October 2014

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

KPMG cutting through complexity

BMR & Associates

Foreword

I am pleased to enclose the October, 2014 issue of FICCI's Tax Updates. This contains recent case laws, circulars and notifications pertaining to direct and indirect taxes.

FICCI participated in a meeting convened by the Director General of Income Tax, Ministry of Finance on 29th September, 2014 to discuss suggestions/queries/problems relating to Tax Deducted at Source (TDS).

On the taxation regime, Organization for Economic Co-operation and Development (OECD) launched an action plan on Base Erosion and Profit Shifting (BEPS). The plan recognized the importance of borderless digital economy and proposed to develop a new set of standards to prevent BEPS and to equip governments with domestic and international instruments to prevent corporations from paying little or no taxes. OECD had identified 15 specific actions which were considered necessary to prevent BEPS. In that direction, on 16 September 2014, OECD released its final set of recommendations on 7 action points for combating international tax avoidance by multinational entities.

In a service tax matter (Moser Baer India Limited vs Commissioner of Customs, Central Excise), CESTAT observed that credit on the input services is not dependent upon the actual receipt of services in the factory of manufacture. In the facts of the case, the Head Office (HO) received various services from abroad and discharged applicable service tax under reverse charge mechanism. Taxpayer availed CENVAT credit of the service tax paid by the HO as distributed by it, and utilized the same for discharging output excise duty liability. The Tribunal noted that the services are received qua the taxpayer and not qua the factory or HO of the tax payer. Since the HO and the factory belong to taxpayer, the credit should be available. Therefore, the CESTAT rejected Revenue Authorities reasoning that in as much as the HO was not providing any output service or not manufacturing any excisable goods, it was not eligible for credit and allowed the taxpayers appeal.

A. Didar Singh

Recent Case laws

I. DIRECT TAX

Supreme Court Decisions

The Supreme Court admitted the Revenue's SLP against Delhi High Court's order rejecting ALP determination based on FOB value of goods exported out of India by third party vendors to customers, in the case of Li & Fung India Private Limited

The taxpayer rendered sourcing support services to its Hong Kong-based Associated Enterprise (AE) receiving a remuneration of cost plus 5 per cent, and applied the Transactional Net Margin Method (TNMM) to determine the ALP of such remuneration, considering Operating Profit/Total cost (OP/TC) as the profit level indicator (PLI). The Transfer Pricing Officer (TPO) accepted the TNMM method and the comparables selected by the taxpayer held that the cost for the purpose of the 5 per cent mark-up should include the FOB value of exports that have been facilitated by the taxpayer. Reducing the mark up to 3 per cent the Dispute Resolution Panel (DRP) upheld the order of the TPO.

On an appeal to the Tribunal, by the taxpayer, The Tribunal, upheld the TPO's findings and held that the amount of adjustment cannot exceed the amount that has been retained by the AE out of the total remuneration received from third party customers. The Tribunal held that the distribution of total compensation received by the AE from its customers should be in the ratio of 80:20. Rejecting the contentions of the taxpayer that Rule 10B(1)(e) of the Rules made no provision for consideration of the cost incurred by third parties while computing the net profit margin of the taxpayer, the Tribunal also held that the taxpayer performed all the critical functions with the help of tangible and unique intangibles developed to fulfill the conditions of the agreements entered into by the AE with the third parties.

High Court ruling

The High Court held that broad basing of the profit determining denominator as FOB value of the exports to determine the ALP is contrary to provisions of the Income Tax Act, 1961 and the Rules. For application of the TNMM, Rule 10B(1)(e) does not enable imputation of cost incurred by third parties to compute the taxpayer's net profit margin. The approach of the TPO and the tax authorities in essence imputes notional adjustment/income in the hands of the taxpayer which is outside the provision of the law. The High Court held that the taxpayer is a low risk contract service provider and the AE undertakes substantial functions and assumes enterprise risks. The High Court emphasised on the fact that tax authorities should base their conclusions on specific facts, and not on vague generalities, to establish such findings.

SLP with the Supreme Court

The Revenue filed SLP against the order of the High Court. Supreme Court admitted Revenue's SLP against High Court order that rejects ALP determination based on FOB value of exports. Considering importance of issues raised in the appeal, the Supreme Court admitted the SLP, condoning the delay in filing and directed the hearing to be held within one year from the date of the order admitting the SLP (11 August 2014).

CIT v. Li & Fung India Pvt. Ltd. – SLP No(s). 11346/2014 - Arising out of impugned final judgment and order dated 16 December 2013 in ITA No. 306/2012 passed by the Delhi High Court

High Court Decisions

Income accruing to a non-resident from the operations in India which result in purchase of goods from India for the purpose of export is exempt under the Act

The taxpayer, a company based out of Hong Kong, operates in India through branch offices. The branch offices have demarcated departments which are engaged in carrying out the following activities:

- Merchandising
- Quality control
- Administration
- Shipping

The main activity of the branch office is to identify appropriate Indian vendors, assess their suitability for foreign buyers, while ascertaining quality of merchandise, and its timely dispatch.

Foreign buyers connect with the taxpayer with their requirements, the price range, the quality etc., and the taxpayer, thereafter, finds the appropriate Indian vendor. The taxpayer helps to ensure that the merchandise is manufactured according to the specifications and quality parameters of foreign buyers and is delivered on time. It is then remunerated by foreign buyers for the said services.

The taxpayer did not offer any income to tax in India. The taxpayer claimed exemption under Section 9(1)(i)(b) of the Act, on the ground that it carried out its operations in India, which were confined to purchase of goods in India, for the purpose of exports and therefore, no income was deemed to have accrued or arisen in India. The tax department, however, denied the benefit as the taxpayer was not actually engaged in purchasing merchandise on its 'own' account, rather, was rendering services to foreign buyers which purchased the merchandise. Reliance was placed by the tax department on an earlier decision of the Karnataka High Court in the case of ACIT/DCIT v. Nike Inc [2013] 217 Taxmann 1 (Kar) wherein a non-resident placed orders with Indian vendors for supply of merchandise to its affiliates. The tax department contended that as the nonresident was placing orders on its 'own account' (though the merchandise was for its affiliates), the High Court had granted the benefit Section 9(1)(i)(b) of the Act. However, considering the facts of the present case, the taxpayer did not purchase merchandise on its 'own account' and, accordingly, the benefit was to be denied.

The Tribunal, however, granted the benefit of the Section 9(1) (i)(b) of the Act on the basis that it was not necessary for the taxpayer to directly export products. Purchase, per se, for the purpose of export was not the requirement. In other words, said section did not require the taxpayer to directly purchase the merchandise, and export the same. As long as the taxpayer assisted in purchasing the merchandise, which is ultimately exported; the benefit of the purchase and export exclusion provision would apply. Aggrieved, the tax authority filed an appeal with the Karnataka High Court.

The Karnataka High Court observed that the foreign buyers approached the taxpayer and accordingly the taxpayer took up the responsibility of finding the appropriate Indian vendors, getting the merchandise manufactured as per foreign buyers' specifications, assuring quality and ensuring timely delivery. However, the taxpayer did not purchase the merchandise on its own account but enabled the Indian vendors to provide merchandise to foreign buyers.

The High Court held that the activities carried out by the taxpayer fits in to the condition of Section 9(1)(i)(b) of the Act.

The DIT/ACIT v. Mondial Orient Limited (ITA 204 of 2010)

Madras High Court denies Section 10B relief for a year before obtaining STPI registration

The taxpayer was incorporated on 19 December 2003 and is engaged in the business of software development. The taxpayer had applied for registration as 100 per cent Export Oriented Unit before the competent authority on 24 March 2005 and got the approval in May 2005. The taxpayer claimed benefit under Section 10B for AY 2005-06. The AO denied the deduction under Section 10B as the taxpayer had obtained approval from Software Technology Parks of India (STPI) only in May 2005, which was after the end of the previous year relevant to the AY 2005-06. Accordingly, the AO disallowed the taxpayer's Section 10B claim placing reliance on Circular 1 of 2005 dated 6 January 2005. In an appeal, the CIT(A) and the Tribunal both ruled in favour of the taxpayer. Aggrieved, the tax department preferred an appeal before the Madras High Court.

