November 2014

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

Foreword

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

Based on the suggestions received from our members, draft Pre-Budget Memorandum has been prepared for being submitted to the Government. A meeting of the Taxation Committee was held on 21st October, 2014, to identify important issues which should be flagged for being brought to the notice of the Revenue Secretary and the Finance Minister. The Pre-Budget Memorandum 2015-16 has since been submitted to the Government on 10th November, 2014.

On the taxation regime, the Delhi Tribunal in the case of Agence France Presse held that payments received towards distribution and circulation of news reports and photographs within India through Indian news agencies is taxable as 'royalty' under the India-France tax treaty and under the Income-tax Act, 1961. The Tribunal has provided clarity on 'circulation of news articles and photographs' being treated as a copyright under the provisions of the Copyright Act.

In a Central Excise matter (Gopala Polyplast Ltd. v/s Commissioner of Central Excise, Ahmedabad), the Tribunal has ruled that the excise duty paid by export oriented units (EOU) for clearances to the domestic tariff area (DTA) is eligible for cenvat credit. The Revenue authorities had contended that the Cenvat Credit Rules allowed credit of only duties of excise whereas the duties paid by the 100% EOUs included element of basic customs duties, cess etc. The Tribunal concluded that the duty indicated on the invoices issued by the EOU was central excise duty even though the method used for calculating the measure included elements of customs duties. Therefore, CESTAT held that the entire duty paid would have to be considered as Central Excise duty paid under Section 3(1) of the Central Excise Act and the taxpayer is eligible to avail the cenvat credit of the entire amount

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Recent Case laws

I. DIRECT TAXES

High Court Decisions

Export Commission not akin to fee for technical services

The taxpayer paid commission in AY 2010-11 to Agenta World Trading and Consulting Establishment (Agenta), a company registered in Liechtenstein for procuring export orders. An application was made under Section 195(2) of the Act for authorisation to remit Euro commission for arranging export sales and realising payments to Agenta.

The AO held that the commission to non-resident was taxable as Fees for Technical Services (FTS) under Section 9(1)(vii)(b) of the Act. The AO relied on the ruling of Wallace Pharmaceuticals Private Limited [2005] 278 ITR 97 (AAR). The AO had directed the taxpayer to deduct tax at the rate of 10 per cent. The CIT(A) and the Tribunal ruled against the tax department. The tax department appealed before the Delhi High Court.

The High Court held that commission payment to non-resident for procuring export orders are not FTS since the activities carried out by Agenta do not relate to carrying out managerial, technical and consultancy. The High Court held that though Agenta had expertise and knowledge in marketing domain, it was used for its own purposes, and therefore, there was no provision of consultancy/advisory services to the taxpayer. Further, the High Court observed that there was no special skills or knowledge relating to a technical field required for carrying out export commissionaire arrangement, and therefore, not taxable as FTS. While rejecting the revenue's reliance on Wallace Pharmaceuticals, the High Court placed reliance on the decisions in the cases of J.K. (Bombay) Limited v. CBDT and Another [1979] 118 ITR 312 (Del), CIT v. Bharti Cellular Limited and Others, [(2009] 319 ITR 139 (Del) and AAR ruling in Intertek Testing Services India Private Limited [2008] 307 ITR 418 (AAR).

DIT v. Panalfa Autoelektrik (ITA No 292/2014) (Delhi High Court)

Payments made under composite agreement taxable as Royalty and Technical services to the extent performed in India under the India-Austria tax treaty

The taxpayer, a resident of Austria, entered into Technical Assistance Agreement for small hydro power plants with Punjab Power Generation Machines Limited (PPGML). The taxpayer owned the knowhow, technology for producing hydro power plants and agreed to provide the same to PPGML. The consideration was split into two types vis-à-vis lump-sum payment and recurring payments. The AO ignoring Article VII of the India-Austria tax treaty treated the entire sum as Royalty without assigning any reasons for characterization as technical services.

The CIT(A) observed that the agreement was a composite one, wherein, royalty as well as technical services had to be paid. The lump-sum fee payable under clause 4.1 was for technical services furnished in Austria and covered under Article VII of the tax

treaty, whereas payments made under clause 4.2 would be covered under Article VI of the tax treaty. The Tribunal also held in favour of the Taxpayer.

The Delhi High Court held that the consideration paid for right to use technical know-how etc. under the Agreement would be taxable in India as royalty under Article VI and consideration paid for technical services would be taxable in India to the extent of such amounts were attributable to the activities actually performed in the country of source, after allowing deduction of expenditure incurred in India. Further, payments made for technical services furnished by the taxpayer outside India would not be taxable in India.

With regard to the proportion of royalty and technical services that would be taxable and exempt, the High Court held as follows:

- Consideration paid for technical services would be taxable under Article VII of the DTAA to the extent the amounts were attributable to the activities performed by the taxpayer in India.
- Consideration paid for right to use technical information and know-how would be taxable under Article VI of the tax treaty.
- The consideration paid for furnishing technical services outside India, shall not be taxable in India.

CIT v. Voest Alpine A.G (ITA No 79/2001 and 80/2001) (Delhi High Court)

Himachal Pradesh High Court strikes down TDS under Section 194A on motor accident compensation, as no taxable income element in the payments

Recently the Himachal Pradesh High Court has quashed the Circular, dated 14 October 2011 whereby deduction of income tax had been ordered on the award amount and interest accrued on the deposits made under the orders of the Court in Motor Accident Claims cases.

The High Court observed that Chapters X and XI of the Motor Vehicles Act, 1988 provided for grant of compensation to the victims of a vehicular accident. The purpose of granting compensation under the Motor Vehicles Act is to ameliorate the sufferings of the victims so that they may be saved from social evils and starvation, and that the victims get some sort of help as early as possible. It is to save them from sufferings, agony and to rehabilitate them. Under no provisions of law the Income Tax Authorities can treat the amount awarded or interest accrued on term deposits made in Motor Accident Claims cases as income. As the said Circular is against the concept and provisions and runs contrary to the mandate of granting compensation the same was liable to be quashed. The High Court Directed to refund the amounts deducted with interest at the rate of 12 per cent from the date of deduction till payment.

