products 'upto the place of removal.'

The original definition of 'input service' contained in Rule 2(l) of the Rules, 2004 used the expression 'from the place of removal.' As per the said definition, service used by the manufacturer of clearance of final products 'from the place of

removal' to the warehouse or customer's place etc., was exigible for Cenvat Credit. This stands finally decided in Civil Appeal No. 11710 of 2016 (*Commissioner of Central Excise Belgaum vs. M/s. Vasavadatta Cements Ltd.*). However, vide amendment carried out in the aforesaid Rules in the year 2008, which became effective from March 1, 2008, the word 'from' is replaced by the word 'upto'. Thus, it is only 'upto the place of removal' that service is treated as input service. This amendment has changed the entire scenario. The benefit which was admissible even beyond the place of removal now gets terminated at the place of removal and doors to the cenvat credit of input tax paid gets closed at that place. This credit cannot travel therefrom. The word 'from' was the indicator of starting point, the expression 'upto' signified the terminating point, putting an end to the transport journey. SC, thus, stated that Adjudicating Authority was right in its interpretation of said Rule.

As per SC, the CBEC Circular dated 23/08/2007 was issued in clarification of the definition of 'input service' as existed on that date i.e. it related to unamended definition, hence, it could not be applied after amendment of the definition of 'input service' which brought about a total change. The definition of 'place of removal' and the conditions to be satisfied, had to be in the context of 'upto' the place of removal. If this Circular was made applicable even in respect of post amendment cases, it would be violative of Rule 2(l) of Rules, and such a situation could not be countenanced.

Thus, ruling in favour of Revenue, SC held that CENVAT credit on GTA service availed for transport of goods from place of removal to buyer's premises was not admissible.

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Service Tax

LD/66/131
Commissioner of Service Tax
vs.
Lakshminarayana Mining Company
24th January, 2017

SC set aside HC's judgment wherein HC incorrectly relied on ruling in ABB Ltd. where the issue pertained to admissibility of CENVAT credit of service tax in respect of output transportation from the place of removal as "input service"

SC observed that question which needed consideration by the High Court was as to whether the category of "Goods Transport Agency" is exigible to service tax as per Section 65(105) (zzp) and Section 65 (50b) of the Finance Act as well as Rule 2(1)(d)(v) of the Service Tax Rules, 1994. Section 65 (50b) defines "Goods Transport Agency" to mean any person who provides service in relation to transport of goods by road and issues consignment note by whatever name called. On the other hand, Section 65(105) (zzp) provides that the service to a customer by a goods transport agency, in relation to transport of goods by road in a goods carriage.

SC remarked that the High Court was required to decide as to whether the services provided by the assessee herein are covered by the aforesaid definitions. The High Court has not discussed the aforesaid issue. Instead, it has dismissed the appeal of the Revenue by observing that the aforesaid questions of law are covered by the decision of the Division Bench of the High Court dated 23.03.2011 in C.E.A No. 121 of 2009 and other connected

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matters titled as *Commissioner of Central Excise & S.T., LTU, Bangalore vs. ABB Ltd.* reported in [2011(23) S.T.R. 97 (Kar.)]. Supreme Court remarked that in the said judgment the issue pertained to CENVAT credit of service tax in respect of input service and that whether output transportation from the place of removal was input service of which CENVAT credit was admissible. Thus, the issue in ABB Ltd. case was entirely different and the High Court has wrongly dismissed the appeal of the Revenue.

In view thereof, SC set aside the impugned order and remitted the matter to HC for de novo consideration

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LD/66/132

M/s Sir Ganga Ram Hospital, Bombay Hospital and Medical Research Centre, Appollo Hospitals, M/s Max Health Care Institute Ltd.

vs.

CCE, CCE & ST and CST

vs.

M/s Indraprastha Medical Corporation

6th December, 2017

The arrangement between hospitals and professional doctors wherein doctors are engaged by hospitals to provide treatment to patients coming to/admitted in hospital for getting healthcare services and the fees to doctors are paid by hospital by applying pre-determined ratio on total amounts charged by hospital to patients towards health care services, cannot be regarded as provision of 'infrastructure support service' by hospital to doctors and thus, no service tax liability would sustain under category of 'business support services'.

