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To do or not to do: Compliance of procedures in notifications

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Often the dispute when interpreting notifications under tax laws, particularly indirect taxes, is whether the procedural conditions prescribed in the notification is to be strictly complied with, or whether substantial compliance would be sufficient to avail the benefit accorded therein. If strict compliance is required, then the procedure, as prescribed, has to be followed to the letter, with no derogation whatsoever. If strict compliance is not required, then as long as the 'spirit of the conditions' is complied with, then the assessee would be entitled to the benefit. In other words, if the assessee has satisfied the essence of the (substantive) conditions of the notification, even if the procedure laid down in the notification is not followed in the manner prescribed, the notification will apply. It is therefore pivotal to identify the conditions as either requiring strict or substantial compliance.

The first step is to understand the object sought to be achieved by a particular notification, i.e., the essential object of the notification [See *Commissioner of C. Ex., Shillong* v. *North Eastern Tobacco Co. Ltd.* - 2002 (146) ELT 490 (SC) at Para 9]. For instance, in an area based exemption, the primary object is to provide impetus for industrial expansion in certain areas which often lack infrastructure, and to build the economy in such areas. It is imperative that if the essential or primary requirement itself is not satisfied, then the notification would not apply at all. If the notification relates to manufacturing units or service providers situated in a certain area, or applies to an assessee carrying out a very specific activity, then unless the manufacturing unit or service provider is situated in that specified area, or does the specific activity, as the case may be, the notification will not be applicable. The focus here, however, is on the procedural conditions set out in a notification, and whether they require strict or substantial compliance.

It has been held that when requirements which are the 'substance' or 'essence' of the notification are fulfilled absolutely, without any dispute, then the improper/non-fulfillment of a procedure that follows, should not disentitle the assessee from the benefit of the notification [refer *CC (Imports) v. Tullow India Operations Ltd.* - 2005 (189) ELT 401 (SC), *Compack Pvt. Ltd.* v. *CCE* - 2005 (189) ELT 3 (SC), *CCE, Shillong* v. *North Eastern Tobacco Co. Ltd. (supra), & Thermax Ltd.* v. *CC* - 1992 (61) ELT 352 (SC)].

However, at times, confusion may be created by the wordings of the procedural conditions, as to whether they form the essence or substance of the notification. The usage of the term 'shall' indicates a mandate, and mandates, unless specifically provided otherwise, expect strict compliance. The Supreme Court held that whether a provision is mandatory or directory is not dependent on the use of the words 'shall' or 'may'. The provision must be read in the text and context thereof and the question is to be answered having regard to the purpose and objective it seeks to achieve. A procedural provision may not be held to be mandatory if thereby no prejudice is caused and if reading it as directory does not do violence to the language of the notification [see *P.T. Rajan* v. *T.P.M. Sahir and Ors. AIR* - 2003 SC 4603; (2003) 8 SCC 498 at para 46 & 50 and *CCE v. M.P.V. & Engg. Industries* - 2003 (153) ELT 485 (SC) at para 11].

This takes us back to identifying the basic

purpose and essence of the notification and ascertaining whether reading the procedure as only directory would cause prejudice to the essence. The stringency and mandatory nature must be justified by the purpose intended to be served. The mere fact that it is statutory does not matter one way or the other [see *Mangalore Chemicals & Fertilizers Ltd.* v. *Deputy Commissioner* - 1991 (55) ELT 437 (SC) at para 11].

In the case of *CCE, New Delhi* v. *Hari Chand Shri Gopal* - 2010 (260) ELT 3 (SC), the 5 judge bench while discussing the construction of exemption notifications held that *a distinction between provisions of statute which are of substantive character and were built in with certain specific objectives of policy, on the one hand, and those which are merely procedural and technical in their nature, on the other, must be kept clearly distinguished.* The Court further held that if the requirements are procedural or directory in that they are not of the "essence" of the thing to be done, but are given with a view to the orderly conduct of business, they may be fulfilled by substantial, if not strict compliance. [Para 23-24]. In the same case, the Court denied the benefit of a notification to the assessee on the ground of non-fulfillment of procedural conditions. However, there is no dichotomy or contradiction in the judgment. The Court was seized with the issue of compliance with the procedures laid out in Chapter X of the erstwhile Central Excise Rules, 1944, and held that the procedures prescribed therein related to the substance and essence of what was sought to be achieved in Chapter X. The case provides an illustration of circumstances where procedural conditions become mandatory and where substantial compliance would be insufficient, and also lays down extensive guidelines to clarify the issue.