Court on its own motion v. The H.P. Cooperative Bank Ltd. and ors. [CWPIL No.9 of 2014]

Tribunal Decisions

Application of Indian Copyright Law – French news agency taxed for Royalty

The taxpayer, an international news agency owned by the Government of France was

distributing text news and photos in connection with the news in India through news agencies, viz, Press Trust of India (PTI) and IANS India Pvt. Ltd. (IANS). It provided news of international events of interest in the field of politics, sports, economic, etc. The taxpayer also provided news on the web directly to the subscribers in India on its web site. It received payments from transmission of its news items as well as from transmission of news photos.

For Assessment Year (AY) 2006-07, the taxpayer filed a nil return of income. The taxpayer contended that news per-se was not property and hence not copyrightable. The agreement between the taxpayer and IANS & PTI was for transmission of photos, reporting of current events etc. and not to secure any copyright in the expression of such news report. Accordingly, the payments received were not in the nature of Royalty as per the Act or the India-France tax treaty.

However, the Assessing Officer (AO) did not agree with the contention of the taxpayer and levied tax at the rate of 15 per cent on gross basis. The Commissioner of Income tax (Appeal) [CIT(A)] also confirmed the AO's order.

The Delhi Tribunal admitted the additional evidence particularly the case papers relating to taxpayer's case against Google Inc. before the US district court, Columbia in relation to the infringement of taxpayer's news items and photos. The Tribunal referred to the Indian Copyright Act, 1957 (Copyright Law) and also the Article 13 of the tax treaty and did not accept the taxpayer's contention that the term copyright of literary, artistic work should be given ordinary literal meaning instead of lending it from the Copyright Law. For the limited purpose of finding out the true meaning and context of the words 'copyright of literary, artistic work' the Tribunal referred the copyright law.

The Tribunal also referred to rulings pertaining to other laws and after perusing the clauses of the distribution agreement, it observed that the taxpayer had a high degree of control and regulates its news content. Thus, the information was propriety in nature. The Tribunal also probed into the source from which the news information was extracted and how they were processed by the Taxpayer. Therefore, the Tribunal came to a conclusion that the information collected were processed by their editorial group and then a news report was created which created a unique expression even though the facts were the same. Further, the Tribunal also observed that the photographs could not be altered except for minor fading effect and resizing.

News report/ photographs meets the statutory requirements for copyright as per the Copyright Law. Thus the Tribunal ruled in favour of the tax department and held that the revenue earned from the Indian news agencies were taxable as Royalty.

Agence France Presse v. ADIT (ITA No 1055/Del/2011) (Delhi Tribunal)

New license agreement not an extension, allows benefit of lower rate of tax under Section 115A of the Act

The taxpayer, a company incorporated in United Kingdom, had two Indian associates - GKN Driveline (India) Limited and GKN Sinter Metals Limited. The taxpayer, owner of certain trademarks and license, entered into agreement with the associates permit-

ting the use of its trademarks on various products and services in accordance with the agreement.

The taxpayer received an amount of INR 62.09 million and offered the same as royalty and discharged tax at the rate of 10.56 per cent under Section 115A of the Act. The AO observed that the agreements were preceded by other agreements, which were entered prior to 1 June 2005. Since the agreements were a mere extension of the earlier agreement, tax rate of 15 per cent was applied as per the India-UK tax treaty.

The Pune Tribunal noted that Section 115A(1)(b) provided for income tax at 10 per cent on income by way of royalty received pursuant to agreement made on or after 1 June 2005. The Tribunal further noted that these provisions did not debar the taxpayer from entering into new agreements. The Tribunal held that the taxpayer had entered into two separate agreements with its Indian associates and the taxpayer could change/ manage its affairs within the framework of statute and the tax department could not question the business decisions of the taxpayer.

The Tribunal also held that even if the taxpayer had entered into new agreement to take advantage of lower rate of tax of at the rate of 10 per cent, the taxpayer could not be denied benefit on the ground that the same was nothing but extension of an old agreement. The Tribunal therefore concluded that the new license fee agreement entered into between the taxpayer and its Indian associates were new and separate from the earlier agreements and accordingly the license fee should be taxed at 10 per cent.

GKN Holdings Plc v. DDIT International Taxation (ITA No 149/PN/2013) (Pune Tribunal)

Disallowance under Section 14A cannot be made unless the exempt income has been received during the year

The taxpayer, engaged in the business of real estate and construction, is a holding company of about ten companies. As a part of regular business, it takes advance from group companies and gives advance to other group companies, as per the availability and requirement of funds. During AY 2009-10, the taxpayer had raised loans from a financial institution which was used for its day-to-day working. Further, the taxpayer made an investment in the form of shares in various companies, and also an investment in a partnership firm. These investments continued without any change during AY 2010-11. During AY 2009-10 and 2010-11, the taxpayer claimed interest expenditure incurred on loans raised from the financial institution in the return of income. The AO disallowed the interest on borrowed loan since the taxpayer could not prove that the investments were made out of its own funds. The AO applied the formula prescribed in Rule 8D(2)(ii) and (iii) of the Income-tax Rules, 1962 (the Rules) and made disallowance under Section 14A of the Act. However, no disallowance for any direct expenditure was made as prescribed in Rule 8D(2)(i) of the Rules.

The CIT(A) deleted disallowance under Rule 8D(2)(ii) and sustained disallowance under Rule 8D(2)(iii) of the Rules. It is an undisputed fact that the taxpayer had no exempt income during both the years involved. The tax department relied on the decision of the Special Bench of Delhi Tribunal in the case

of Cheminvest Ltd. v. ITO [2009] 121 ITD 318 (Del) where it was held that disallowance under Section 14A of the Act could be made even in a year in which no exempt income was earned or received by the taxpayer.