Facts:

The appellants, engaged in providing health care services to patients, are managing hospitals/medical centers in various places. For providing medical services to patients, appellants engaged doctors/ medical professionals on contractual basis and the fees payable by hospital to such doctors were arrived at on the basis of pre-determined ratio to be applied on amounts received by appellant from patients. Revenue alleged that by providing to the doctors the space in the hospitals with required facilities to attend the patients (coming to hospital run by appellant), hospital is providing infrastructure support to doctors, without which they cannot undertake their activities as professional doctors and consideration due from doctors is earned by hospital by way of retaining certain portion from the total amounts received from the patients, namely "collection fees/facilitation charges", which would be liable to service tax for being consideration for provision of 'business support services' to doctors by appellants. It is the contention of department that method of sharing revenue etc. cannot alter the nature of services provided by appellant hospitals to doctors.

While rebutting allegations made by department, appellant submitted that being hospitals, they are mainly engaged in providing health care services to patients and the appointment of professional doctors is in furtherance of providing health care services to patients, accordingly, the agreement between doctors and appellant hospitals is essentially revenue sharing arrangement wherein doctors are entitled to fixed percentage of total revenue earned by hospitals from providing healthcare services to patients and remaining portion i.e. collection charges, belong to appellant hospitals, and thus, this is not the case of one party providing services to another. Relying on the decision of Hon'ble Gujarat HC in *Dr. K. K. Shah 135 ITR 146 (Guj)*, appellant submitted that doctors are not "business entities" and are not engaged in business or commerce, therefore, doctors cannot be said to have outsourced any activity to appellant hospital which would be chargeable to service tax under category of 'business support service'. In fact, in the present case, the service, if any, is provided by the doctors to appellant and not vice-versa as alleged by department. Appellant also submitted that the patients are of the hospital only and not of the individual doctors who are engaged by appellant hospitals

Held:

Tribunal noted that for providing healthcare services to patients, appellant hospitals can either appoint the required professional directly as employees or also by having contractual arrangements like the present ones. On perusal of contracts/agreements entered into between appellant hospital and doctors, Tribunal found that such agreements generally talk about the appointment of consultant doctors to provide services to the patients who will visit or get admitted in the appellant hospital; the contractual arrangement between the parties

to such agreements do not specify the specific nature or list of facilities which can be categorised as infrastructural support to the doctors and even the agreed upon revenue model did not refer to any consideration attributable to such infrastructural support services. Thus, the Tribunal held that the patient pays full amount to the appellant hospitals for health care services; for providing such services, hospitals engage various consulting doctors who attend patients for treatment using their professional skill and knowledge and appellant hospitals manage the patients from the time they enter the hospital till they leave the premises, also manages the follow-up procedures and provide for further health service in the manner as required by the patients. In other words, the appellants are availing the professional services of doctors for providing health care services to patients and for such services of doctors, hospitals pay fees to doctors from amounts received from patients for rendering health care services and the balance money retained by appellant hospital is also necessarily for such health care services, therefore, there is no business support service in such mutually beneficial revenue sharing arrangement between appellant hospitals and doctors as alleged by r evenue.

Tribunal further noted that the services mentioned under 'business support services' are "provided in relation to business or commerce."; as such, to bring in a tax liability on the appellant hospital, as contented by revenue, it should be held that they are providing infrastructural support services in relation to business or commerce, that means, the doctors are in business or commerce and are provided with infrastructural support. However, Tribunal held that such a preposition cannot hold good as doctors are engaged in medical profession, and as examined by Hon'ble Guj HC in *Dr. K. K. Shah (Supra)*, there is discernible difference between "business" and "profession", therefore in terms of ratio laid down by Guj HC and scope of 'business support services', there is no taxable activity identifiable in the present arrangement for tax liability of the appellant hospitals.