In summation, the crucial factor in determining the nature of a procedural condition as requiring strict or substantial compliance, is whether the procedure itself is, or forms part of, the essence of the notification, and whether treating the same as directory would defeat the purpose of the notification. However, one must be cautious and mindful of the fact that merely because a procedure may be directory, its compliance, substantial or strict, is never dispensed with.

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CUSTOMS

Notifications & Circulars

Refund of Terminal Excise Duty (TED) to both supplier and recipient of goods: Para 8.3.1(i) of the Handbook of Procedures Vol. 1, 2009-2014 has been amended by DGFT to allow refund of TED, in case of deemed exports, to the recipient of the goods on production of a 'disclaimer certificate' from the supplier of the goods. Before this amendment by DGFT, as per Public Notice No. 31 (RE 2012)/ 2009-14, dated 21-11-2012, only the supplier of goods could claim refund of TED from DGFT.

Export proceeds – Relaxation for realization & repatriation extended up to 31st March, 2013: Relaxation to realize and repatriate amount representing value of goods or software exported, within 12 months instead of 6 months, has been extended upto 31-3-2013. This relaxation which was earlier available upto 30-9-2012 has been extended with effect from 1st October, 2012 by RBI A.P. (DIR Series) Circular No. 52, dated 20-11-2012. Period of realization and repatriation for exports made by

SEZ units (no specific time period stipulated) as well as for exports made to warehouses established outside India (within fifteen months from the date of shipment), however remains unchanged.

Authorized Economic Operator (AEO) - Guidelines revised: Guidelines for the AEO Programme have been revised. Circular No. 28/2012-Cus., dated 16-11-2012 which supersedes earlier Circular No. 37/2011-Cus., dated 23-8-2011 prescribes bank guarantee upto 5% of the bond amount in the case of AEO importers. Reduced percentage in the examination in the case of AEO exporters has also been specified. Under the AEO Programme, any party involved in the international supply chain that undertakes customs related activity in India can apply for AEO status. The facilitation granted to an importer under this programme is higher than the facilitation granted to an ACP importer.

Storage of imported goods pending clearance: Importers have been asked to avail the facility of storage of imported goods in warehouses if there is delay in their clearance. As per Instruction F. No.450/95/2012-Cus.IV, dated 20-11-2012 issued in this regard, importers also have the option to de-stuff goods from foreign containers and keep the same in a CFS / ICD and also in empty domestic containers in such CFS/ICD under Customs supervision.

Ratio decidendi

Conversion of 'Free Shipping Bill' into 'Export Promotion Scheme Shipping bill' when not deniable: Request for conversion of 'Free Shipping Bills' into 'Export Promotion Scheme Shipping Bills' cannot be denied if ARE-1 carries a certification from the Superintendent that the exports were made under his supervision and the documents were existing at the time of export. CESTAT observed that as per the certification provided by the department's officer, there was no dispute about description, value and exports were made to fulfill export obligation. The Tribunal while holding so, placed reliance on Board's Circular No. 36/2010-Cus., terming it more liberal on the issue [*Gennex Laboratories* v. *Commissioner* - 2012-TIOL-1655-CESTAT-Bang.].

Postal imports – Postal receipt is not an assessment order requiring challenge for refund of duty wrongly paid: When goods are imported through post, the postal receipt cannot be treated as an assessment order enabling the assessee to challenge it before Commissioner (Appeals). The CESTAT in this order, while holding so, allowed refund of duty after taking into consideration exemption available under Notification No. 25/2005-Cus. Earlier, refund claim was rejected by the department on the ground that original assessment order was not challenged as required as per the Supreme Court decision rendered in the case of *Priya Blue Industries.* [*Commissioner* v. *LGC Promochem India Pvt Ltd.* - 2012-TIOL-1747-CESTAT-BANG].