The Tribunal observed that the decision in the case Cheminvest Ltd. has been overruled by various High Courts. In the case of CIT v. Shivam Motors P. Ltd. (ITA No. 88 of 2014, 5 May 2014) (All), the Allahabad High Court held that if the taxpayer had not earned any tax free income, the corresponding expenditure could not be worked out for disallowance under Section 14A of the Act. Further, the Gujarat High Court in the case of CIT v. Corrtech Energy Pvt. Ltd. (Tax Appeal 239 of 2014 dated 24 March 2014) (Guj) held that where the taxpayer did not make any claim for exemption, Section 14A of the Act cannot apply. The Tribunal relied on the decision of the Punjab and Haryana High Court in the case of Winsome Textile Industries Ltd. where it was held that since the taxpayer did not make any claim for exemption, Section 14A of the Act will not apply. The Bombay High Court in the case of CIT v. Delite Enterprises (Tax Appeal 110 of 2009, dated 26 February 2009) held that since there was no profit derived by the taxpayer from a partnership firm which is exempt under Section 10(2A) of the Act, the interest paid by the taxpayer on the borrowed funds cannot be disallowed under Section 14A of the Act. Similarly, the Punjab and Haryana High Court in the case of CIT v. Lakhani Marketing (ITA No.970 of 2008, dated 2 April 2014) held that it was incumbent on the AO to establish a nexus between the expenditure incurred and the income which was exempt under the Act. In view of above, the Tribunal held that unless there is a receipt of exempt income during the concerned year, Section 14A of the Act cannot be invoked.

Alliance Infrastructure Projects Pvt. Ltd. v. DCIT [ITA No. 220 & 1043(Bang)/2013]

Capital loss cannot be carried forward to amalgamated company in absence of specific provisions under Section 74 of the Act

As per the scheme of merger, four companies got merged into Clariant Chemicals (I) Ltd. with effect from 1 April 2005. In the computation of total income, the taxpayer brought forward the long term capital loss and also sought to carry forward remaining loss. The taxpayer was of the view that there was no bar in Section 74 for claim of losses under the head Capital Gains of the amalgamating companies. However, the AO was of the view that as per provisions of Section 72A of the Act, accumulated loss of amalgamating company was allowed to be brought forward and set off only under the head 'profit and gains of business or profession' and such a carried forward was subject to certain conditions, whereas in Section 74, there was no such stipulation of carried forward in case of amalgamation. The CIT(A) also rejected taxpayer's contentions. Aggrieved, taxpayer filed an appeal before the Tribunal.

The Tribunal noted that Section 74 provided that in respect of any AY, if the net result of the computation under the head capital gain was loss to the taxpayer, then such a loss should be carried forward and set–off in the manner provided therein. On perusal of Section 74 of the Act, the Tribunal was of the opinion that with regard to loss under the head 'Capital Gain' there was no mention about a situation and condition under

which such a loss was allowed to be set off and carried forward in case of amalgamation. Likewise in Section 72, the Tribunal noted that there was no provision relating to carry forward and setoff of business loss in cases of amalgamation or demerger. Later Section 72A of the Act was introduced by Finance Act 1977 to cover such benefit of carried forward and set off of accumulated losses under the head business income. The Tribunal was of the view that once the legislature had enacted a different code all together for a specific purpose and intention, then such a code laying down the terms and conditions and the circumstances, cannot be imported or read into other general provisions or sections. The intention of legislature for enacting a particular statute or provision had to be kept in mind while interpreting a particular provision of the Act. In cases of amalgamation, wherever the statute had provided certain conditions or benefits or restrictions, the same has been provided categorically e.g. Section 47, dealing with transactions not regarded as transfer, has provided specific clauses (vi) to (vid) for the cases of amalgamation and demerger. In view of the same the Tribunal held that it is not the role of Tribunal, to read such specific provisions into general provisions. The Tribunal is not empowered to read down the provision of section 72, by importing the provisions of section 72A, into the said section. What is apparent from the clear language of the section and intention of the legislature has to be inferred and is to be applied. Had the legislature intended to allow set–off and carry forward of loss of capital gains in the case of amalgamation or demerger, the legislature could have provided specifically. On the basis of above the Tribunal concluded that Section 74 of the Act cannot be read or interpreted so as to give benefit of set–off and carried forward of losses under the head capital gains in the case of amalgamation and demerger, sans any specific provision therein.

Clariant Chemicals (I) Ltd. v. ACIT (ITA no. 4281/Mum./2011)

The Mumbai Tribunal held that non-charging of interest attracts transfer pricing provisions and also affirms the DRP's order striking the secondary adjustment

The taxpayer is engaged in the business of manufacturing and marketing auto components to original equipment manufacturers. During the AY 2009-2010, the taxpayer advanced a loan to its wholly owned subsidiary, PMP Mauritius with a moratorium of one year after which it would charge interest. The taxpayer had also advanced a loan to PMP Bakony, Hungary, another subsidiary, wherein an interest rate of 8 per cent was charged. The Transfer Pricing Officer (TPO) proposed a Transfer Pricing (TP) adjustment by adopting an interest rate at 15 per cent on the basis of the bank lending rate of 12 per cent plus mark up of 3 per cent on account of the business risks taken in giving the loan without any security, for both the loans. The Dispute Resolution Panel (DRP) upheld the adjustment made by the TPO.

The TPO also made an addition on account of notional interest, on the share application money remitted by the taxpayer towards investment in equity shares of its subsidiary, PMP Mauritius, as the shares were allotted almost after a period of one year and proposed a secondary adjustment on account of the interest chargeable on the deemed loan transaction i.e. for the capital investment made in PMP Bakony.

However, this secondary adjustment was deleted by the DRP.

