

Legal Decisions¹



Income-tax Act

LD/62/54

Aircorn International Ltd., United Kingdom, In re

And

J & P Coats Ltd., In Re

January 10, 204 (AAR)

Section 245R of the Income-tax Act, 1961 - Advance rulings - Procedure on receipt of application

Where though return of income was filed but no notice under Section 143(2) was issued before filing the application, issue in question cannot be said to be already pending before the Income-tax Authorities and hence application for advance rulings is to be admitted

The Revenue objected to the admissibility of the application for advance rulings stating that return of income was filed before filing the application. It was submitted that when return of income is filed it should be treated as pending before the Income-tax Authority and therefore the application is barred by proviso to section 245R(2).

The applicant on the other hand submitted that mere filing of return does not attract the bar unless the question raised in the application for Advance Ruling is an issue pending for adjudication before the Income Tax Authorities. Reliance is placed on the decision of this Authority in the case of *Hyosung Corporation Korea* in AAR/1138/2011 dated 7-8-2013.

The authority for advance rulings held as follows:

In the case of *Hyosung Corporation Korea* (*supra*) it was held that mere filing of return does not attract bar on the admission of the application as provided in section 245R(2) of the Act. Only when the issues are referred in the return and notice under section 143(2) is issued, the question raised in the application will be considered as pending for adjudication before the Income-tax Authorities. In the present case return of income was filed before filing application to the Authority for Advance Rulings. However, notice under section 143(2) was issued after the application was filed before the Authority. The question cannot be said to be already pending before the Income-tax Authorities, as no notice under Section 143(2) was issued before filing the application though return was filed. The application is, therefore, admitted under section 245R(2).

¹ Readers are invited to send their comments on the selection of cases and their utility at eboard@icai.in. For full judgment, write to eboard@icai.in

LD/62/55

**Mitsubishi Corporation, In Re
December 12, 2013 (AAR)**

Section 245R of the Income-tax Act, 1961 - Advance rulings - Procedure on receipt of application

Where return of income was filed before filing the application for advance rulings and notice under section 143(2) was issued after the date of the application, following the ruling in Hyosung Corporation (AAR/1138/2011 dated 7-8-2013), it is to be held that the question raised by the applicant is not already pending before the Income-tax Authorities and, therefore, the application is to be admitted



Maharashtra VAT

LD/62/56

Larsen & Toubro Ltd.

Vs.

**State of Karnataka
September 26, 2013 (SC)**

Section 2(24) of the Maharashtra

Value Added Tax Act, 2002, read with Rule 58(1A) of the Maharashtra Value Added Tax Rules, 2005 - Sale

When a completed building is sold, there is no work contract and, therefore, no liability to tax.

If at the time of construction and until the construction was completed, there was no contract for construction of the building with the flat purchaser, the goods used in the construction cannot be deemed to have been sold by the builder since at that time there is no purchaser.

That the building is intended for sale ultimately after construction does not make any difference.

[K. Raheja Development Corpn. vs. State of Karnataka [2005] 2 STT 178 (SC) lays down the correct legal position]

L&T objected to the assessment of tax for development of projects by it. The L&T *inter alia* submitted that the development agreement was not a works contract *per se* on account of the reasons: (a) the agreement was to develop and market flats to customers; (b) the intent and purpose of the agreement was to develop property by the petitioners on the one hand and the land owner on the other; (c) the construction and development of the said land involved no monetary consideration; and (d) the only consideration was that upon the completion of the entire project, L&T would be entitled to 75 per cent of the same.

The legal position as summarised by the Supreme Court is as follows:

(i) For sustaining the levy of tax on the goods deemed to have been sold in execution of a works contract, three conditions must be fulfilled: (one) there must be a works contract, (two) the goods should have been involved in the execution of a works contract and (three) the property in those goods must be transferred to a third party either as goods or in some other form.

(ii) For the purposes of Article 366(29-A)(b), in a building contract or any contract to do construction, if the developer has received or is entitled to receive valuable consideration, the above three things are fully met. It is so because in the performance of a contract for construction of building, the goods (chattels) like cement, concrete, steel, bricks etc. are intended to be incorporated in the structure and even though they lost their identity as goods but this factor does not prevent them from being goods.

(iii) Where a contract comprises of both a works contract and a transfer of immovable property, such contract does not denude it of its character as works contract. The term "works contract" in Article 366 (29-A)(b) takes within its fold all genre of works contract and is not restricted to one specie of contract to provide for labour and services alone. Nothing in Article 366(29-A)(b) limits the term "works contract".

(iv) Building contracts are species of the works contract.