The Madras High Court, perusing the provisions of Section 10B, noted that it provides for deduction of profits or gains as derived by a 100 per cent Export Oriented Unit (EOU) from export for a period of 10 consecutive assessment years, starting from the assessment year in which the undertaking begins to manufacture or produce articles or things or computer software. Further, Clause (iv) of Explanation 2 to Section 10B defines 100 per cent EOU as an undertaking which has been approved as 100 per cent EOU by the central government. The High Court observed that in this case, such approval was granted during May 2005 only and therefore, prior to that date or the assessment year, relevant to the date of registration, the benefit of Section 10B would not be available as the requirement of approval by the competent authority is not available as on the date, from which the taxpayer claimed exemption. Thus, the High Court states that the section itself clearly says unless and until the taxpayer gets an approval in the manner prescribed under Section 10B, the question of granting the benefit would not arise.

CIT v. M/s. Live Connection Software Solutions Pvt. Ltd. (ITA No. 1328 of 2009, dated 25 August 2014)

Capital asset

The taxpayer, a partner in a firm carrying on business as a builder and contractor, received land on dissolution of the firm on 1 April 1985. The taxpayer, along with the other Partner as co-owner, continued to hold the land and sold the same on 16 September 1987. The taxpayer offered the gain on sale of land as capital gain, however, the AO considered the same to be business income on sale of stock-in-trade. The High Court held that the Tribunal had no material to come to the conclusion that the land sold by the taxpayer was stock-in-trade and held the gain to be taxable under the head capital gain.

Arvind Shamji Cheda v. CIT [TS-577-HC-2014(BOM)]

Surrender of tenancy

The taxpayer acquired tenancy for a period three years starting from 15 March 1973 under a lease deed. The taxpayer continued to occupy the property even after expiry of the period of three years. The taxpayer continued to pay the rent and the landlord continued to accept the same. On 24 January 1997, the taxpayer received INR67.8 million towards the surrender of tenancy right and offered the same as long-term capital gain. The AO claimed that post the expiry of initial three years, the tenancy was on a month-to-month basis coming to an end every month, and therefore the period of holding was less than 36 months and gain was liable to be taxed as shortterm capital gain. The Tribunal held that the month-to-month tenancy does not come to end by efflux of time. Further expression 'held by the taxpayer' means the date from when the taxpayer acquired the right, got hold of and started enjoying the said asset and is not synonymous with right over the asset as an owner. In the present case, the taxpayer had acquired tenancy rights on 15 March 1973, and therefore the period of holding was more than 24 years. Accordingly, gains from surrender of tenancy rights are taxable as long term capital gain. The Delhi High Court upheld the Tribunal's decision.

CIT v. Frick India Ltd. [TS-572-HC-2014(DEL)]

Conversion of partnership

The taxpayer firm was converted into a private limited company under Part IX of the Companies Act, 1956. The AO took the view that there was transfer of assets from the respondent to the private limited company, and thereby the capital gains tax under Section 45 (4) was leviable. According to the AO the respondent stood dissolved once a new company has come into existence in its place and levied tax on capital gains. The CIT(A) accepted the contention of the taxpayer that no distribution of asset has taken place and set aside the order of the AO. The Tribunal dismissed the appeal filed by the department.

The High Court held that for application of Section 45(4) two aspects become important viz., the dissolution of the firm and distribution of assets as a consequence thereof. It was further held that, assuming that on its being transformed into a private limited company, the respondent ceased to exist and thereby, it stood dissolved, the liability to pay tax would arise, if only there is distribution of assets, as a result of such dissolution. It was held that the distribution must result in some tangible act of physical transfer of properties or the intangible act of conferring exclusive rights vis-à-vis an item of property of the erstwhile shareholder. According to the court on a conversion only change that takes place was that the shares of the partners were reflected in the form of share certificates, and beyond that, there was no physical distribution of assets in the form of dividing them into parts, or allocation of the same to the respective partners or even distributing the monetary value thereof. The appeal was dismissed.

CIT v. M/s. United Fish Nets. [TS-545-HC-2014(AP)]

The Karnataka High Court upheld the Tribunal's judgment that the Commissioner of Income-tax has no revisionary powers under Section 263 of the Act once the ALP is accepted by the AO/TPO

The taxpayer has filed its return of income (ROI) for the AY 2002-03 on 31 October 2002 and the same was processed under Section 143(1) of the Act. Subsequently, noting that the taxpayer had entered into an international transaction with its group companies, the AO issued a notice for re-opening of the case under Section 148 of the Act and referred the case to the TPO. The TPO issued a notice seeking details of such international transactions. The taxpayer argued that, since no notice under Section 143(2) was issued pursuant to filing of the original return, the assessment shall be deemed to be final and the reference made to the TPO under Section 148 is erroneous, and also submitted that no valid ROI is pending for re-opening the assessment. The TPO passed the order accepting the ALP determined by the AO. However, the Commissioner of Income-tax (CIT) invoked his power under Section 263 of the Act on the grounds that the AO's order is erroneous and prejudicial to the interest of the revenue. Aggrieved, the taxpayer filed an appeal before the Tribunal.

The Tribunal, in its order, held that when two views are possible and the TPO has accepted valuation of the AO determining the ALP, the CIT has no jurisdiction to interfere with the order of the AO under Section 263 of the Act. Further, the Tribunal observed that on the day the reference was made by the AO for re-opening the case under Section 148 there was no return pending for consideration, and set aside the order of the CIT. Against the order of the Tribunal, the revenue appealed before the High Court.

High Court ruling

The High Court confirmed the order of the Tribunal that the CIT has no jurisdiction under Section 263 of the Act to interfere with the assessment order. The High Court, inter-alia, has considered the following key points in pronouncing the judgment:

- The day the reference was made by the AO to the TPO, there was no valid return pending for consideration by the AO
- The very reference by the AO to the TPO is bad in law;
- Even otherwise, the TPO did not find fault with the adjudication of determining ALP by the AO.

Under these circumstances, the High Court held that the CIT committed an error in exercising his power under Section 263 of the Act and the Tribunal was justified in interfering with the said order.

CIT v. SAP Labs Private Limited (Income Tax Appeal No.339 OF 2010 and Income Tax Appeal No.842 OF 2010)

Tribunal Decisions

Purchase of product and service manuals is not royalty income; distinguishes the Karnataka High Court

ruling in Samsung Electronics and Sonata Information Technology

The taxpayer had paid an amount of INR2.48 million towards service manuals. The payments made were incidental to the import of projectors, LCD cables, etc. for sales made within India. The manuals contained operating and servicing instructions for use of the equipments. ATPL submitted that the payments were not in the nature of Royalty or Fee for Technical Services (FTS) since the manuals and software were copyrighted products and the payment was made for the use of and sale of copyrighted product and not for acquiring any copyright.

The Assessing Officer (AO) rejected the submissions of the ATPL by relying on the ruling of the Karnataka High Court in Samsung Electronics [2011] 203 Taxman 477 (Karnataka) and Sonata Technology [ITA No.3076 of 2005]. The Commissioner of Income tax (Appeals) [CIT(A)] ruled in favour of ATPL. Aggrieved by the CIT(A)'s order, the AO filed an appeal before the Bengaluru Tribunal.

The Tribunal distinguished the ruling of the Karnataka High Court on the premise that the service manuals are not products by themselves, but are only manuals, which guide in using the products. Further, the products imported by ATPL are not protected by a licence or copyright and these products cannot be used by the purchaser without any restriction on the right to transfer or usage. On this basis, the Tribunal concluded that the service manuals imported by ATPL are different from the equipment which comes with the copyright or licence to use the copyright, and therefore the payments in question would not qualify as Royalty.