Tribunal also noted that the view taken by revenue that in spite of the exemption available to health care services, a part of the consideration received for such health care services from the patients shall be taxed as business support service/ taxable service is not tenable because such a view will in effect defeat the very purpose of exemption provided to the health care services by clinical establishments. Accordingly, Tribunal set aside impugned service tax demand.

LD/66/133
M/s Hotel Kailash International
vs.
Commissioner of Central Excise
9th January, 2018

Tribunal set aside service tax demand under category of 'supply of tangible goods' on activity of constructing bunk houses along with other incidental facilities, at sites designated by client.

Facts:

In terms of service order received from its client for providing bunk houses along with all the incidental facilities such as housekeeping, breakfast, lunch etc., at the sites earmarked by the client, appellant constructed row of accommodation facilities at such sites in the form of bunk-houses assembled/ erected as per the requirement of the client. Revenue demanded service tax from appellant under category of 'supply of tangible goods' by alleging that bunk houses supplied by appellant are goods for these being movable properties which are easily moved from one place to another depending on the requirement. Appellant rebutted revenue's allegation on the ground that the whole facility of bunk houses is created at site and there is no ready built bunk house supplied by them, thus, it would not amount to services of supply of tangible goods but that of accommodation facilities.

Held:

Tribunal observed that the bunk house accommodation is created by appellant at its client's site and is based on permanent concrete base with some dismantlable components and as such there is no identifiable supply of bunk houses to be called supply of tangible goods; in fact, department could not point out exact nature of tangible goods allegedly supplied by appellant except holding that whole consideration for provision of bunk houses would be considered as supply of tangible goods. Therefore, Tribunal set aside impugned demand and allowed present appeal with consequential relief.

LD/66/134

M/s Cybercom Datamatics Information Solutions Ltd.
vs.
Commissioner of Service Tax
12th July, 2017

For deciding whether services provided by SEZ unit would constitute 'export of services' or not, provisions of SEZ Act, 2005 would prevail over Rule 6A of STR, 1994 and if answer is affirmative, such SEZ unit would be entitled to refund of unutilised accumulated cenvat credit in terms of Rule 5 of CCR, 2004.

Facts:

Appellant, a unit located in Special Economic Zone (SEZ) was engaged in export of services and filed refund claim of accumulated cenvat credit on input services, under Rule 5 of Cenvat Credit Rules, 2004 (CCR). The order of lower adjudicating authority sanctioning refund claim to appellant was challenged by department before first appellate authority, which held that in terms of Place of Provisions of Services Rules, 2012, the place of provision of services rendered by appellant was not outside India. Further, the activity undertaken by the appellant did not conform to all the six parameters embodied in Rule 6A of Service Tax Rules, 1994 which was an essential requirement for a service to qualify as 'export', so as to become eligible for refund of accumulated credit. Aggrieved by the order of first appellate authority, appellant filed present appeal.

Held:

As regards reliance placed on decision of the Authority for Advance Rulings (Central Excise, Customs & Service Tax) in *Universal Services India Pvt Ltd. [2016 (42) STR 585 (AAR)]* and that in *Godaddy India Web Services Pvt. Ltd. 2016-TIOL-08-ARA-ST*, Tribunal held that decisions of the Advance Rulings Authority are not binding on Tribunal and nor do they constitute a valid precedent to be cited by anyone other than applicant before such authority.

As regards question of whether services provided by appellant can be regarded as exports or not, Tribunal noted that Finance Act, 1994 is the statute enacted for levy and collection of tax on services rendered within the territory of India; however, the appellant operates under a special legislation enacted to govern the operations of entrepreneurs within specially demarcated areas, viz., namely, Special Economic Zones Act, 2005. Hence, while export of service has been defined in the Service Tax Rules, 1994, the special legislation i.e. SEZ Act, 2005, with intent promote exports by units in such SEZ contains within it a definition of 'service' and of 'export' which are not congruent with that in the laws governing taxation of services in India. Since under Section 51 of SEZ Act, 2005 the provisions therein shall prevail notwithstanding anything contained in any other law, Tribunal held that in determining whether a SEZ unit has performed activity amounting to exports, the provisions of Service Tax Rules, 1994 cannot be applied and services provided by appellant in present case would tantamount to export of services in light of provisions of SEZ Act, 2005 which overrides provisions of service tax law.