Tribunal's ruling

Addition of notional interest on account of loans given to the Associated Enterprises (AE)

On the issue of prime lending rate or LIBOR rate to be taken as arm's length interest rate, the Tribunal directed the AO/TPO to consider LIBOR plus 2 per cent relying on the Tribunal ruling in Aurionpro Solutions Ltd.

The Tribunal dismissed the taxpayer's contention that due to moratorium of payment of interest, no interest was charged to the Mauritius based AE, and notional interest would not be taxable under the provisions of Article 11 of the India-Mauritius tax treaty. The Tribunal held that when the transaction between the taxpayer and the AE falls within the ambit of international transaction as per the provisions of Section 92B of the Act, then the arm's length price (ALP) has to be determined by the Comparable Uncontrolled Price (CUP) and the provisions of Article 11 of the Act cannot be considered in the present case.

Re-characterisation of share application money towards investment in subsidiary, PMP Mauritius, as loan and addition on account of notional interest

The Tribunal relied on its ruling in Bharti Airtel Limited where it was held that, capital contribution could be treated as interest free loan for the period of inordinate delay and not the entire period till the actual allotment of shares.

The Tribunal held that the taxpayer was the 100 per cent shareholder of the AE and hence, had control over allotment of shares. Thus, abnormal delay in allotment of shares cannot be held to be reasonable or beyond the control of the taxpayer.

The addition if any, on account of application money and delay in allotment of shares, should be done on the basis of what would have been interest payable to an unrelated share applicant.

The issue was referred back to the AO/TPO to determine the actual period of delay and arm's length interest that would have been received had the transaction been with an unrelated party.

Treatment of equity investment at par in overseas subsidiary as international transaction. Further, secondary TP adjustment on account of notional interest on the income receivable from the AE - PMP Bakony

The Tribunal accepted the taxpayer's reliance placed on the valuation report of KPMG based on the Discounted Cash flow (DCF) method, and held that the valuation in case of a 100 per cent subsidiary has to be future prospective earning rather than present net worth of the subsidiary.

The Tribunal remanded the case back to the AO/TPO to decide after taking into account the valuation report based on the DCF method.

In respect of the secondary adjustment, which was over and above the entire amount of capital investment, it held that adjustment is not permissible as per the provisions of the Income-tax Act, 1961.

PMP Auto Components P. Ltd. v. DCIT (ITA NO.1484/Mum/2014 & ITA NO.1506/Mum/2014)

Pune Tribunal rejects high margin companies, after considering if the

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high profits reflect normal business phenomena or they are a result of certain abnormal conditions

The taxpayer is an Indian branch of a U.K. based company engaged in the business of manufacture and sale of turbochargers. The taxpayer is engaged in the business of providing support services in the areas of finance, human resource, marketing, database support, product management support, etc. to its parent. The appeals relate to two different AYs for the same taxpayer.

AY 2007-08

The taxpayer adopted Transactional Net Margin Method (TNMM) as the most appropriate method to benchmark its international transaction of provision of IT enabled services (ITES). As the taxpayer's margin of 11.76 per cent which was within +/-5per cent of the comparables margin of 15.54 per cent under the proviso to Section 92C(2) of the Act, it claimed its transactions to be at arm's length.

During TP proceedings, the TPO rejected few companies and selected other comparable companies, and based on a single year data re-computed the Profit Level Indicator (PLI) of comparable companies as 22.20 per cent, and thereby proposed a TP adjustment.

The CIT(A) allowed partial relief to the taxpayer with respect to recomputation of margins of certain comparable companies and also allowed working capital adjustment.

The taxpayer contentions against rejection/selection of certain comparable companies by the TPO/CIT(A) alongwith findings of the Tribunal are summarised below:

Informed Technologies India Limited (Informed)

Taxpayer's objections - Abnormal profit making company, wide fluctuation in margin over a five year period (preceding three years and the subsequent year) ranging from (69.07) per cent to 34.71 per cent.

Tribunal's findings - Relied on Special Bench Ruling in the case of Maersk Global Centres (India) Private Limited (Maersk Global) wherein it was held that appropriate investigation is required for including/ excluding a high profit making company and directed the AO to reject Informed, since its financial results did not reflect normal business trend.

Maple eSolutions Limited (Maple)

Taxpayer's objections - Engaged in providing call centre services, activities performed by the taxpayer different from Maple, relied on rulings wherein financial results of Maple were found to be unreliable as its directors were involved in frauds.

Tribunal's findings - Merely because the two kinds of activities are referred to as ITES under the CBDT notification, the same cannot be concluded to be similar, and directed the AO to reject Maple as a comparable on account of difference in the nature of services and unreliability of financial data.

Considering the above exclusions, the TP adjustment stands deleted, and accordingly other grounds were not adjudicated for AY 2007-08.

AY 2008-09

The taxpayer had adopted TNMM for benchmarking the transaction of ITES. As

the taxpayer's margin of 10.03 per cent which was within +/-5per cent of the comparables margin of 10.28 per cent, it claimed its transactions to be at arm's length.

During the TP proceedings, the TPO rejected few companies and selected other comparable companies, and based on a single year data re-computed the PLI of comparable companies as 27.61 per cent, which was later rectified to 24.91 per cent, thereby leading to a TP adjustment.

The taxpayer filed its objections before the DRP wherein the DRP granted relief for rectifying the margins of certain companies allowing the working capital adjustment. Based on the directions of the DRP, the AO passed its order reducing the TP adjustment. Aggrieved by the AO's order, the taxpayer filed an appeal before the Tribunal.

The taxpayer's contentions against rejection/selection of certain comparable companies by the TPO/DRP alongwith findings of the Tribunal are summarised below:

Coral Hubs Limited (Coral)

Taxpayer's objections - Engaged in the business of conversion of books into POD titles (e-publishing business), significant outsourcing of business operations, relied on the Tribunal's ruling in the case of Maersk Global Service Centre (India) Private Limited.