ITO v. M/s Antrax Technologies Pvt Ltd (ITA No 674/Bang/2012)

Discount allowed to foreign buyers towards advance payment on sales is treated as interest, and therefore liable to withholding of tax under Section 195 of the Act

Kothari Foods & Fragrances (KFF) is an exporter, and against the export proceeds receivable from the overseas buyer, the taxpayer allowed a discount for making advance payment. During the Assessment Year (AY) 2008-09, KFF allowed a discount of INR5.63 million on sales made to foreign buyers for making advance payment.

The AO held that discounts credited in the foreign buyers account in KFF's books of accounts constituted a 'credit', though not 'payment', and therefore Section 195(1) of the Income-tax Act, 1961 (the Act) would apply. Since KFF had debited an equivalent amount as expenditure, by not deducting or withholding tax on such payment, the AO disallowed the expenditure on account of discount allowed under Section 40(a)(i) of the Act. However, the Commissioner of Income-tax (Appeal) [CIT(A)] deleted the additions made by the AO.

On a perusal of the purchase contract, it was indicated that the seller shall cause the issuance of a banker's guarantee or standby letter of credit by the seller's bank for an amount equal to the provisional price, plus interest in the form acceptable to the buyer, and that will be informed in a separate message.

The Lucknow Tribunal observed that within two business days from the date when the buyer's bank receives the bank guarantee, the buyer shall pay to the seller the pre-payment amount. Hence, it was not mentioned in the purchase contract that any pre-payment discount will be allowed by KFF.

The payment to be made by the buyer was the provisional price after furnishing the bank guarantee by KFF. As per the purchase invoices, pre-payment discount was allowed by KFF, and KFF asked the buyer to make the payment of the balance amount against the invoiced price after adjusting the advance received by KFF and the pre-payment discount. Asking the buyer to pay lesser amount after adjusting discount or making payment of discount to the buyer is equivalent to the buyer receiving benefit out of it.

The Tribunal observed that the benefit allowed by KFF to its buyers under the name of discount was in the nature of interest as the same was in consideration of receiving the advance payment. On receiving the advance payment, one may compensate the maker of advance payment by way of allowing interest, or the same benefit can be given in the name of discount, but merely because a different nomenclature has been given, it does not change its character. Accordingly, the Tribunal held that TDS was deductible under Section 195 of the Act on the discount allowed to foreign buyers for making advance payment and consequently, the disallowance made by the AO was justified.

DCIT v. Kothari Food & Fragrances (ITA No. 92/LKW/2012)

Holds non-compete fee as 'capital' expense, doubts 'bonafides' of agreement

Mr. Rajagopal and Ms. Madhavi agreed to constitute a partnership firm named 'All things Web' on 16 March 2000. The firm was carrying out 'internet services' business. The taxpayer company was constituted on 16 March 2001 where both these partners of the firm became directors which was also engaged in the business of providing internet services. On 1 April 2001, Mr. Rajagopal (partner of the firm and also a promoter director of the taxpayer company) had entered into an agreement with the firm vide which the firm agreed to pay a sum of INR9.9 million. As per the agreement, Mr. Rajagopal agreed not to enter into any services/ Business which were being carried on by the firm. On 1 April 2002, the taxpayer, took over a partnership firm. In AY 2003-04 the taxpayer claimed deduction of said amount of INR9.9 million as revenue expenditure which was liability in the hands of firm and taken over by the company alongwith assets and liabilities. The AO disallowed the said claim which was deleted by the CIT(A). The Tribunal in the first round set aside this issue to the AO which was again disallowed by the AO in the second round. The CIT(A), again deleted the addition in the second round. Aggrieved by the same the revenue filed an appeal before Bengaluru Tribunal.

The Tribunal noted that the non-compete agreement was executed on 1 April 2001 while the private limited company was incorporated on March 2001. The Tribunal hence observed that when the Partner had already undertaken a similar job to be done in the company in the capacity of the Director, if that be so, then he may not be able to fulfill his promise given in this non- compete agreement. Thus, suspicion whether the agreement entered into between the two partners was bonafide were expressed.

Further, the Tribunal also noted that the non-compete agreement was executed on 1 April 2001 and the accounts of the company were closed on 31 March 2002. The firm had been taken over by the company on 1 April 2002 i.e. in the next accounting year. Thus, the firm ought to have discharged the liability, and the claim ought to have been made by the firm while filing the return for the accounting period which ended on 31 March 2002. The Tribunal therefore held that the liability was not falling first time in AY 2003-04, therefore, the firm could not shift the year of claim in a subsequent year and the taxpayer could not claim it in AY 2003-04. Therefore, the Tribunal formed an opinion that noncompete fees could not be allowed. Furthermore, the Tribunal also held that the said expenditure is capital in nature relying on the decision of the Delhi High Court in the case of Sharp Business Systems v. CIT [2012] 254 CTR 233 (Delhi), Special bench ruling in Tecumseh India Pvt. Ltd. v. Addl CIT [2010] 127 ITD 1 (Delhi) (SB) and Mumbai Tribunal ruling in NELITO Systems Ltd. v. DCIT [2012] 139 ITD 321 (Mum).

DCIT v. ATW Technologies Pvt. Ltd. (ITA No. 1527/Bang/2012 dated 14 August 2014)

No 14A disallowance on interest expense if taxpayer has sufficient reserves and loan funds trail is established

The taxpayer is engaged in the business of power generation and filed its return of income for AY 2008-09 disclosing other income of INR258.2 million including mutual fund dividend income of INR100.8 million claimed as exempt under Section 10(34) and 10(35) of the Act. The AO made addition under Section 14A of the Act read with the Rule 8D of the Income-tax Rules, 1962 (the Rules). However, the CIT (A) allowed partial relief on the amount of disallowance attributable to interest expense.

The Tribunal held that Rule 8D(ii) of the Rules provided for computation in respect of expenditure incurred by the assessee by way of interest during the previous year which was not directly attributable to any particular income or receipt. Which implied that if there was any interest expenditure directly relatable to any particular income or receipt, such interest expenditure was not to be considered under Rule 8D(2)(ii). The Tribunal further noted that CIT(A) had clearly brought out that interest expenditure was not relatable to the exempt income earned by the taxpayer. The Tribunal further observed that assessee had sufficient funds, reserves, and surplus for making investments in tax free securities, and also that outstanding loans were taken by the taxpayer much before the investments in tax free securities were made, for specific business projects and repayment of the same was made as per terms and conditions, without any default. The Tribunal concluded that the taxpayer had adequately established that the investments made in tax free securities in the period under consideration were out of owned funds and that there was no nexus between the borrowed funds with investments made in tax free securities. Thus, the Tribunal held that the tax officer was not correct in applying Rule 8D(2) (ii) of the Rules.

GMR Power Corporation Ltd v. DCIT (I.T.A. No.778/Bang/2012,dated 12 July 2013)

Deletes Section 40(a)(ia) disallowance following Merilyn ratio in ab-

sence of jurisdictional High Court ruling on the issue

The taxpayer is a proprietor and is engaged in constructing and preparing designs of telecommunication towers located in different parts of India. During the AY 2009-10, the assessee was providing consultancy as well as working as a sub-contractor for erecting telecommunication towers. The tax officer noticed that the taxpayer had claimed soil testing expenses of INR6.887 million out of which work was allocated to sub-contractors for which assessee had paid INR2.850 million. The tax officer noticed that tax under Section 194C on this amount of INR2.850 million was not deducted, and therefore disallowed the amount under Section 40(a)(ia) of the Act. However, the CIT(A) deleted the addition following the decision of Special Bench of Visakhapatnam in case of Merilyn Shipping v. ACIT [2012] 146 TTJ 1 (Viz) (SB) wherein by the majority view it was held that provisions of Section 40(a)(ia) are applicable to amounts of expenditure which are payable as on the date 31 March of every year and it cannot be invoked to disallow expenditure which has been actually paid during the previous year, without deduction of tax.