(v) A contract may involve both a contract of work and labour and a contract for sale. In such composite contract, the distinction between contract for sale of goods and contract for work (or service) is virtually diminished.

(vi) The dominant nature test has no application and the traditional decisions which have held that the substance of the contract must be seen have lost their significance where transactions are of the nature contemplated in Article 366(29-A). Even if the dominant intention of the contract is not to transfer the property in goods and rather it is rendering of service or the ultimate transaction is transfer of immovable property, then also it is open to the States to levy sales tax on the materials used in such contract if such contract otherwise has elements of works contract. The enforceability test is also not determinative.

(vii) A transfer of property in goods under clause 29-A(b) of Article 366 is deemed to be a sale of

the goods involved in the execution of a works contract by the person making the transfer and the purchase of those goods by the person to whom such transfer is made.

(viii) Even in a single and indivisible works contract, by virtue of the legal fiction introduced by Article 366(29-A)(b), there is a deemed sale of goods which are involved in the execution of the works contract. Such a deemed sale has all the incidents of the sale of goods involved in the execution of a works contract where the contract is divisible into one for the sale of goods and the other for supply of labour and services. In other words, the single and indivisible contract, now by Forty-sixth Amendment has been brought on par with a contract containing two separate agreements and States have now power to levy sales tax on the value of the material in the execution of works contract.

(ix) The expression "tax on the sale or purchase of goods" in Entry 54 in List II of Seventh Schedule when read with the definition clause 29-A of Article 366 includes a tax on the transfer of property in goods whether as goods or in the form other than goods involved in the execution of works contract.

(x) Article 366(29-A)(b) serves to bring transactions where essential ingredients of

'sale' defined in the Sale of Goods Act, 1930 are absent within the ambit of sale or purchase for the purposes of levy of sales tax. In other words, transfer of movable property in a works contract is deemed to be sale even though it may not be sale within the meaning of the Sale of Goods Act.

(xi) Taxing the sale of goods element in a works contract under Article 366(29-A)(b) read with Entry 54 List II is permissible even after incorporation of goods provided tax is directed to the value of goods and does not purport to tax the transfer of immovable property. The value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in works even though property passes as between the developer and the flat purchaser after incorporation of goods.

Effectively and *de facto* it is the developer who constructs the building for the flat purchaser. The developer does so for monetary consideration. The label of payment is not decisive but the factum of the payment is. The construction is done on payment of price as agreed upon between the developer and the flat purchaser.

It is not correct to say that the work is undertaken by the developer for himself and for the owner and the

construction is not carried for and on behalf of the purchaser.

In the development agreement between the owner of the land and the developer, direct monetary consideration may not be involved but such agreement cannot be seen in isolation to the terms contained therein and following development agreement, the agreement in the nature of the tripartite agreement between the owner of the land, the developer and the flat purchaser whereunder the developer has undertaken to construct for the flat purchaser for monetary consideration. Seen thus, there is nothing wrong if the transaction is treated as a composite contract comprising of both a works contract and a transfer of immovable property and levy sales tax on the value of the material involved in execution of the works contract. The observation in the referral order that if the ratio in *Raheja Development (supra)* is to be accepted then there would be no difference between works contract and a contract for sale of chattel as chattel overlooks the legal position which we have summarized above.

If the developer has undertaken to build for the prospective purchaser for cash or deferred payment or a valuable consideration pursuant to a contract then to that extent, the contract is works contract and there is deemed sale of material (goods) used in the construction of building and merely because the builder has a right of lien in the event due monies are not paid does not alter the character of contract being works contract.

In Article 366(29-A)(b), the term 'works contract' covers all genre of works contract and it is not limited to one specie of the contract. That definition of "works contract" is inclusive and refers to building contracts and diverse construction activities for monetary consideration viz; for cash, deferred payment or other valuable consideration as works contract. Where the developer entered into development agreements with the owners of the land and it also enters into agreements for sale with the flat purchasers, the consideration being payment in installments, the developer undertakes to build for the flat purchaser and so long as there was no termination of the contract, the construction is for and on behalf of the purchaser and it remains a "works contract".

The activity of construction undertaken by the developer would be works contract only from the stage the developer enters into a contract with the flat purchaser. The value addition made to the goods transferred after the agreement is entered into with the flat purchaser can only be made chargeable to tax by the State Government.

Since *K. Raheja Development Corpn. v. State of Karnataka* [2005] 2 STT 178 (SC) in May, 2005 almost all States have modified their laws in line with *K. Raheja Development Corpn. (supra)* and there is no justification for change in the position settled after the decision of this Court in *K. Raheja Development Corpn. (supra)*.