EOU - Clearance of dismantled capital goods: When capital goods imported by a 100% EOU without payment of duty are later on dismantled and cleared from the factory as scrap, it should be considered as DTA clearance by the EOU attracting central excise duty. CESTAT, Bangalore while holding so observed that the dismantling was done under the supervision of Central Excise Officers and that such clearance cannot be considered as 'as such' clearance of capital goods. [*Kumar's Cotex Ltd.* v. *Commissioner* - 2012-TIOL-1754-CESTAT-BANG].

Appeal against order passed under Customs Section 110A not maintainable before CESTAT: Order for provisional release of goods pending

adjudication is not appealable before CESTAT. The Tribunal while holding so, in its majority order, observed that Section 110A provides for only provisional release of seized goods pending adjudication order. It was noted that in an earlier order in the case of *Shanti Alloys* it was held that Section 129A(1) clearly lays down that jurisdiction of Tribunal would only commence when an order by commissioner of customs acting as adjudicating authority is agitated before it. [*Akanksha Syntex Pvt. Ltd.* v. *Commissioner* - 2012-TIOL-1697-Cestat-Mum.]

Demurrage when not payable: No rent or demurrage is chargeable by the Customs Cargo Service Provider on the goods seized or detained or confiscated by the proper officer of Customs. CESTAT, Chennai in its order while holding so, relied on Regulation 6(1) of the Handling of Cargo in Customs Areas Regulations, 2009. It was also noted that after the advice of the department to shift the goods to bonded warehouse, the assessee had approached the bonded warehouse but there was no space there and the matter was informed to the department. [*Commissioner* v. *Paragon Sales Agency* – 2012 (285) ELT 294 (Tri. – Chennai)].

Refund of SAD available even if importer undertakes some processing on imported goods: Mere change of tariff heading of imported goods and goods sold subsequently by undertaking certain processes would not disentitle the importer from claiming SAD or special CVD refund. CESTAT in this case, after relying on previous decisions also held that merely cutting and slitting of coils would not amount to manufacture unless a new, different and distinct article having distinct name, character and use emerges from the process. Earlier, appellant had imported HR/CR Coils and undertook slitting and cutting of imported goods before domestic sales on payment of VAT/Sales Tax. Department had denied refund of SAD under Notification No. 102/2007-Cus. on the ground that the importer had undertaken further processing on imported goods and also the tariff heading of goods imported and goods sold subsequently by the importer are different. [*Posco India Delhi Steel Processing Ltd.* v. *Commissioner* - 2012-TIOL-1769-CESTAT-AHM].

CENTRAL EXCISE

Ratio decidendi

Manufacture – Statutory definition as interpreted by Tribunal cannot be modified by Board's Circular: Statutory definition of manufacture as contained in Section 2(f) of the Central Excise Act, 1944, and as interpreted by CESTAT which had attained finality, cannot be modified by CBEC by issuing a circular. The Bombay High Court, by its recent order, quashed Circular dated 27-7-1995 issued by CBEC. Earlier the Tribunal, considering various High Court orders had held that processing of concentrated basic pesticidal chemical through addition of inert carriers and solvents and dispensing and stabilizing agents resulted only in dilution and hence the process did not amount to manufacture. The Board however, subsequently issued the circular modifying the interpretation and on this basis show cause notice was issued. [*Maharashtra Insecticides Ltd.* v. *Chairman, CBEC* – 2012 (285) ELT 498 (Bom.)].