Aggrieved, the revenue filed an appeal before the Tribunal. Noting that the facts of the case were not in dispute, the Tribunal observed that although the taxpayer had not deducted tax as required under Section 194C, no amount was payable at the year end to the subcontractors. The Tribunal stated that the majority view of the Special Bench in the case of Merilyn Shipping & Transports, is squarely applicable to the facts of the case. Further, as the Special Bench decision was examined by various High Courts, and it was observed by Allahabad High Court in the case of CIT v. Vector Shipping Services (P.) Ltd [2013] 357 ITR 542 (Allahabad) that for disallowing expenses from business and profession on the grounds that tax has not been deducted at source, the amount should be payable, and not which has been paid by the end of the year; and the revenue's Special Leave Petition (SLP) against the decision in the case of Vector Shipping had been dismissed by the Supreme Court [CC No(s) 8068/2014]. As no decision of the Jurisdictional High Court was available directly on the issue, considering the conflict of opinion between various High Courts and the decision of the Special Bench of the Tribunal, the Tribunal ruled in favour of the taxpayer.

Mrs. Kanak Singh v. ITO (ITA No. 5530/Del/2012, dated 19 September 2014)

Depreciation allowable under Section 32(1)(ii) of the Act on 'maintenance portfolio' as revenue yielding rights acquired under maintenance contracts are intangible assets in nature of commercial/business rights

The taxpayer acquired running business of ECE Industries Ltd. (ECE Ltd.) under 'Undertaking Sale Agreement' dated 16 October 2002 (agreement). The taxpayer had acquired 'Elevator Division' business of ECE Ltd. which comprised of marketing, selling, erection, installation, commissioning, service, repair, maintenance and modernization including major repairs of products on slump basis. The said transaction was valued at INR203.2 million out of which valuation for 'Maintenance Portfolio' of ECE Ltd. was worked out at INR183.4 million. The balance consideration of INR18.5 million was separately shown in the balance sheet and was treated as 'goodwill' pertaining to

FICCI

the business. In the return for AY 2003-04, the taxpayer claimed depreciation on commercial rights received under the agreement as intangible assets under Section 32(1) of the Act. However, the AO denied the claim which was confirmed by the CIT(A), holding it as a nondepreciable asset. Aggrieved taxpayer preferred an appeal before Delhi Tribunal. Before the Tribunal, the taxpayer also raised an additional ground of depreciation on 'goodwill' which was not claimed in its return.

The Delhi Tribunal observed that value ascribed to 'goodwill' was always part of the taxpayer's accounts and it also formed part of purchase consideration under the agreement, and hence depreciation claim on 'goodwill' is to be allowed. For depreciation on 'Maintenance Portfolio' i.e. other intangible assets, the Tribunal perused Section 32(1)(ii) and observed that after the specified intangible assets, the words 'business or commercial rights of similar nature' have been additionally used, which clearly demonstrates that the legislature did not intend to provide for depreciation only in respect of specified intangible assets but also to other categories of intangible assets, which were neither feasible nor possible to exhaustively enumerate. In the circumstances, the nature of 'business or commercial rights' cannot be restricted to only the aforesaid six categories of assets, viz., knowhow, patents, trademarks, copyrights, licences or franchises. The nature of 'business or commercial rights' can be of the same genus in which all of the aforesaid six assets fall. All the above fall in the genus of intangible assets that form part of the tool of trade of an assessee facilitating smooth carrying on of business. From the perusal of the terms of the agreement between the taxpayer and ECE Ltd., the Tribunal noted that the taxpayer had sought many annual maintenance contracts (AMCs), which constituted the whole and sole of the 'maintenance division' business of the transferor and which was carried out by taxpayer after transfer. Thus, applying the principle of ejusdem generis, the Tribunal held that AMCs were commercial rights and should be categorized as 'business or commercial rights' for the purposes of Section 32(1)(ii) of the Act.

Thyssen Krupp Elevator v. ACIT [TS-588-ITAT-2014(Del)]

Capital receipt

The taxpayer acquired a plot of land, in an auction from liquidator of the seller for setting up a factory for INR31.6 million. The plot was on leasehold and transferred in the name of the taxpayer on the payment of transfer fees. Subsequently, other group offered to buy the entire asset of the seller at a higher price, which was confirmed by the company judge and the first sale to the taxpayer was set aside. On an appeal the High Court confirmed the sale to the taxpayer. The order of the High Court was challenged in the Supreme Court. During the hearings before the Supreme Court, the taxpayer and the other group came to a settlement whereby the other group agreed to pay INR63.6 million to the taxpayer resulting in net gain of INR26.9 million. The Supreme Court confirmed the settlement and confirmed the sale in favour of the other group. The Assessing Officer considered the gain of INR26.9 million to be short-term capital gain on extinguishment of right in land and levied tax accordingly. The CIT(A) deleted the addition.

The Tribunal held that compensation received by the taxpayer cannot be assessed under the head capital gain because no asset came into existence with the taxpayer. The Tribunal further held that the taxpayer has acquired an industrial shed for running a manufacturing business, the acquisition of which was set aside and the taxpayer was deprived of making future profits by surrendering this profit making structure or capital asset and therefore, compensation received against such surrender is to be treated as capital receipt and cannot be taxed as revenue receipt.

DCIT v. M/s Winsome Yarns Ltd [TS-546-ITAT-2014(CHANDI)]

Set-up of business

The taxpayer was in the business of out of home advertisement. The taxpayer took a contract for the construction of bus queue stands at own cost and exploiting the same for earning advertisement revenue. During the year under consideration, taxpayer had ordered manufacturing of stands, arranged finance and carried out other activities. The taxpayer claimed a deduction of INR31.7 million of revenue expenditure. The AO disallowed the same stating that the business has not yet commenced. The Tribunal held that it emerges from a combined reading of Section 3 and Section 4 of the Act that the starting point of taxability of income or allowability of deduction, is the 'setting up of the business' and not the commencement of business. The Tribunal also held that the taxpayer had set-up the business and is eligible to claim the deduction.

JCDecaux Advertising India P. Ltd. v. DCIT [TS-561-ITAT- 2014(DEL)]

Notification & Circulars

OECD releases first BEPS recommendations to G20 on international approach to combat tax avoidance by Multinationals

On 16 September 2014, the OECD released its first recommendations for combating international tax avoidance by multinational enterprises (MNE). The recommendations are on key elements of its BEPS action plan. The recommendations have been agreed in consensus with the OECD and G20 countries, which include India.

The first 7 out of 15 elements of the Action Plan released focus on helping countries to:

- ensure the coherence of corporate income taxation at an international level, through new model tax and treaty provisions to neutralise hybrid mismatch arrangements (Action 2);
- realign taxation and relevant substance to restore the intended benefits of international standards and to prevent the abuse of tax treaties (Action 6);
- assure that transfer pricing outcomes are in line with value creation, through actions to address transfer pricing issues in the key area of intangibles (Action 8);
- improve transparency for tax administrations and increase certainty and predictability for taxpayers through improved transfer pricing documentation and a template for country-by-country reporting (Action 13);

- address the challenges of digital economy (Action 1);

- facilitate swift implementation of the BEPS actions through a report on the feasibility of developing a multilateral instrument to amend bilateral tax treaties (Action 15);

- counter harmful tax practices (Action 5).

Source: www.oecd.org

Amendment to Listing Agreement:

The Securities Exchange Board of India (SEBI) issued a circular amending Clause 49 of the Listing Agreement which is applicable from 1 January 2014. Important amendments are:

- The Clause should not apply to listed companies having paid-up capital not exceeding INR100 million and net worth not exceeding INR250 million

- Appointment of woman Director provisions to now apply from 1 April 2015

- Provisions relating to disposal of material subsidiary/assets thereof are relaxed in case disposal is through court approved scheme

- If an entity is a related party under the Companies Act or is a related party under applicable accounting standards, the entity will be a related party under amended Clause 49

- Materiality of the related party transaction is linked to the turnover as per consolidated financials instead of the turnover/networth as per the standalone financial of the Company

- The Audit Committee is empowered, subject to conditions, to grant omnibus approval for related party transactions

- Transactions between two government companies and transactions between holding company and its wholly owned subsidiary(being part of the consolidated financials) are exempted from audit committee / shareholders' approval

- All entities covered under definition of related party, whether an interested party in the particular transaction under consideration or not, are prohibited from voting at the meeting approving such transaction.