The submission that the view in *K. Raheja Development Corpn. (supra)* that when a completed building is sold, there is no work contract and, therefore, no liability to tax is not correct statement of law, does not appeal. If at the time of construction and until the construction was completed, there was no contract for construction of the building with the flat purchaser, the goods used in the construction cannot be deemed to have been sold by the builder since at that time there is no purchaser. That the building is intended for sale ultimately after construction does not make any difference.

K. Raheja Development Corpn. (supra) lays down the correct legal position.



Banking Laws

LD/62/57

Kamlesh Kumar

Vs.

State of Bihar

December 11, 2013 (SC)

Section 138, read with section

142, of the Negotiable Instruments Act, 1881 – Dishonor of Cheque for Insufficiency etc. of Funds in Account

Where complainant received the information about the dishonour of the cheque but he did not send the legal notice within 30 days therefrom, the complaint filed by him subsequently was not maintainable as it was filed beyond the period of limitation

The cheque in question was presented on 25.10.2008. After it was dishonoured, complainant issued notice dated 27.10.2008 to the appellant. The appellant did not accede to the demand contained in the said notice. Even the complainant chose not to file any complaint under Section 138 at that time. Instead, he presented same very cheque again for encashment through his banker on 10.11.2008. It bounced this time as well because of insufficient funds. Another legal notice dated 17.12.2008 was sent to the appellant. As this legal notice also did not invoke any positive response from the appellant, this time the complainant filed the complaint dated 7.01.2009.

The Supreme Court of India held as follows:

In the present case, the complainant had not filed the complaint on the dishonour of the cheque in the

first instance, but presented the said cheque again for encashment. This right of the complainant in presenting the same very cheque for the second time is available to him under the aforesaid provision.

The act of the complainant in presenting the cheque again cannot be questioned by the appellant. However, when the cheque was presented second time on 10.11.2008 and was returned unpaid, legal notice for demand was issued only on 17.12.2008 which was not within 30 days of the receipt of the information by him from the Bank regarding the return of the cheque as unpaid. Non-issuance of notice within the limitation prescribed has rendered the complaint as not maintainable.

The period of limitation is not to be counted from the date when the cheque in question was presented in the first instance on 25.10.2008 or the legal notice was issued on 27.10.2008, inasmuch as the cheque was presented again on 10.11.2008. For the purposes of limitation, insofar as legal notice is concerned, it is to be served within 30 days of the receipt of information by the drawee from the bank regarding the return of the cheque as unpaid. Therefore, after the cheque is returned unpaid, notice has to be issued within 30 days of the receipt

of information in this behalf. That is the period of limitation provided for issuance of legal notice calling upon the drawer of the cheque to make the payment. After the sending of this notice 15 days time is to be given to the noticee, from the date of receipt of the said notice to make the payment, if that is already not done. If noticee fails to make the payment, the offence can be said to have been committed and in that event cause of action for filing the complaint would accrue to the complainant and he is given one month time from the date of cause of action to file the complaint.

Applying the aforesaid principles, in the present case, it may be found that cheque was presented, second time, on 10.11.2008. The complainant, however, sent the legal notice on 17.12.2008 i.e. much after the expiry of the 30 days. It is clear from the complaint filed by the complainant himself that he had gone to the bank for encashment the cheque on 10.11.2008 but the cheque was not honoured due to the unavailability of the balance in the account.

The crucial question is as to on which date the complainant received the information about the dishonour of the cheque. As per the appellant the complainant received the information about the

dishonour of the cheque on 10.11.2008. However, the respondent has disputed the same. After the judgment was reserved, the complainant has filed the affidavit alleging therein that he received the bank memo of the bouncing of cheque on 17.11.2008 and therefore legal notice sent on 17.12.2008 is within the period 30 days from the date of information.

The complainant himself had gone to the bank for encashing the cheque on 10.11.2008 and found that because of unavailability of sufficient balance in the account, the cheque was bounced. Therefore, it becomes obvious that he had come to know about the same on 10.11.2008 itself. In view of this admission in the complaint about the information having been received by the complainant about the bouncing of the cheque on 10.11.2008 itself, no further enquiry is needed on this aspect.

It is, thus, apparent that he received the information about the dishonour of the cheque on 10.11.2008 itself. However, he did not send the legal notice within 30 days therefrom. Thus, the complaint filed by him was not maintainable as it was filed without satisfying all the three conditions laid down in Section 138.

Chartered Accountants Act

LD/62/58

Council of Institute of Chartered Accountants of India
Vs.