'Soft serve' is classifiable as ice-cream: The Supreme Court of India has held that the product 'soft serve' would be classifiable under Heading

2105 of the Central Excise Tariff Act, 1985 as 'ice-cream' and not under Heading 0404 as a dairy produce. It was noted that 'soft serve' is not defined in any of the chapters and in the absence of a statutory definition in precise terms, entries and items in taxing statutes must be construed in terms of their commercial or trade understanding, or according to their popular meaning and rigid interpretation in terms of scientific and technical meaning should be avoided. The Court also held that the manner in which a product may be marketed by a manufacturer, does not necessarily play a decisive role in affecting the commercial understanding of that product. The definition of 'ice cream' as contained in the Prevention of Adulteration Act was further found not relevant by the Court while it held that the provisions of PFA, dedicated to food adulteration, are not a standard for interpreting goods mentioned in the Tariff Act. [*Commissioner* v. *Connaught Plaza Restaurant Pvt. Ltd.* - 2012-TIOL-114-SC-CX].

Abatement of duty under capacity based levy – Continuous non-production need not be in a given calendar month: CESTAT, Delhi has held that Rule 10 of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 does not provide that continuous non-production of excisable goods should be during a given calendar month. The said rule provides for abatement of duty in the case of continuous non-production for 15 days or more, which the department said should be in a given calendar month. Abatement was earlier denied by the department as there was non-production for only 5 days in April 2011. The Tribunal however, dismissed the departmental appeal noting that there was non-production for continuous period of 36 days and all the machines were sealed. [*Commissioner* v. *Kays Fragrance Pvt. Ltd.* – 2012 (285) ELT 247 (Tri. – Del.)].

Job work – Not all materials required to be supplied by principal: An assessee would continue to qualify as job-worker and can avail benefit of Notification No. 214/86-C.E., even if one of the raw-materials has not been provided by the principal manufacturer. CESTAT, Delhi observed that 'job-work' as defined in the explanation to the said notification means processing or working upon the raw materials supplied by the principal manufacturer and that it does not provide that all the raw materials must be supplied by the principal manufacturer. The CESTAT distinguished the judgment of *Prestige Engineering (India) Ltd.,* 1994 (73) ELT 498 (SC), wherein it was held that a job-worker is one who works on the materials, majority of which have been provided by the principal manufacturer. The Tribunal said that the said judgment was on the basis of the definition of job-worker given under Notification No. 119/75-C.E., and was therefore not applicable to the case before it. [*Commissioner* v. *Abhinav Chemicals* - 2012 (284) ELT 589 (Tri-Del)].

SSI exemption - Tehsildar's certificate of 'rural area' binding on Tribunal: CESTAT, Chennai has held that the only authority to verify whether a particular area falls under 'rural area' or the 'urban area' is the Tehsildar of that area. It was held that since the Tehsildar in the present case, had certified the area to be a rural area and the said certificate was not challenged by the Department before any authority, the Tribunal was bound by such a certificate. Department's appeal, seeking to deny exemption under Notification No. 8/2001-C.E., was hence dismissed by the Tribunal. [*Commissioner* v. *BN Agro Foods & Co.* – 2012 (285) ELT 300 (Tri. – Chennai)].

Interest in case of voluntary payment of time-barred duty before issuance of SCN: Interest is not payable under Section 11A(2B) of the Central Excise Act, 1944 in the case of voluntary payment of duty when the period of limitation for raising demand of said duty had already expired. The Gujarat High Court while holding so noted that in the absence of voluntary payment, even recovery of said duty would not have been possible, and that interest liability in such cases would bring about an incongruent situation. The Court held that reference to show cause notice in the said provision means notice which could have been validly issued and not notice which had become time-barred. [*Commissioner* v. *Gujarat Narmada Fertilisers Co. Ltd.* – 2012 (285) ELT 336 (Guj.)].

Job worker has option to pay duty: The Gujarat High Court has held that job-worker has an option to clear goods on payment of duty without availing benefit of Notification No. 214/86-CE, and under Rule 4(5)(a) of the Cenvat Credit Rules, 2004, the principal manufacturer is not required to reverse the Cenvat credit on inputs. The Court relied on the judgment of Supreme Court in the case of *International Auto Ltd.,* 2005 (183) ELT 239 (SC). [*Commissioner* v. *Rohan Dyes & Intermediated Ltd.* - 2012 (284) ELT 484 (Guj.)].