SEBI (CIR/CFD/POICY CELL/7/2014 dated 15 September 2014)

II. SERVICE TAX

Tribunal Decisions

Separate contracts for goods supply & erection / commissioning, taxable as composite works contract

The issue before Mumbai CESTAT was whether service tax was payable under 'works contract' category on turnkey project for setting up a power plant. The taxpayer is engaged in the business of generation of electricity. The taxpayer wanted to set up a power plant for which, it awarded an Engineering Procurement Construction ("EPC") Contract to China National Automotive Industry International Corporation ("CNAICO"). CNAICO had an authorized representative in India, viz SOKEO Power Private Ltd ("SOKEO"). The taxpayer entered into separate contracts for supply of goods and supply of services. The taxpayer discharged applicable service tax on the service contract (under reverse charge mechanism), but did not discharge any service tax on the contract for supply of goods. However, Revenue Authorities contended that the total work is a composite contract and the taxpayer should discharge applicable service tax on both value of goods and services. Being aggrieved the taxpayer preferred the present appeal.

The matter came up for consideration before the Mumbai Bench of CESTAT. CESTAT observed from the Letter of Intent, that the taxpayer had given a contract for turnkey project to CNAICO which involves design and procurement of items from various sources and other ancillary equipment from domestic sources in India. Customs, Excise and Service Tax Appellate Tribunal ("CESTAT") observed that SOKEO, was undertaking activities related to the project within India, right from clearance, transportation of goods, erection, commissioning, coordinating with CNAICO as well as Indian suppliers, ensuring supply etc. CESTAT, thus observed that the total project or initial Letter of Intent splits up into two contracts, one with CNAICO and other with SOKEO, which is doing everything on behalf of CNAICO and hence should be considered as a single composite contract within the scope of 'works contact service'. Further, the CESTAT noted that the terms and conditions of a contract are to be read as a whole and a contract / agreement must be construed keeping in view the intention of parties, therefore the taxpayer is liable to service tax on reverse charge basis. However, CESTAT agreed with the contention of the taxpayer that the Revenue Authorities could not enforce composition scheme under the Works Contract. CESTAT observed that value of works contract service would be gross amount charged for works contract less the value of goods transferred in execution of said contract. Since, the goods were imported and appropriate customs duty was discharged on such goods, it was possible to determine the value of goods and service tax at the normal rate would apply only on value of services. Accordingly, the CESTAT disposed the appeals in above terms.

Gupta Energy Private Limited vs Commissioner of Customs and Central Excise, Nagpur [TS 410 Tribunal 2014 ST]

Input credit availment is qua the tax payer and not head office or factory

The taxpayer was engaged in the business of manufacturing CDR, CD Rom, DVDR and DVD Rom, falling under Chapter Heading 85 of Central Excise Tariff Act, 1985 ("CETA"). Head Office ("HO") of the taxpayer was registered as an Input Service Distributor ("ISD") in terms of Rule 2(m) of CENVAT Credit Rules, 2004 ("CCR"). HO received various services from abroad and discharged applicable service tax under reverse charge mechanism. Taxpayer availed CENVAT credit of the service tax paid by the HO as distributed by it, and utilized the same for discharging output excise duty liability. Revenue Authorities were of the view that since the HO is not engaged in provision of any services, it was not eligible to avail any CENVAT credit and also distributing the same. Upon adjudication, Revenue Authorities rejected taxpayers appeal and confirmed the denial of the credit along with interest and penalty. Being aggrieved, taxpayer filed the present appeal.

The matter came up for consideration before the Delhi Bench of CESTAT. CESTAT observed that as per Rule 7 of CCR, the HO was entitled to get itself registered as ISD and distribute CENVAT credit and that such rule does not require the HO to be a provider of service or a manufacturer. CESTAT also highlighted that the services are received qua the taxpayer and not qua the factory or HO of the tax payer and thus, the taxpayer is eligible to avail CENVAT credit. CESTAT also observed that credit on the input services is not dependent upon the actual receipt of services in the factory. Since the HO and the factory belong to taxpayer, the credit should be available. Therefore, the CESTAT rejected Revenue Authorities reasoning in as much as the HO was not providing any output service or not manufacturing any excisable goods and allowed the taxpayers appeal.

Moser Baer India Limited vs Commissioner of Customs, Central Excise [TS 368 Tribunal 2014 ST]

Discounts received by ad-agency from media non-taxable as Business Auxiliary Services absent contractual obligation

The taxpayer is engaged in the business of rendering 'Advertising Agency Services' to various clients. As per clients' request, taxpayer places advertisements on their behalf in various print media and electronic media and pays service tax on the agency commission received. Revenue Authorities sought to levy service tax on the volume discounts received by the taxpayer from the media agencies under the category of BAS, on the ground that the taxpayer was promoting the business of print / electronic media, by booking orders on behalf of such media owners. Being aggrieved, the taxpayer preferred the present appeal.

The taxpayer *inter alia* contended that some of the media owners gave discount at the end of the year, based on the quantum of advertisement placed on the print / electronic media and same was in the nature of gratuitous payment. It was also submitted that there was no agreement or understanding between the taxpayer and the media owner for placement of advertisement on behalf of its clients. Taxpayer contended that merely because it had placed the order for advertisement, it could not be said that it had rendered any service to the print / electronic media.

On the other hand, Revenue Authorities argued that discount availment and rate difference retained by the taxpayer in respect of the transaction undertaken with media has to be deemed as a consideration received for the services rendered and would merit as service tax levy under BAS category. It was also alleged by the Revenue Authorities that in addition to placing ads for clients, taxpayer also promoted the business of media owners and accordingly, so long as outstanding amount is not demanded by the media owner, the same would partake the character of consideration for the services rendered.

The matter came up for considered before the Mumbai Bench of CESTAT which decided the matter in favour of the tax payer. CESTAT observed that the choice of the print / electronic media was with the client and not with taxpayer and thus, the taxpayer was merely acting as a coordinator. Further, CESTAT also observed that there was no contractual obligation between the taxpayer and the media owner for provision of any services. Therefore, CESTAT by placing reliance on the decisions in case of Euro RSCG Advertising vs CST [2007 7 STR 277], P. Gautam vs CST [2011 (24) STR 447], rejected Revenue Authorities claim and concluded that incentives received by the taxpayer from the media owners without any contractual obligation to render any service were not liable to service tax under category of BAS. Accordingly, CESTAT allowed taxpayer's appeal.

Grey Worldwide Private Limited vs Commissioner of Service Tax, Mumbai [TS 359 Tribunal 2014 ST]

Penalty under section 78 not imposable if penalty under section 77 is waived

The taxpayer was engaged in the business of marketing the loan products of ICICI Bank Limited on agency basis. Thus, the taxpayer provided services classifiable under Business Auxiliary Services ("BAS"). However, the taxpayer did not discharge its service tax liability on commission received for such marketing services. Accordingly, a show cause notice was issued to the taxpayer demanding such service by, invoking extended period of limitation and levying penalties under section 77 and 78 of the Finance Act, 1994. However, upon adjudication the Revenue Authorities dropped the demand of the penalty under section 77 on the basis that the taxpayer is small service provider and hence not expected to be well equipped and aware of the service tax legislation. However, the Revenue Authorities retained the penalty demand under section 78 of the Finance Act, 1994. The Commissioner of Central Excise (Appeals) ("Commissioner (Appeals)") confirmed the penalty demand on the grounds that in case the taxpayer had doubts about the taxability of the service, he should have approached the departmental officers, however, the taxpayer failed to do so and thereby deliberately avoided payment of tax and therefore imposition of penalty under section 78 is valid. Being aggrieved the taxpayer preferred the present appeal.