Arun Purushottam Kapadia
December 13, 2013 (GUJ)

Section 22, read with section 21, of the Chartered Accountants Act, 1949 - Professional or other misconduct

Where it has been found by the Disciplinary Committee of the Institute of Chartered Accountants of India as well as the Council that the respondent Chartered Accountants has not performed his duties as concurrent auditor with due diligence and was gross negligent in performing his duties as concurrent auditor of the bank, no different view can be taken

The respondent is a chartered accountant and member of the Council and was working as concurrent auditor of the complainant - bank. The respondent herein is held to be guilty of professional misconduct for different charge. Charges for which the respondent is held guilty by the Disciplinary Committee as well as Council reads as under:

- (i) Account was opened on 05.08.02 without obtaining regular sanction, despite the condition laid down in the in-principle approval that the branch has to submit a detailed proposal with full particulars and take a regular sanction.

- (ii) As per the in-principle sanction, one day's balance has to be maintained in the escrow account whereas end of day's balance was always Nil.

- (iii) Cheques out of Escrow account have to be issued only upto the extent of deposit provided. Though the deposit provided is ₹1.00 Crore, cheques were issued to the tune of ₹2.50 Crores on every day.

- (iv) As per the approval OD against the deposit has to be given only to meet the cheques issued out of Escrow account. But branch released OD 95% on the very first day itself without any basis.

- (v) Escrow Account is operated by Branch officials and the cheques drawn on the account do not bear any stamp to indicate that it is drawn out of escrow account. This may lead to an impression in the banking circles that these cheques were Banker's Cheques.

- (vi) Though Escrow account is meant for advance freight payment to S.E. Railways, many high value cheques favoring Mauli Impex (a sister concern of Mahadev Associates) were issued.

- (vii) Margin in respect of FLC's for Import of Gold - Deviations observed: Margin has to be obtained on 110% of the LC value until receipt of the final invoice and other documents. But the branch is in the practice of keeping the margin for 110% of LC value until receipt of the provisional invoice and after receipt of provisional invoice, the branch is keeping the 100% of LC value till the receipt of final documents. The Respondent has not brought to the Complainant's notice about the risk to the extent of 10% tolerance level. As on 09.05.03, the shortfall in margin is to the extent of around ₹3.00 Crores. These deviations were not pointed in the concurrent audit reports.

Thus, it has been found by the Disciplinary Committee as well as the Council that the respondent has not performed his duties as concurrent auditor with due diligence and was gross negligent in performing his duties as concurrent auditor of the bank. Both the Disciplinary Committee as well as the Council have found the respondent guilty of professional misconduct within the meaning of Clauses (7), (8), (9) of Part I of Second Schedule to the Act read with sections 21 and 22.

The High Court of Gujarat held as follows:

As held by the Supreme Court in the case of *Chandra Shekhar Soni vs. Bar Council of*

Rajasthan AIR 1983 SC 1012, the court would not, as a general rule interfere with the concurrent finding of the fact given by the Disciplinary Committee unless the finding is based on no evidence or it proceeds on mere conjectures and unwarranted inferences. In the present case, the finding of fact given by the Disciplinary Authority accepted by the Council is neither demonstrated as perverse and/or contrary to the evidence on record.

Part I of Second Schedule which is framed under sections 21(3), 21(b)(3) and 22 of the Act described "professional misconduct in relation to chartered accountants in practice". The said clause 7 of part I of Second schedule to the Act prescribes inter alia that if practicing chartered accountant does not exercise "due diligence" or shows "gross negligence" and is grossly negligent in conduct of his professional duties, then, it would amount to professional misconduct. As observed by the learned single Judge in the case of *C.A. Rajesh v. Disciplinary Committee [2013] 117 SCL 304/[2012] 28 taxmann.com 100 (Guj)*, which is reported to be confirmed by the Division Bench, not only 'gross negligence', but 'due diligence' is equally relevant and important criterion in measuring and determining 'professional misconduct' in case of a chartered accountant. No different view can be taken.

SEBI ACT

LD/62/59

Sandeep Badriprasad Agrawal

Vs.

SEBI

October 9, 2013 (BOM)

Section 11 of the Securities and Exchange Board of India Act, 1992 – Functions of the Board

SEBI cannot take action against jewellery shop owners who launch scheme under which the said shop owners are receiving monthly instalments for a period of 11 months and at the end of 11 months are giving golden ornaments equal to the said amount

The jewellery shop owners are running a scheme popularly known as "B.C." under which the said shop owners are receiving monthly instalments for a period of 11 months and at the end of 11 months are giving golden ornaments equal to the said amount. It is the contention of the present public interest petitioner that such scheme is illegal.