SERVICE TAX

Circular

Old accounting codes and service descriptions restored: Accounting codes for payment of service tax, interest and penalty have been changed. Descriptions as provided for earlier in the positive list scenario have been restored and made applicable to the new negative list regime also. A list of 120 service descriptions for the purpose of registration, and accounting codes corresponding to each such description for payment of tax, interest and penalty, have been provided in the latest C.B.E.C. Circular No. 165/16/2012-ST, dated 20-11-2012. Accounting codes for deduction of refunds by the department are also provided. The list contains 119 entries relating to services which were already covered under the service tax net before 1st of July, 2012 while Sl. No. 120 deals with services other than those covered under the said 119 serial numbers. A new taxpayer has to select relevant description from such list while obtaining registration. Assessees who have already registered themselves under "all taxable services", after the introduction of the negative list, are now required to file online application in ACES for amendment and opt for the relevant description from this list. Registration obtained under the erstwhile positive list approach will continue to be valid. Reports indicate that Service Tax Rules have also been amended to modify ST-1 (application for registration) to provide for mentioning of description of service.

Ratio decidendi

Expenditure incurred by service provider while providing service not liable to service tax – Rule 5(1) ultra vires Sections 66 & 67: The High Court of Delhi has held that Rule 5(1) of the Service Tax (Determination of Value) Rules, 2006 runs counter and is repugnant to Sections 66 and 67 of the Finance Act, 1994 and to that extent it is *ultra vires*. The Court held that the value of taxable services for charging service tax has to be in consonance with Section 66 which levies

a tax only on the taxable service and nothing else. According to the Court, the expenditure or costs 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. The petitioner had challenged the validity of Rule 5 in so far as inclusion of reimbursement of expenses in taxable value was concerned. [*Intercontinental Consultants Pvt. Ltd.* -2012-TIOL-966-HC-DEL-ST].

Services for safe movement of export cargo – Cenvat credit admissible: CESTAT, Ahmedabad observed that security services engaged for safe transport of cargo upto port of export would be required to safeguard business interest. Although the said services had been utilized after goods have been cleared from factory premises after manufacturing, in respect of export of goods, place of removal would be the port. The said expenses are thus input services. [*Commissioner* v. *Heubach Colour Pvt. Ltd.* - 2012-TIOL-1720-CESTAT-AHM].

Security services for pump house outside factory premises can be input service: Emphasising that the criterion for eligibility to Cenvat credit of input service is that it should be integrally connected with the manufacturing activities, CESTAT, Mumbai held that security services in respect of pump house located outside the factory premises would be an input service. Water used as coolant in the manufacturing process was pumped from a river by the pump house. [*Welspun Maxsteel Ltd.* v. *Commissioner* - 2012-TIOL-1662-CESTAT-MUM]

Exemption to principal includes agent: Ruling on whether exemption has to be specifically granted or exemption granted to the principal would also extend to the agent, the CESTAT held that the agent is eligible for exemption in terms of the relation of the principal with the agent. In the instant case, the assessee-bank was carrying out certain functions on behalf of RBI which was not required to pay service tax in view of exemption. The Tribunal noted that if the same functions were undertaken by RBI, service tax payment would not be required. [*Canara Bank* v. *Commissioner* - 2012 (28) S.T.R.369 (Tri. –Ahmd].

After sales service charges included in assessable value – Input service credit allowed: CESTAT, Mumbai held that after sales service, paid by the dealer and included in assessable value can be 'input service' for the purposes of claiming Cenvat credit. It reasoned that value of warranty and servicing – post manufacturing expenses, are includible in assessable value as per Section 4(3) of the Central Excise Act, 1944 and are expenses incurred towards manufacture of vehicle. [*Commissioner* v. *Mahindra & Mahindra* - 2012 (28) S.T.R.382 (Tri. –Mumbai)].

Service tax paid on exempt services – Refund admissible: Reasoning that there is no clause in Finance Act, 1994, barring the assessee from paying tax on exempted services and claiming refund, the CESTAT, Mumbai held that the assessee could claim refund on tax paid. The assessee, a merchant exporter of food items paid service tax on GTA services under mistake of law. The department contended that this was in nature of deposit with the government and refund could not be claimed. [*Crown Products* v. *Commissioner* - 2012 (28) S.T.R.406 (Tri. – Mumbai)].