The matter reached before Delhi Bench of CESTAT for consideration which allowed the appeal in favour of the taxpayer. CESTAT observed that the order of the Commissioner (Appeals) is misconceived as there is no statutory provision for the taxpayer to approach the Revenue Authorities for seeking advice / guidance on interpretation of provisions of Act. Since the Revenue Authorities have clearly recorded the reasons of inability of the taxpayer and dropped the penalty under section 77 of the Finance Act, 1994, the findings equally cover the case in favour of the taxpayer for dropping of the penalty under section 78 of the Finance Act, 1994, as well. Accordingly, the CESTAT quashed the order and appeal of taxpayer was allowed

Smart Finance vs Commissioner of Central Excise, Jaipur [2014 TIOL 1410 HC DEL ST]

Availment of CENVAT credit of the service tax erroneously paid is at par with taking refund of such tax amount

The taxpayer is engaged in the business of providing General Insurance Services throughout India including the state of Jammu & Kashmir ("J&K"). The taxpayer has its head office located at Pune and is centrally registered at Pune, for service tax purposes. The taxpayer has appointed various insurance agents to promote its business and discharges applicable service tax on the services availed of such agents under reverse charge mechanism. Taxpayer provides insurance services to the clients located in J&K through its branches located in J&K and such branches also receives services of insurance agents located in J&K. The services rendered by a service provider located in J&K to a service recipient located in J&K for assets located in J&K are not liable to service tax, however the taxpayer inadvertently paid service tax under reverse charge mechanism and availed CENVAT credit of such tax paid instead of applying for refund. The Revenue Authorities took objection on such credit availed and issued two SCN's to the taxpayer and upon adjudication, credit was denied to the taxpayer. Aggrieved by the order, the taxpayer preferred the present appeal contending that the service tax paid by it was refundable and accordingly, it availed credit of the same. The taxpayer relied on SC's pronouncement in case of CIT vs Mahalakhsmi Textile Mills Limited [1967 (66) ITR 710 (SC)]. On the other hand, the Revenue Authorities argued that since the services provided in J&K are exempt from levy of service tax, taxpayer is not eligible to avail any input credit in relation to such services.

The matter came up for consideration before the Mumbai Bench of CESTAT. CESTAT observed that there is no dispute that the insurance agents provided services to the branches of the taxpayer located in J&K and also that general insurance services are rendered in respect of the assets located in J&K. However, the Revenue Authorities, disputed that the service recipient is the taxpayer and it is located in Pune. CESTAT by placing reliance on the Central Board of Excise and Customs ("CBEC") Circular no. BI/6/05-TRU dated July 27, 2005 and section 66A of the Finance Act, 1994 held that the branches are directly concerned with the provision of service and are the service recipients. Accordingly, the taxpayer was not liable to pay service tax on such services and consequently availing CENVAT credit of service tax so paid, is nothing but refund of service tax. CESTAT by placing reliance on the SC's judgment in case of Mahalakhsmi (Supra) held that the taxpayer is eligible to avail CENVAT credit of the service tax.

Bajaj Allianz General Insurance Co. Limited vs Commissioner of Central Excise, Pune-III [2014 TIOL 1540 CESTAT MUM]

Accreditation cannot be equated with grant of franchise right and cannot be taxed under franchise services

The taxpayer was engaged in the activity of registering website domain names. The taxpayer was accredited by International Corporation for Assigned Names and Numbers ("ICANN"), an organisation performing regulatory function of controlling domain names. The taxpayer was registering domain names permitted by ICANN and ICANN accredited registries. Accordingly, the taxpayer paid fees to ICANN and various registries (accredited by ICANN). The taxpayer also appointed resellers located worldwide for rendering them services of registration, renewal, cancellation, deletion of domain names and collected charges in this regard.

The taxpayer was issued two Show Cause Notice ("SCN's") demanding service tax on the remittance made by the taxpayer to ICANN and various registries under reverse charge mechanism and demanding service tax as a service provider on the fees received by it from the resellers under the taxable service category of Franchise Services. The contention of the Revenue Authorities was that the taxpayer represents ICANN and is conducting business in name of ICANN and therefore is a franchise of ICANN and likewise, re-sellers of the taxpayer are also franchisees of the taxpayer.

The taxpayer submitted that ICANN is a not for profit organisation performing a regulatory function of controlling domain names and does not provide any service to the registrars. It was also submitted that ICANN merely provides accreditation to the taxpayer and not any representational right; also the activity of registering domain names is not associated with ICANN and therefore ICANN and taxpayer cannot be treated as franchisor and franchisee.

The matter was before consideration of the Mumbai Bench of CESTAT which decided the matter in favour of the tax payer. The CESTAT observed that ICANN is merely a registrar and cannot do anything but act as a registrar. Further, CESTAT mentioned that it is unable to identify any service provided or process developed by ICANN, which was used by the taxpayer. Further, CESTAT also agreed with the taxpayer contention that accreditation and representation are two separate things and that taxpayer is merely accredited by ICANN. Accordingly, CESTAT held that the taxpayer was not a franchisee of ICANN it was merely accredited by ICANN. In respect of re-sellers appointed by taxpayer, CESTAT observed that they merely act as resellers of the services provided by the taxpayer. Also, that the agreement between the taxpayer and the re-sellers is on principal to principal basis and reseller's cannot be considered as franchisees of the taxpayer. Accordingly, CESTAT allowed the taxpayers appeal on merits and held that the services rendered and received are not classifiable under 'Franchise Services'.

Directi Internet Solutions Private Limited vs Commissioner of Service Tax [2014 TIOL 1505 CESTAT MUM]

III. VAT/ CST/Entry Tax

High Court Decision

Emphasise on trade parlance test and not the scientific or technical meaning for classification under Value Added Tax ("VAT") laws

The taxpayer was engaged in the manufacture and sale of handheld Electronic Ticketing Machines ("ETM"). It discharged VAT at 12.5 percent and classified the ETM under the residuary category as it did not fall under any of the entries. Later, it realised that the ETM was an IT product and therefore started paying only 4 percent VAT on such sales. The taxpayer contended that the ETM performed all the functions of an IT product such as calculation, arithmetic computations by software, electronic printing; advance features such as wi-fi, Bluetooth, global positioning system device; contained li-on battery with inbuilt charge control etc. Therefore, the ETM was correctly classifiable as IT products and thus liable to only 4 percent of VAT.

On the other hand, the Revenue Authorities were of the view that the ETM was correctly classifiable under entry 8470 for 'ticket issuing machines and similar machines, incorporating a printing device'. Therefore, ETM was liable to 12.5 percent VAT applicable for entry 8470.

The matter came up for consideration before the Karnataka HC which held against the taxpayer. It held that the description of the goods has to be understood in the commercial sense and the scientific and technical meaning has no place in determining the classification of goods. Therefore, when the taxpayer explained the good to be a handheld ticketing machine; that is how the customer has also understood the machine and in the Central Excise Tariff Act also, this ticketing machine is included in entry 8470. Therefore, when there is an explicit entry 8470 to this effect, the goods should be classified as such.

MicroFX vs The State of Karnataka [STRP No 456 of 2012 & 702, 704 of 2013 Karnataka HC]

Transportation charges includible in the taxable turnover and liable to VAT

The taxpayer was Government of India undertaking and a registered dealer under the Gujarat Sales Tax Act, 1969 ("GSTA"). It sold the crude oil manufactured by it to its sole buyer through pipelines. The taxpayer received transportation charges towards this. The Revenue Authorities sought to levy sales tax on the transportation charges received by the taxpayer. The taxpayer contended that it was not liable to pay any tax on the transportation charges received because the definition of 'sale price' did not specifically include 'freight' or 'transportation charges'. Therefore, the same were not includible in the taxable turnover.

The matter came up for consideration before the Gujarat HC which held against the taxpayer. The HC found that the definition of 'sale price' included 'amount of consideration paid or payable to the dealer for any sale made including any sum charged for anything done by the dealer in respect of the goods at the time or before the sale thereof'. The HC held that in view of the definition and the amount received by the taxpayer towards transportation of crude oil, the transportation charges were liable to be taxed as per the GSTA. Accordingly, the claim of the taxpayer was disallowed.