The Bombay High Court held as follows:

No public interest is involved in the petition. If any shop owner is running such a scheme and the consumers are voluntarily taking part in such a scheme, it is purely a commercial transaction between a businessman and a consumer.

If the petitioner so desires to bring it in the nature of public ambit the least that is expected is to point out as to under what statutory provisions or the rules framed thereunder the said scheme is prohibited. Nothing is placed on record in that regard.

In that view of the matter, petition is to be without substance and it is dismissed.

LD/62/60

A. Venkatramani

Vs.

SEBI

August 22, 2013 (MAD)

Section 15T of the Securities and Exchange Board of India Act, 1992 – Appeal to Securities Appellate Tribunal

Where SAT was not having a Judicial Member and it was functioning with a single Non-Judicial Member, in view of new appointment, liberty was to be given to the appellant to file appeal before SAT, instead of resorting to writ jurisdiction

SEBI prevented the petitioner company from accessing the capital Market. The writ petitions filed by the company as well as by the promoter respectively were dismissed on the ground that an effective alternative remedy is available before the Securities Appellate Tribunal.

When the writ appeals were listed for admission it was represented that the Securities Appellate Tribunal is not having a Judicial Member and it is functioning with a single Non-Judicial Member and therefore, as on date of moving the writ appeals, there is no possibility of preferring the appeals before the Tribunal.

Additional Solicitor General, represented that as per the notification issued by the Ministry of Finance (Department of Economic Affairs) (Capital Market Division) dated 11-7-2013 new Presiding Officer/Judicial Member for the Securities Appellate Tribunal had been appointed.

The Madras High Court held as follows:

In view of the constitution of the Securities Appellate Tribunal, the appellants herein are at liberty to invoke the appeal remedy before the said Tribunal and file appeals within a period of two weeks. The Securities Appellate Tribunal need not insist upon the limitation for filing the appeals before it.

SICA

LD/62/61

Inderjeet Arya

Vs.

ICICI Bank Ltd.

December 13, 2013 (SC)

Section 22, read with section 15, of the Sick Industrial Companies (Special Provisions) Act, 1985 – Suspension of Legal Proceedings, Contracts, etc.

Where bank filed only a recovery proceeding, and no suit against a sick company, Directors and

Guarantors of debts are not entitled to get the protection of Section 22(1) of the SICA

The term 'suit' would apply only to proceedings in civil court and not actions or recovery proceedings filed by banks and financial institutions before a tribunal such as DRT.

Company RPL was engaged in the business of manufacturing, trading and export of generic pharmaceuticals formulations and products. The Bank instituted recovery proceedings in the Debt Recovery Tribunal. RPL apprehending institution of recovery proceedings took steps seeking registration of its reference under Section 15 of the SICA.

The appellants, directors and guarantor of RPL preferred an application under Section 22(1) SICA. They sought dismissal of the recovery proceedings since the same was filed without prior permission of the Appellate Authority for Industrial and Financial Reconstruction (AAIFR)/BIFR in terms of Section 22(1) of SICA.

The Supreme Court of India held as follows:

The appellants, who are the guarantors, can obtain the protection of Section 22(1) of SICA only if the action filed by the bank comes within the ambit of the term 'suit'. If the action filed by the respondent bank in the nature of 'proceedings' and not a 'suit', protection under Section 22(1) would not be available, especially, when the appellants are guarantors.

This Court, in *KSL & Industries Ltd. vs. Arihant Threads Ltd.* [2011] 3 taxmann.com 50 (SC) took the view that even though both the conflicting statutes SICA and Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDB Act) contain a non-obstante clause, in case of conflict the RDDB Act, 1993 will prevail over SICA, so far as public revenue recoveries are concerned. This Court also emphasized that the liability of surety or guarantor is co-extensive with that of the principal debtor in *Kailash Nath Agarwal v. Pradeshiya Industrial & Investment Corpn. of U.P. Ltd.* [2003] 42 SCL 689 (SC). In *Nahar Industrial Enterprises Ltd. v. Hong Kong and Shanghai Banking Corporation* [2009] 8 SCC 646 this Court reiterated the term 'suit' have to be confined in the context of sub-section (1) of Section 22 of SICA to those actions which are dealt with under the Code and not in the comprehensive over-arching proceedings so as to apply to any original proceedings before any legal forum. The term 'suit' would apply only to proceedings in civil court and not actions or recovery proceedings filed by banks and financial institutions before a tribunal such as DRT. ■