Consultancy for plant modernisation is an input service: Examining the Cenvat credit eligibility of engineering consultancy services resulting in earning of Certified Emission Reduction Sale (CERS) or

carbon credit, the Tribunal held that the consultancy charges being in relation to modernisation of plant, the same would be eligible for Cenvat credit. The department denied cenvat credit contending that CERS was neither dutiable nor subject to service tax. [*Shree Bhawani Paper Mills Ltd* v. *Commissioner* - 2012 (28) S.T.R.409 (Tri. – Del.)].

Installation and testing of meters are services relating to transmission and distribution of electricity: Erection, commissioning and installation of meters and testing and analysis of the same can be services relating to the transmission and distribution of electricity. Interpreting notification No. 45/2010-S.T, the Tribunal held that, to sell electricity to the consumer, it was necessary to undertake the said services and these would be covered under the exemption granted therein. [*Paschimanchal Vidyut Vitran Nigam Ltd.* v. *Commissioner* - 2012 (28) S.T.R.412 (Tri. – Del.)].

VALUE ADDED TAX (VAT)

Notifications

Works Contract clarified under Punjab VAT: Department of Excise and Taxation, Punjab has clarified that any agreement for carrying out the activity of building construction, manufacturing, processing, fabrication, erection, installation, fitting, improvement, modification, repairs or commissioning of any movable or immovable property will be covered within the ambit of 'works contract.' The public notice issued in this regard also states that contractors of any of the above-mentioned activities and builders and developers involved in sale of flats or housing units, are liable to get registered and that failure to do so will attract penalty. Liability of contractee in works contract has been highlighted and it is stated that contractee has to furnish information of a contract if the contract exceeds Rs. 5 lakhs. Further, the contractee shall apply for tax deduction number, deduct WCT-TDS and deposit the same within the prescribed time limit.

Entry tax increased on certain products in Bihar: Bihar has, by Notification S.O. 215, dated 27-11-2012, increased the rate of entry tax from 4% to 5% on certain goods. The goods mentioned at Serial No. 7, 9, 12, 13, 18, 19, 20, 24 and Serial No. 27 in the Schedule appended to the Notification S.O. 95 dated 31st July 2008 for which rate is increased include coal, computer hardware and software, iron and steel, vanaspati and tractors. The change in rate is effective from 27-11-2012.

Ratio decidendi

Goods used in production of electricity entitled to credit when electricity for manufacture of final product: The Orissa High Court has held that coal, alum, caustic soda and other consumables which are used for generation of electricity, which in turn is used in the manufacture of aluminium qualify to be input under the Orissa Value Added Tax Act, 2004 (O-VAT) and input tax credit on the said goods can be allowed. The Department had denied input tax credit contending that the above-mentioned goods are used for generation of electrical energy which is a finished product in itself and is also exempt from the payment of tax under O-VAT. The Court however held that huge quantity of electrical energy is required for production of aluminum and the electrical energy generated by the assessee in the captive power plant is not the final product which is sold in the market

but is only an intermediate product which is used in the process of manufacturing of final products. The court observed that as per the definition it is not necessary that consumables should go directly into composition of the finished product but what is required that they should be directly used for manufacturing or processing of the finished products. [*National Aluminum Company Limited* v. *Deputy Commissioner of Commercial Taxes* - 2012-VIL-97-Ori.].

Sale in course of import: The company, a registered dealer under the provisions of the Gujarat Sales Tax Act, 1969, was importing goods when customers desirous of purchasing goods manufactured by the foreign company would place purchase orders with specifications asking them to import the goods. The assessee treated the transaction as sale in the course of import and thereby not liable to tax under Section 87 of the Gujarat Sales Tax Act read with Section 5(2) of the CST Act. The authorities contended that there was no link in the transactions and charged sales tax. On appeal, the Tribunal took the view that the transactions between the assesee and the customers on one hand, and the transactions of import of goods from the company in German on the other hand were different transactions. The Gujarat High Court held that as the order of the Tribunal dismissing the appeal was based on the reasoning supplied in paragraph 9 of its order and once it came to be deleted on rectification, the basis of the order of Tribunal did not survive and thus, the assessee's transaction was accepted as sale in the course of import under Section 5(2) of the CST Act. [*Fag Bearing India Ltd.* v. *State of Gujarat* - 2012-VIL-95-Guj.].