Thereafter, while deciding appellant's entitlement to refund of accumulated unutilised cenvat credit, Tribunal noted that in terms of Section 26 of SEZ Act, 2005 all duties and taxes on goods and services required for use in authorised operations within SEZ are exempted. In the instant case, since the destination of the services rendered by the appellant being undoubtedly the location of overseas clients, it necessarily follows that the domestic tax should not be carried outside the country and thus, requires refund of such tax, which in the present case, is represented by accumulated CENVAT credit. Therefore, Tribunal held that in the absence of other provisions, the appellant has no option but to rely upon Rule 5 of the CCR, 2004 to get such tax, which should not have been collected or would have been refunded owing to the primary provision of Section 51 of SEZ Act, 2005.

LD/66/135

M/s Lea International Ltd.
vs.
Commissioner of Service Tax
12th January, 2018

Tribunal held that once the income accruing to foreign head office has suffered service tax liability in India, no service tax can be further demanded under reverse charge mechanism on the expenditure recorded in books of Indian project office as entire income has already borne tax incidence.

Deputation of employees to group company does not amount to provision of 'manpower supply services'.

Facts:

The appellant is an Indian project office of foreign entity located outside India. The foreign entity entered into agreements with various Indian clients for providing engineering consultancy services and technical assistance in various projects and consideration accruing in terms of said contracts is directly credited to foreign entity. The appellant has no role in execution of agreements, rendering of services or receipt of consideration from Indian clients. However, service tax liability arising out of such contracts i.e. on consideration earned by foreign entity from Indian clients is being discharged by appellant to Indian service tax authorities.

In terms of certain provisions of Indian Income Tax law, appellant is required to maintain accounts in India wherein the income accrued to foreign entity is accounted for in the books of appellant so as to suffer income tax liability under India law and later on, such income is captured in accounts of foreign entity. Similarly, certain expenses are incurred/shown in accounts of appellant against income of consultancy/ technical fees and such expenditure also forms part of overall income and expenditure of foreign entity. Disregarding these accounting/compliance requirements, revenue entertained a view that the expenses shown in the accounts of appellant represent consideration paid by appellant to foreign entity i.e. its own head office, towards receipt of consultancy services by appellant from such foreign entity and demanded service tax from appellant under reverse charge mechanism (RCM). Revenue also alleged that the staff deputed by foreign entity in appellant's office in India tantamounts to supply of manpower, resulting in service tax liability on appellant under RCM.

Held:

Tribunal found that it is undisputed that the entire consideration accruing to foreign entity in terms of consultancy services provided to Indian clients, has suffered service tax liability and such consideration is captured in the accounts of the appellant and further adjusted in the accounts of foreign entity. While setting aside impugned service tax demand under RCM in respect of expenses shown in books of appellant, Tribunal held that the whole income accrued to foreign entity and shown in the books of accounts of appellant has suffered incidence of service tax and an expenditure which is part of accounting for such income, cannot be taxed under reverse charge tax. Further, it was noted that there didn't exist any agreement/ arrangement between appellant and foreign entity in terms of which appellant would receive consultancy services from foreign entity as alleged by department.

As regards impugned demand in respect of alleged manpower supply by foreign entity to appellant, Tribunal noted that it is settled law, especially as held in *Computer Science Corporation India Pvt. Ltd. - 2014-TIOL-1896-HC-ALL-ST* that the deputation of employee for executing work cannot be considered as a manpower supply and employer cannot be considered as manpower supply agency. Accordingly, Tribunal allowed present appeal on both the issues by setting aside impugned order.

LD/66/136

Religare Enterprise Ltd.

vs.

Commissioner of Service Tax

9th November, 2017

Tribunal held that making of payment by one partner of joint venture to other partner of joint venture towards expenditure incurred in connection with such joint venture, cannot be regarded as payment towards provision of business support service.