Tribunal's findings - The nature as well as business model needs to be examined to establish comparability and directed the AO to reject Coral on account of difference in the business model.

Genesys International Corporation Limited (Genesys)

Taxpayer's objections - Abnormally high profit margin, Wide fluctuations in the margin earned over a three year period ranging from 2.64 per cent to 46.82 per cent.

Tribunal's findings - Relied on the Special Bench Ruling in the case of Maersk Global and directed the AO to reject Genesys based on similar reasoning adopted for the exclusion of Informed.

Considering the above exclusions, the TP adjustment stands deleted and accordingly other grounds were not adjudicated for AY 2008-09.

Cummins Turbo Technology Limited v. DDIT (ITA Nos. 161 & 269/PN/2013)

Notification & Circulars

CBDT supersedes its earlier circular on allowability of deduction under Section 10A/10AA on transfer of technical manpower in the case of software industry, in line with Rangachary Committee's recommendations

On 8 October 2014, Central Board of Direct Taxes (CBDT) issued a circular superseding its earlier circular clarifying that the transfer or re-deployment of technical manpower from existing unit to a new unit located in Special Economic Zone (SEZ), in the first year of commencement of business, shall not be construed as splitting up or reconstruction of an existing business, provided the number of technical manpower so transferred as at the end of the financial year does not exceed 50 per cent of the to-

tal technical manpower actually engaged in development of software or Information Technology (IT) enabled products in the new unit. Further, in the alternative, if the taxpayer is able to demonstrate that the net addition of the new technical manpower in all units of the taxpayer is at least equal to the number that represents 50 per cent of the total technical manpower of the new SEZ unit during such previous year, deduction under Section 10A/10AA of the Act would not be denied provided the other prescribed conditions are also satisfied. For the sake of clarity, it is provided that the taxpayer will have a choice of complying with any one of the above given two alternatives. It is also clarified that this circular shall be applicable only in the case of taxpayers engaged in the development of software or in providing IT Enabled Services in SEZ units eligible for deduction under Section 10A or under Section 10AA of the Act. This circular shall not apply to the assessments which have already been completed. Further, no appeal shall be filed by the tax department in cases where the issue is decided by an appellate authority in consonance with this circular.

Circular No.14/2014, dated 8 October 2014

OECD – BEPS action plan 13: transfer pricing documentation and country-by-country reporting

Organisation for Economic Co-operation and Development (OECD), as a part of Base Erosion and Profit Shifting (BEPS) initiative, released a discussion draft on TP documentation and country-by-country reporting (Draft Guidance) on 30 January 2014 inviting comments from interested parties. On 16 September 2014 it has released guidance on TP documentation and country-by-country reporting (Report) as an output to action plan 13 with the consensus of 44 countries (including all OECD members, OECD accession countries, and G20 countries).

Three tiered structure

The Guidance on Transfer Pricing documentation states the following:

- The OECD has prescribed a 'three-tier' documentation structure consisting of Master file, Local file and Country-by-Country (CBC) report:

  -- Master file provides an overview of the multinational group and business

  -- Local file provides a 'zoomed-in' view of operations and transactions relevant to that jurisdiction

  -- CbC report provides aggregate, jurisdiction-wide information on global allocation of income, taxes, and indicators of economic activity.

- The CbC report which earlier was proposed to be a part of the master file is now delinked from the same and has been prescribed as a separate document.

- The OECD has significantly diluted the reporting norms in the revised CbC report by:

  -- Excluding reporting of information such as place of effective management, royalty, interest, services, employee expenses, withholding taxes, bifurcation of income-taxes paid in home country and other countries, etc.

-- Excluding reporting of financial and tax information (such as revenue, taxes, accumulated earning, number of employees, etc.) at the entity-level. Instead, the OECD has now sought such aggregated information at the tax jurisdiction level (i.e. one line item consisting of total revenue/profit etc. for all Constituent Entities of the MNE operating in a tax jurisdiction).

- OECD has warned that the CbC report should not be used by tax administrations to propose transfer pricing adjustments based on a global formulary apportionment of income.

The OECD has indicated that it will provide further guidance on the implementation mechanism by February 2015.

OECD – BEPS Action Plan 8: Guidance on Transfer Pricing Aspects of Intangibles

On 30 July 2013, the OECD had released a second discussion draft on intangibles entitled 'Revised Discussion Draft on Transfer Pricing Aspects of Intangibles' (the Revised Discussion Draft) detailing proposed revisions to Chapter VI of the OECD's Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (the OECD Guidelines). The OECD also held a public consultation on Action 8 in November 2013.

On 16 September 2014, under the BEPS Action 8, OECD has provided guidance on the Transfer Pricing Aspects of Intangibles (the Guidance), as part of the initial seven deliverables issued under the BEPS action plan.

Action 8 calls for developing rules to prevent BEPS that arises through the movement of intangibles among multinational group members.

Interim guidance to be finalised in 2015

The interim guidance primarily relates to issues around ownership of intangibles, intangibles whose valuation is uncertain at the time of the transaction, and the guidance relating to the application of profit split methods.

Key highlights

The Guidance is generally similar to the guidance in the Revised Discussion Draft and is broadly related to the following five aspects that would stand to amend Chapter I and II, and replace Chapter VI of the OECD Guidelines.

Detailed comments on issues such as location savings and other local market features, assembled workforce and Multinational Enterprise (MNE) group synergies is now included as part of Chapter I of the OECD Guidelines. The focus on issues related to location savings, group synergies, marketing intangibles and research and development arrangements, is particularly relevant from an Indian context as most of these currently are highly debated and litigated TP issues in India.

- Identifying intangibles: with a broader definition of intangible property, the Guidance provides specific example of six categories including patents; know-how and trade secrets; trademarks, trade names; and goodwill and ongoing concern value.