Oil and Natural Gas Corporation vs Commissioner of Sales Tax [STR no 3 of 1996 Gujarat HC]

If literal interpretation of statutes leads to absurd results, purposive interpretation to be adopted

The taxpayer was engaged in the manufacture and sale of refined sunflower oil from sunflower oil cake by employing solvent extraction process. The taxpayer was duly registered under the Karnataka Value Added Tax, 2003 ("KVAT"). A scrutiny of returns of the taxpayer was conducted and it was found that after the taxpayer extracted sunflower oil from sunflower oil cakes, it obtained de-oiled sunflower cakes as a by- product. It was also found that the taxpayer sold the de-oiled sunflower cakes which were exempted under the KVAT. On this ground, the Revenue Authorities contended that as per the KVAT, the taxpayer will not be eligible for the entire amount of Input Tax Credit ("ITC") because the inputs (here, sunflower oil cakes) were used in the sale of exempted goods (de-oiled sunflower cakes); since no ITC is available if there is no output tax liability.

The matter came up for consideration before the Karnataka HC which held in favour of the taxpayer. The HC held that a literal interpretation of the statute led to absurd results because ITC cannot be denied to the taxpayer who is in the business of only one product which is taxable, and merely because in the process of manufacture of that one taxable product, another by-product comes into existence which although is exempted, yet sold for a value. The HC went on to say that the KVAT makes it very clear that it is only when there is a direct relationship to the taxable sales, the taxpayer is entitled to ITC benefit.

In the present case, it cannot be said that there was a direct nexus between the sunflower oil cake and de-oiled sunflower cake because the taxpayer did not set up a manufacturing unit to manufacture de-oiled cakes. The sunflower oil cakes were only purchased for the purpose of manufacturing sunflower oil which is a taxable commodity. Therefore because the de-oiled cakes had some value and were sold, that would not take away the benefit of ITC conferred upon the taxpayer. The HC also opined that the legislative intent was being defeated on a literal interpretation of statute, therefore a purposive interpretation had to be adopted.

MK Agrotech Private Limited vs The State of Karnataka [STRP Nos 774- 974/ 2013 Karnataka HC]

IV. CUSTOMS

Tribunal Decisions

Refund claim even if filed with the wrong authority, has to be considered as filed within the time limit

The issue on hand of the Delhi Bench of CESTAT, was that whether a refund claim filed within the time limit but with the wrong authority, and later on re-filed with the proper authority should be considered as filed within the time limit. Certain proceedings were initiated against the taxpayer resulting into confiscation of the goods and imposition of redemption fine and penalties. On appeal, said confiscation and penalties were set aside, as a result, the taxpayer was entitled for refund of the fine and penalties deposited by it. Accordingly, the taxpayer made an application for grant of refund. However, incidentally the taxpayer made such application with the wrong authority. Subsequently, on receipt of the communication from the Revenue Authorities, taxpayer re-filed the refund claim with the proper authority. However, the refund claim of the tax payer was rejected on the ground that the claim was barred by limitation of time. Further, upon appeal to Commissioner (Appeals), it was held that the appeal stands filed on the date of re-submission with the proper authority. Being aggrieved, the taxpayer preferred the present appeal.

The matter came up for consideration before the Delhi Bench of CESTAT. The CESTAT observed that the refund application for the first time was filed within the time-limit. CESTAT observed that admittedly, the taxpayer filed the refund claim with the jurisdictional office of Revenue Authorities, but if such jurisdictional office was not capable to grant such refund, it should not have accepted the refund application in first place. Further, CESTAT also observed it is not possible for the taxpayer to identify the proper officer, also so that the officer in the Jurisdiction office of Revenue Authorities is the proper officer for the taxpayer. Accordingly, the CESTAT by placing reliance on the decisions in case of CCE, Ahmedabad vs AIA Engineering Limited [2009 (248) ELT 826] and CCE vs AIA Engineering Limited [2011 (21) STR 367] held that the refund claim even if filed with the wrong authority has to be considered as filed on first day. Accordingly, the CESTAT ruled in the favour of taxpayer.

Rathi Steel and Power Limited vs Commissioner of Central Excise [2014 TIOL 1401 CESTAT DEL]

Fees paid for technology transfer, not includible in the transaction value for custom duty purposes

The taxpayer was engaged in the business of manufacturing and selling float glass and mirror in India. The taxpayer entered into a license and technology agreement for transfer of technology know-how to India with its parent company located outside India. Under such agreement the taxpayer also imported certain capital equipment from its group company. Under the agreement, the taxpayer was obligated to pay its parent entity a lump sum fees for transfer of technical know-how and also a percentage of total sales of manufactured goods as royalty.

Since the taxpayer imported certain capital goods from a related party, such import was taken up for review by special valuation branch ("SVB"). Upon adjudication, the Revenue Authorities, held that lump sum fees and the percentage royalty was liable to be added to the transaction value in terms of Rule 9(1)(c) of Custom Valuation Rules, 1988 ("CVR"). Upon an appeal made to Commissioner (Appeals), the appeal of the taxpayer was rejected and the order of Revenue Authorities was upheld. Being aggrieved, the taxpayer preferred the present appeal, *interalia* contending that Revenue Authorities has erred in holding that the license fees is for import of all supplies and materials, whereas the license fees was for transfer of technological know-how and not for import of capital equipment's.

The matter came up for considered before the Chennai Bench of CESTAT. The CESTAT observed that the agreement is for transfer of the technological know-how and nowhere there was a mention that license fee and royalty is payable on importation of capital goods. Further, the CESTAT by placing reliance on the SC's pronouncement in case of CC, Chennai vs. Toyota Kirloskar Motors Private Limited [2007 TIOL 94 SC CUS] held the judgment of SC is squarely applicable in the present case, since the payment of license fees and royalty are for transfer of technological know-how and has no relation with the import of capital goods.

Further, as per rule 9(1) (c) of CVR, the addition of license fees and royalty only triggers if such payment is a condition of sale of capital goods to the taxpayer. In absence of any such condition in the agreement and also considering the fact that the royalty and license fees are related to transfer of technological know-how, the CESTAT held that license fees and royalty paid by the taxpayer should not be added in the value of imported capital goods. Accordingly, the CESTAT set aside the order of Commissioner (Appeals), and allowed the taxpayer's appeal.

Saint Gobain Glass India Limited vs Commissioner of Customs, Chennai [2014 TIOL 1406 CESTAT MAD]

V. CENTRAL EXCISE

Tribunal

Rule 8 of Central Excise Valuation Rules, 2000 to apply to cases where entire production being captively consumed

The taxpayer was a manufacturer and was clearing goods by way of sale as well as to its manufacturing unit for captive consumption. The taxpayer was discharging the excise duty on the entire stock on the value determined based on the factory gate sale of the same product to independent buyers. The Revenue Authorities disputed the position adopted by the taxpayer and contended that rule 8 of the Central Excise Valuation Rules, 2000 ("Valuation Rules") was applicable for captive consumption of goods and therefore, the taxpayer had not discharged excise duty appropriately. On the other hand, the taxpayer contended that rule 8 is applicable only when the entire production was being captively consumed. Since there were independent sales, rule 8 was not applicable.

The matter came up for consideration before the Ahmedabad Bench of CESTAT which held in favour of the taxpayer. It held that indeed, rule 8 was applicable only when the entire production was being captively consumed. Given that the words used in rule 8 were 'where the excisable goods are not sold' and not 'where excisable goods are consumed by an assessee himself or on his behalf in the manufacture of other articles'; the contention of the taxpayer was to be accepted. Accordingly, in terms of the decision of the Larger Bench of CESTAT in Mumbai in the case of Ispat Industries Limited vs Commissioner of Central Excise [2007 TIOL 245 CESTAT Mumbai], the claim of the taxpayer was allowed.

Reliance Industries Limited vs Commissioner of Central Excise, Rajkot [2014 TIOL 1740 CESTAT Mumbai]

Undervaluation of intermediate goods immaterial when final goods cleared on payment of duty under section 4A

The taxpayer was a manufacturer of soap and also got its finished product manufactured by job workers. On one occasion, the taxpayer cleared the intermediate goods to a sister unit in Goa at INR 47,250 per Metric Ton and to another job worker by the name Aquagel at INR 28,600 per Metric Ton. The Revenue Authorities contended that there was undervaluation of intermediate goods to the extent they are cleared to the job worker. Consequently, they issued show cause notices to the taxpayer for demand of differential duty. The taxpayer responded that the price was the sole consideration for sale and the final products are cleared after payment of excise duty under section 4A of the Central Excise Act, 1944 ("CEA"). Therefore there was no undervaluation, given that the entire exercise was revenue neutral.