Facts:

Appellant entered into joint venture (JV) agreement with foreign entity for commencing and running business in India. In terms of such JV agreement, the foreign entity is obliged to provide capital protection for joint-venture, which they have done through providing bank guarantee. The contractual terms of said JV agreement mandated appellant to reimburse to foreign entity, the charges incurred for furnishing bank guarantee. Revenue held a view that such charges paid by appellant to foreign entity shall be liable to service tax under category of 'business support services' and accordingly confirmed service tax demand along with penalties. Appellant submitted that since the transaction is part and parcel of joint-venture agreement and in pursuance of business activity to set up and manage such joint-venture, and also

it being transaction between partners of joint-ventures, it will not qualify as transaction between service provider and service recipient and thus, not chargeable to service tax.

Held:

Tribunal held that admittedly, the transaction in question is in pursuance of a joint-venture agreement for the joint business, hence, it cannot be construed that said foreign partner supported the business of the appellant and provided business support services. This is because both the appellant and foreign partner have jointly promoted their new business and in pursuance of such intention, made the capital protection arrangement and the payments are towards such arrangements. Therefore, as there is no third party involved and in absence of relationship of service provider and service recipient, as the activity is for the joint benefit of parties in joint-venture. In other words, these are part of shared responsibilities arising out of a joint venture agreement and hence there is no scope for service tax liability on such agreement.

International Tax

LD/66/137

Booz & Company (ME) FZ-LLC

vs.

DDIT

ITA No. 4063/Mum/2015

Mumbai ITAT

Hon. Mumbai ITAT holds that consideration of Rs.112.83 lakhs received by taxpayer (a UAE based Booz group company) for providing technical/professional personnel to its Indian associated enterprise (i.e. Booz India) during AY 2011-12, not taxable as business income under Article 7 of India-UAE DTAA absent taxpayer's PE in India

Facts:

Booz & Company (ME) FZ-LLC ('taxpayer'), company incorporated in UAE and engaged in the business of providing management and technical consultancy services, provided technical/professional personnel to its Indian associated enterprise named Booz & Company India Private Limited (Booz India). The taxpayer received a fee of ₹112.83 lakhs from Booz India during AY 2011-12.

The taxpayer did not offer the said income to tax contending that since India-UAE DTAA does not have any specific clause on taxability of fees for technical services and hence the said receipt is taxable as business income as per Article 7 of DTAA. However, since it did not have Permanent Establishment (PE) in India, above said fee is not taxable in India.

Assessing Officer (AO) noticed that group is a global network group of companies having subsidiaries all over the world. AO relied upon past AAR rulings in case of some of the group companies wherein the AAR has held companies are having PE in India.

CIT (A), upheld the order of AO. Aggrieved, taxpayer preferred the appeal before Hon. ITAT.

Issue:

Whether, in the facts of the case, taxpayer is having PE in India and consequently its income is liable to tax in India?

Held:

Hon. ITAT held that ruling given by AAR should not have been followed by the AO as ruling given by the AAR is binding only on those parties who have sought it and not on others. Even if it is considered that the same shall have persuasive value, a perusal of the ruling would show that it has been given without considering main aspects, such as, the Form of PE (whether fixed place PE, Service PE, Agency PE etc.), relevant provisions of DTAA country-wise etc. All the applicant companies before AAR were from different countries, but the AAR has given a common ruling without making specific reference to the provisions of respective DTAA. Accordingly, he submitted that the reliance placed upon the ruling of AAR is not justified.

Hon. ITAT noted that the employees of the taxpayer have worked for 156 solar days only (on all projects taken together), meaning thereby, the period of working is less than 9 months. Therefore, there is no Service PE also in terms of Article 5(2)(i) of DTAA.

Hon. ITAT also noted that taxpayer has provided service to M/s Booz India and did not receive any service, the question of dependent agent PE also does not arise in India.

Hon. ITAT also accepted the taxpayer's contentions that it does not have any fixed place