- Ownership of intangibles and entitlement to returns from intangibles:

the Guidance emphasizes that while legal ownership and contractual arrangements could be the starting point for analysis, each parties' contribution to development, enhancement, maintenance, protection and exploitation of the intangible must be appropriately remunerated.

- Transactions involving the use or transfer of intangibles: the Guidance discusses the relevant considerations separately for transactions involving transfers of intangibles or rights in intangibles and for transactions involving the use of intangibles in connection with the sale of goods or the provision of services.

- Guidance on determining arm's length conditions in cases involving intangibles: there is supplementary guidance for determining arm's length conditions for transactions involving intangibles. One general principal for a transfer pricing analysis involving intangibles is that it must consider the options realistically available to each of the parties to the transaction.

Recognizing the strong interaction and interplay of intangibles with other Action Points on BEPS (related to risks and capital, high-risk transactions, and hard to value intangibles) the draft Guidance is expected to be finalised during 2015 along with other Action Points, so that issues can be addressed in an integrated and consistent manner.

II. SERVICE TAX

Tribunal Decisions

Amount collected for various components of services cannot be considered to be inclusive of service tax

The taxpayer was engaged in providing various services of receipt, storage, management, administration, invoicing etc. of goods belonging to Ford India Limited ("Ford"), at warehouses in Chennai belonging to Ford, using computers / software / systems provided by Ford. The Revenue Authorities ("RA") demanded service tax under clearing and forwarding agents services whereas the taxpayer argued that its services were classifiable under business support services during the relevant period.

The matter came up for consideration before the Mumbai Bench of Customs, Excise and Service Tax Appellate Tribunal ("CESTAT") which held in the favour of the RA. The CESTAT reasoned that the services were classifiable as clearing and forwarding agents services as these broadly included receipt of goods and warehousing them, receiving dispatch orders from Ford and arranging for dispatch of goods, maintain records of incoming shipments and deliveries etc. Further, classification of activities would have to be made as per section 65A of the Finance Act, 1994 ("FA"). The CESTAT also held that amount collected by the taxpayer could not be considered as inclusive of service tax as such

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amount was collected for various components of services. Accordingly, the claim of the taxpayer was rejected.

Talera Logistics Private Limited vs Commissioner of Central Excise, Pune-III [2013 (12) TMI 1021 CESTAT, Mumbai]

Reversal of CENVAT credit to be considered as CENVAT credit not availed

The taxpayer was a Goods Transport Agency and it availed benefit of exemption Notification No 1 / 06-ST dated March 1, 2006 ("Notification") which provided for 75 percent abatement on the gross amount charged provided CENVAT credit on inputs, input services and capital goods is not availed and benefit of exemption Notification No 12 / 2003-ST dated June 20, 2003 is not taken. During the period prior to March 1, 2006 the same exemption was available under another notification, without any restrictions on availment of CENVAT credit on input services. The taxpayer being unaware of the additional condition; inadvertently availed CENVAT credit on input services and duly disclosed the same in service tax returns. When the departmental officers brought this discrepancy to the notice of the taxpayer, he immediately reversed such credit.

The RA denied the benefit of the exemption on the ground that exemptions have to be construed strictly; non-fulfilment of any of the prescribed conditions would lead to denial of such exemption.

The matter came up for consideration before the Delhi Bench of CESTAT which held in the favour of the taxpayer. The CESTAT reasoned that reversal of CENVAT Credit initially availed; it would be considered as CENVAT Credit not taken and hence the benefit of exemption notification cannot be denied. Accordingly, the appeal of the taxpayer was allowed.

Sachdeva Roadlines vs Commissioner of Service Tax, New Delhi [2014 VIL 120 CESTAT Delhi]

Remittance of dividend does not amount to expatriation of export proceeds

The taxpayer was engaged in the business of rendering the service of steamer agents to its principal abroad who held 100 percent equity in tax payer's company. The taxpayer received commission in convertible foreign exchange from its principal which was exempted from the levy of service tax vide Notification Nos. 6/99-ST and 21/2003-ST, subject to the condition that the export proceeds received by taxpayer were not repatriated from India. The taxpayer declared dividend which was remitted to the principal company.

The RA were of view that the dividends so declared was a result of the company's profits including exports of the taxpayer and its remittance to the principal would tantamount to repatriation of export proceeds and therefore, the taxpayer was not eligible for availing exemption benefit under the aforesaid notifications. Accordingly, demand for the requisite service tax, along with interest and penalty was raised against the taxpayer. Being aggrieved, taxpayer filed the present appeal.

The matter came up for consideration before the Mumbai Bench of CESTAT. On perusal of financials of the taxpayer, it ob-

served that the taxpayer's income was derived from various other services including steamer agent service. CESTAT highlighted that profit is arrived at after deduction of expenses from total income and dividend is then declared out of the profit. CESTAT also observed that the dividend declared by the taxpayer was not only out of profit generated through steamer agent service but from a lot of other activities. Further reliance was placed on the ruling of the Delhi Bench of the CESTAT, in Gillette India Ltd vs Commissioner of Central Excise [2012 (26) STR 59], wherein it was held that dividend is paid out of disposable profits and the amount received by the taxpayer in convertible foreign exchange for the market research conducted for the parent company cannot be held to repatriated in form of dividend. CESTAT, therefore held that the export proceeds earned by the taxpayer were not repatriated by way of dividends to the principal and consequently set aside the demand raised by RA thereby allowing the taxpayer's appeal.

Maersk India Pvt Ltd vs Commissioner of Service Tax, Mumbai [2014 (34) STR 894 CESTAT, Mumbai]

Commission agent cannot be necessarily held to be a clearing and forwarding agent

The taxpayer was appointed as commission agent by its principal where the duly packed product were supplied in drums on regular basis by the principal to the taxpayer, who further supplied these to customers in small packets at prices fixed by principal. The taxpayer was required to submit sales report to principal, and the invoices were issued in principal's name by including the taxpayer's name as a consignment agent. The RA contented that the taxpayer would get covered by the definition of clearing and forwarding agent under section 65 (25) of the FA even though he claimed to be a consignment agent and accordingly raised service tax demand against the taxpayer.