The matter came up for consideration before the Mumbai Bench of CESTAT which held in favour of the taxpayer. The CESTAT reasoned that the duty was payable on finished goods on Maximum Retail Price ('MRP') as per section 4A of the CEA. Therefore, even if undervaluation could be presumed, ultimately, the taxpayer was receiving the duty paid finished goods after payment of excise duty as per section 4A of the CEA. When duty is paid on finished goods on MRP basis, the question of undervaluation of intermediate goods does not arise. Accordingly, the claim of the taxpayer was allowed

Hindustan Unilever Limited vs Commissioner of Central Excise [Appeal No E/ 1163/ 10 CESTAT Mumbai]

Excise duty to be discharged on the sale price prevailing at the depot at the time of removal of goods, subsequent price revisions irrelevant

The taxpayer was engaged in the manufacture of oil and discharged excise duty at the time of the clearance of the goods from its refinery on the basis of the sale price of such goods from its depot. Subsequent to the clearance of these goods, there was an upward price revision and the goods were sold from the depot at a higher price. The Revenue Authorities contended that since the price at the depot is a cum duty price, it implies that the taxpayer collected a higher amount of excise duty from the customers and therefore the demand was sustainable.

The matter came up for consideration before the Mumbai Bench of the CESTAT which held in favour of the taxpayer. The CESTAT reasoned that the liability to discharge duty arises when the goods are cleared from the factory. The law mandates that when the goods are cleared and sent to the depot, duty liability has to be discharged on the price prevailing at the depot at the time of clearance of the goods from the factory. In the present case, there was no dispute that the taxpayer discharged the duty in accordance with the law. Thus, any subsequent price revision is irrelevant as long as the duty is being discharged on the price prevailing at the depot at the time of clearance of the goods. Accordingly, the claim of the Revenue Authorities was rejected.

Commissioner of Central Excise vs Indian Oil Corporation [2014 TIOL 1627 CESTAT Mumbai]

Assessable value to not include the rentals recovered on containers in which goods supplied to customers

The taxpayer was engaged in manufactureof various industrial gases, namely oxygen, nitrogen, hydrogen, etc. These gases were chargeable to central excise duty under chapter 28 of the Central Excise Tariff Act, 1985 (“CETA”). The taxpayer manufactured and cleared the medical grade oxygen of 99.5 percent purity.

Further, the taxpayer sold gases manufactured by it in its own cylinders wherein it charged a separate amount towards cylinder rental and maintenance in addition to the price of gases. Certain customers brought their own cylinders and in such cases where no rental for cylinder was charged, sometimes at the request of the customers, the testing of the cylinders was done and for this, separate amounts were charged.

Further, for about 40 percent of the customers; gas was sold in the taxpayer’s cylinders and for about 40 to 45 percent of the customers; gas was sold in the cylinders brought by their customers. However, in the remaining 15 to 20 percent cases, the gas was cleared either through pipe line or in tankers. Also, the taxpayer arranged transportation of the gases to the customers’ premises whenever a request for this was made by the customers.

The Revenue Authorities raised the following objections:

- Cylinder rentals and maintenance charges recovered in cases of supply of gases where the taxpayer supplied the cylinders; along with the charges recovered for testing of the cylinders in the cases of supply of gases in the cylinders brought by the customers is liable to be included in the assessable value of the gases;

- Differential of the transportation charges (amount charged to the customer less the actual) is to be includible in the assessable value of gases;

- Medical grade oxygen supplied in cryogenic tankers and not cylinders, therefore is classifiable as industrial grade oxygen under chapter sub heading 2804.19 and not 28041.11; and

- Taxpayer is required to reverse the CENVAT Credit taken on cryogenic tank at the time of disposing the used tanks.

The matter came up for consideration before the Delhi Bench of CESTAT which held the following:

- It is clear that the sales of the gases were at the factory gate and the assessable value is the transaction value at the time and place of removal. Therefore, since place of removal was the factory gate, the freight expenses incurred on transportation of the goods from the factory to the customers' premises would not be includible in the assessable value. Further, the transportation did not add to the value of the goods. Therefore, even if the taxpayer was making a profit on the transportation charges, the same was not liable to be included in the assessable value of the goods;

- With respect to the inclusion of cylinder rentals and maintenance charges, it was observed that gases were marketable as such; given that a substantial quantity of the gases was being supplied in tankers as well as through pipe lines. Therefore, mere packing of gases in cylinders did not enhance the marketability of the gases in question. Relying upon the case of Commissioner of Central Excise vs Grasim Industries Ltd. [2014 TIOL 573 CESTAT Del], the cylinder rentals and maintenance charges would not to be included in the assessable value;

- Further, as regards classification of the medical gas oxygen, the CESTAT stated that as per Indian Pharmacopoeia, the medical grade oxygen should be of not less than 99 percent purity and on this basis, the 99.5 percent pure oxygen would have to be treated as medical grade oxygen. It was further observed that since there was no definition of medical grade oxygen, the meaning of this term should be understood from how it is described in Indian Pharmacopoeia and in terms of the Indian Pharmacopoeia, the medical grade oxygen must be not less than 99 percent pure. It was also pointed out that the condition of end use cannot be brought in for deciding the classification. This is to mean that merely because the medical grade oxygen manufactured by the taxpayer and sold by it to his customers was further sold to other dealers for non-medical use, the classification of the oxygen manufactured and cleared by the manufacturer cannot be changed to non-medical oxygen. Therefore, the classification provided by the taxpayer was held to be correct; and

- Lastly, as regards the CENVAT Credit demand on the removal of used cryogenic tanks, it was observed that the taxpayer at the time of clearance of the used cryogenic tanks had reversed the credit equal to the amount of duty paid on the transaction value ie, depreciated value. Given this, no amount over and above amount already reversed would be recoverable from the taxpayer. Reliance was placed on several rulings.

Accordingly, the appeals of the taxpayer were allowed.

Goyal MG Gases Private Limited vs Commissioner of Central Excise, Ghaziabad [Excise appeals no E/ 5180, 5181 & 646/ 2006- Excise CESTAT Delhi]

Notification & Circulars

Service tax (Second Amendment) Rules 2014, prescribe 'rate of exchange' wef October 1,

Service tax authorities vide Notification no 19/2014 – Service tax dated August 25, 2014, *inter alia* prescribed that the 'Rate of Exchange' as applicable with effect from October 1, 2014 shall be rate as per the generally accepted accounting principles on the date of point of taxation.

Notification no. 19 / 2014 – Service Tax dated August 25, 2014

Services by a specified organization in relation to pilgrimage exempted from levy of service tax

Services by a specified organization in respect of a religious pilgrimage facilitated by the Ministry of External Affairs of the Government of India, under bilateral arrangement has been exempted from levy of service tax. Further, the term specified organization has been defined to mean Kumaon Madal Vikas Nigam Limited and 'Committee' or 'State Committee' as defined under Haj Committee Act,

Notification No 17 / 2014-Service tax dated August 20, 2014

Karnataka State Government notifies that Central Sales Tax ("CST") dealers can now generate 'C Forms' online

Karnataka State Government notifies that the dealers having CST registration can now obtain Form-C declarations electronically for the inter-state purchases effected after April 1, 2014 and corresponding values are declared in monthly returns. Further, also prescribes detailed procedure for generation of Form-C for quarter ending June 30, 2014 and also for subsequent quarters after submission of inter-state purchase details by dealers whose turnover exceeds the prescribed limit

Notification No. CCW / CR8 / 2013-14 dated September 9, 2014 sought based on the specific facts and circumstances. This newsletter does not substitute the need to refer to the original pronouncement"