INCOME TAX

Notification

Method of valuation of unquoted shares: Rule 11UA of the Income tax Rules, 1962 has been amended to include determination of valuation of unquoted shares as per 'Discounted Free Cash flow Method'. [Notification No. 52/2012 dated 29-11-2012].

Ratio decidendi

Interest on housing loan deductible under Section 24 (b) as well as Section 48: The assessee had borrowed funds for purchasing a house and the interest paid thereon was claimed as deduction under Section 24(b) of the Income-tax Act, 1961. Further, when the house was sold, the interest paid on the said loan was treated as 'cost of acquisition' and claimed as a deduction under Section 48 in computing the capital gains. Deduction for such interest under Section 48 was disallowed on the ground that assessee had already claimed deduction of such interest under Section 24(b). The ITAT, Chennai upheld the contention of assessee and observed that deduction under Section 24(b) and computation of capital gains under Section 48 are altogether covered by different heads of income i.e., income from 'house property' and 'capital gains' and neither of them excludes the other. Accordingly, the appeal was allowed. [*ACIT* v. *C. Ramabrahmam,* ITAT Chennai, I.T.A No. 943/Mds/2012 dated 31-10-2012].

Current year and brought forward depreciation can be set-off against 'long term capital gains' of current year: The assessee, in the instant case, claimed set off of current year business loss, current year's depreciation as well as brought

forward depreciation against long term capital gains (LTCG). The department argued that 'profits or gains chargeable' mentioned in Section 32 refers only to profit or gains from business or profession. However, the ITAT, Mumbai observed that held that since, due to business loss, current year depreciation could not be set off, it can be merged with brought forward depreciation and set off against LTCG. Further, it also observed that treatment given to the current year's depreciation is equally applicable to brought forward depreciation in view of the legal fiction created by provisions of Sec. 32(2) of the Act. Accordingly, the appeal was allowed. [*Suresh Industries Pvt. Ltd.* v. *ACIT,* ITA 5734/Mum/ 2011, ITAT Mumbai order dated 10-10-2012].

Non-compete fee is not an intangible asset: The assessee paid a lump sum consideration as non compete fee for a period of seven years. The assessee claimed that the non-compete fee was revenue in nature. Alternatively, it also claimed that the rights under the non-compete agreement were an intangible asset under Section 32(1)(ii) eligible for depreciation. The Delhi High court rejected the appeal of the assessee on the following grounds:

a. The advantage derived from the non-compete agreement is for a substantial period of 7 years and advantage cannot be regarded as being merely for facilitation of business and ensuring greater efficiency & profitability. Accordingly, the expenditure qualifies as a capital expenditure.

b. The non-compete rights cannot be treated as intangible asset of the same nature as specifically mentioned in the section since it confers a right *"in personam"* whereby the advantage is restricted & does not confer an exclusive right to carry-on the primary business activity.

[*Sharp Business Systems* v. *CIT ,* Delhi High Court ITA 492/2012, Order dated 5-11-2012].

Revised return can be filed to exclude income not accrued due to subsequent cancellation of sale agreement: In the instant case, a revised return was filed by the assessee on account of subsequent cancellation of five transactions in immovable property. The assessing officer questioned the validity of revised return filed under Section 139 (5). The ITAT, Mumbai while allowing the appeal held no income can be said to have really accrued to the assessee in the real sense as a result of the five relevant transactions in the immovable properties. The wrong declaration was corrected by the assessee by filing the revised return. Further, it was also held that assessee can file revised return to exclude income not accrued due to subsequent cancellation of the sale agreement. Thus, the revised returns were held to be valid. [*Lok Housing & Construction Ltd.* v. *ACIT,* ITA 8485 (Mum) 2011, ITAT Mumbai order dated 23-10-2012].