The matter came up for consideration before the Delhi Bench of CESTAT which allowed the appeal of the taxpayer. The CESTAT relied on the ruling of Videocon TV Manufacturer (P) Ltd. vs. CCE NOIDA [TS-50-Tribunal-2013-EXC] wherein it was held that when the taxpayer was working on commission basis and was not engaged in activity of receiving goods from factory / premises of principal, warehousing these goods, receiving despatch orders, arranging despatch of goods as per the direction of the principal, maintaining records of the receipt and despatch of goods and preparing invoices on behalf of the principal, it could not be held to be clearing and forwarding agent.

CESTAT reasoned that since the taxpayer was permitted to sell goods freely to customers in small lots, it was not working as clearing and forwarding agent for the principal. Accordingly, the appeal of the taxpayer was allowed.

M/s BK Sales Corporation vs Commissioner of Central Excise, Haryana [2014 (10) TMI 135 CESTAT, New Delhi]

III. VAT/ CST/ENTRY TAX

High Court Decision

No tax is payable as a "dealer" or a "casual dealer" on a solitary sale transaction

The taxpayer was a dealer in timber. The RA brought sale of used car by the taxpayer under the purview of tax as a casual trader defined under section 2(12)(b) of Karnataka Value Added Tax, 2003 ("KVAT") and further observed that motor vehicles, being input tax restricted goods under section 11(a)(2) of the KVAT, deduction or exemption or lower rate of tax was not applicable. The taxpayer being aggrieved by the order preferred an appeal before the Karnataka Appellate Tribunal wherein it was held that in order to attract levy of tax under KVAT pursuant to carrying of business in a particular commodity, would depend upon volume, frequency, continuity and regularity of transactions of purchase and sale for a particular class of goods with a motive to earn profit. Further, during the course of business, there must be continuous exercise of an activity; real, substantial, systematic or organized course of activity or conduct set with a purpose. The taxpayer being a dealer in timber and sale of used car being one time transaction was not regular business; hence not liable to tax.

The RA filed a revision petition before the Karnataka HC for the aforesaid matter; which was held in favour of the taxpayer.

The HC relied on the decision of the Supreme Court ("SC") in the case of State of Orissa vs Orissa Road Transport Company Limited [1997 (7) SCC 104] wherein the definition of 'casual dealer' was analyzed and was held that even if a person did not have systematic business which involved regular transactions of purchase or sale, he would still be regarded as a casual dealer if he entered into occasional transactions of a business nature involving purchase or sale of goods. The SC had also referred to the amendments to various State VAT Acts such as Rajasthan, Madras and Orissa Sales Tax Act, wherein the definition of business had eliminated the profit making element, and accordingly held that activity of selling unserviceable material at yearly intervals would fall under meaning of business, and therefore be exigible to sales tax. The HC reasoned that the taxpayer was a dealer in wood and wood products and did not sell cars occasionally every year. Further, the transaction involving sale of car was a solitary one without any motive to earn profit and also had nothing to do with the business carried out by the taxpayer. Accordingly, the revision petition was dismissed.

Vasavi Wood Industries vs State of Karnataka [STRP 621 / 2013 Karnataka HC]

Cross adjustment are allowed for VAT and Central Sales Tax ("CST") credited to the same consolidated fund

The issue for consideration before the Calcutta HC was whether a writ was sustainable against an order disallowing set-off / adjustment of excess payment of State sales tax against Central Sales Tax ("CST").

The RA contended that direct credit of both taxes into consolidated fund of the State fall under different Constitutional / legislative fields and therefore, such adjustment was not possible.

The HC allowed set off / adjustment of excess payment of State sales tax against deficit in CST deposit of equivalent amount. It

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further held separate levy and collection of both the taxes do not matter if they are credited to same fund as it creates a gross credit in the fund. Further, short payment of CST with corresponding increased payment of State sales tax does not reduce gross credit in the fund, hence if dealer wants adjustment / set-off, it must be readily granted without insisting on formalities.

The HC stated that RA's approach in disallowing adjustment was very technical and pedantic; hence no interest or penalty to be levied under section 31 of West Bengal Sales Tax Act, 1994. There was no monetary loss to the government for which it could claim interest.

It also clarified that such adjustment could be made only when taxes are paid in excess / short to which are credited to a known account / fund which could be easily adjusted. Such adjustment would not apply in case of inter-departmental adjustment or completely different types of taxes.

Hindustan Unilever Limited vs Deputy Commissioner, Commercial Taxes, Corporate Division & Ors [Writ Petition no 1384 of 2008 Calcutta HC]

Inextricable link between local sale or purchase and export is important to avail benefit under Section 5(3) of Central Sales Tax Act, 1956

The taxpayer sold toughened glass to the purchaser which was used by purchaser to export solar module, accessories and CIGS module to a foreign buyer. For the relevant assessment period, the taxpayer claimed such sales as sale in the course of export against form H under section 5(3) of Central Sales Tax Act, 1956 ("CST Act"). The Assessing Officer treated such sale as interstate sale and accordingly levied CST. Further appeal made to Additional Commissioner and Member Commercial Tax Tribunal by taxpayer was rejected on the ground that toughened glass was not exported by the purchaser in the same form in which it was purchased from the taxpayer. Aggrieved with the decision of Tribunal, taxpayer filed for revision.

The matter reached before the Allahabad HC which relied on SC ruling in case of State of Karnataka vs Azad Coach Builders Pvt Ltd [2010 (9) TMI 879 (SC)] wherein the provisions under section 5(3) of the CST Act, were interpreted and held that the test to be applied is, whether there is an in-severable link between local sale or purchase and export and if it is clear that the local sale or purchase between parties is inextricably linked with the export of goods, then the claim under section 5(3) of the CST Act for exemption of sales tax is justified, in which case the same goods theory will bear no application.

In light of the above, taxpayer's revision application was allowed and the HC remanded the matter back to the Tribunal with a direction to decide the matter afresh in light of SC ruling in Azad Coach Builders Pvt Ltd.

M/s Allied Glasses Pvt Ltd vs The Commissioner, Commercial Taxes [2014 (9) TMI 564 Allahabad HC]

IV. CUSTOMS

Tribunal Decisions

Certificate by Chartered Accountant providing that burden of duty not passed to customers, sufficient for relief from unjust enrichment

The taxpayer, imported one consignment of glass beads and paid applicable Special Additional Duty of Customs ("SAD") on the said goods. The taxpayer being trader sold such goods and discharged applicable Value Added Tax ("VAT") on such sales. Therefore, the taxpayer by making prescribed application sought refund of the SAD paid on imports.

The RA rejected the refund claim of taxpayer on the premise that it has passed the incidence of the duty to its customers and thus did not pass the bar of unjust enrichment. Being aggrieved, the taxpayer preferred the present appeal.

The issue came up before Mumbai Bench of CESTAT for consideration. CESTAT on review of the invoice raised by the taxpayer for sale of goods, observed that such invoice clearly indicates that no credit of SAD, is available to the purchaser. Further, the CESTAT also observed that the taxpayer being a trader, is not registered with the Central Excise Department. Therefore, it cannot issue Cenvatable invoices to its customers. Further, the taxpayer has also submitted a certificate duly issued by a Chartered Accountant certifying that the SAD amount incurred by the taxpayer has not been passed on to any customer and that such amount has been disclosed as 'receivable' in the balance sheet of the taxpayer. Accordingly, based on the evidences submitted, CESTAT held that the taxpayer has passed the bar of unjust enrichment and is entitled to refund of duty and allowed the appeal of the taxpayer.

Automark Industries India Private Limited vs. Commissioner of Customs (Import) [2014 (307) ELT 918(CESTAT, Mumbai]

Invoice for sale of imported goods could be dated prior to date of passing of charge in such goods, SAD refund available

The taxpayer was engaged in the business of importing hazardous waste materials on behalf of actual users and was required to clear such goods to actual users from the port. Accordingly, the taxpayer raised an invoice for sale of goods to actual users when it paid the import duty. However, the charge in the goods could only be transferred subsequently. Further, the taxpayer made an application for refund of SAD paid on imported goods as per the conditions prescribed under Notification no. 102/2007- Cust dated September 14, 2007. The refund was granted to the taxpayer. Being aggrieved, the RA preferred an appeal before Comm-A, contending that the taxpayer has sold the goods other than those imported and therefore the refund relatable to such sales is improper and should be recovered. The Comm-A, allowed the appeal of RA. Being aggrieved, the taxpayer preferred the present appeal inter alia contenting that they raised the invoice on the date of payment of duty expect-

ing that the charge in the goods shall be passed on the same day, however the same were only released subsequently.

The issue came up before Delhi Bench of CESTAT for consideration. CESTAT on review of the certificate granted by the Delhi Pollution Control Committee, observed that the taxpayer was required to clear the goods directly to the actual users at the port. Thus, the CESTAT held that the contention of the taxpayer that it expected the goods shall be cleared on the date of payment of duty has to be accepted. Further, the CESTAT also held that merely because the passing the charge was delayed, it cannot be said that the goods sold were not the same as the one imported. Further, CESTAT also noted that the Adjudicating Authority on verification of the invoice raised by taxpayer for sale, found that the invoice was relatable to the goods transferred, and thus allowed the refund. In view of the above, CESTAT held that the order passed by Comm-A, cannot be upheld and set aside the same.

Glasstech India vs. Commissioner of Customs [2014 (308) ELT 186 CESTAT, Delhi]

V. CENTRAL EXCISE

Tribunal

MRP affixation post Customs clearance constitutes 'manufacture'; Distinguishes L'Oreal India ruling

The issue before Mumbai Bench of CESTAT was to decide whether the activity of affixing stickers / labels after clearance of the goods liable to excise duty on MRP basis, amount to manufacture or not. The taxpayer, contended that it affixed stickers / labels on imported goods which were found with missing or damaged stickers / labels as prescribed in several statutes. The taxpayer placed reliance on the judgment of Mumbai Bench of CESTAT in case of L'Oreal India Pvt Ltd vs CCE, Raigad [TS-239-Tribunal-2014-EXC], where in it was held that activity of affixing stickers carried out in custom bonded warehouse does not amount to manufacture. The taxpayer also contended revenue neutrality as countervailing duty ("CVD") was paid on imported goods on MRP basis and placed reliance on BASF India Ltd. v CCE [2009 (245) ELT 381 (Tri Ahmd)].

On the other hand, RA contended that the activity of taxpayer amounts to manufacture as per section 2(f) (iii) of Central Excise Act, 1944 ("CEA") and alleged that the case of L'Oreal India Pvt. Ltd. is distinguishable on facts.

CESTAT observed the view taken in L'Oreal India was that activity of fixing MRP stickers which took place in Customs bonded warehouse was not manufacture. However in the present case, MRP stickers were affixed after clearance of goods from Customs and therefore, CESTAT referring to Chapter Note and section 2(f) (iii) of the CEA concluded that taxpayer's activity amounts to manufacture. Additionally, CESTAT also held that since the taxpayer's activity was held as manufacture, it is eligible to avail CENVAT credit of CVD paid on imports. Further, the MRP declared before Customs or before Excise authorities was the same, which

means that the duty payable on goods was equal to the CVD paid by the taxpayer. Thus, the situation being Revenue neutral (as observed in the case of BASF India and in L'Oreal India), CESTAT held that although the activity amounted to manufacture, the overall duty impact was 'Nil'.

Therefore, CESTAT set aside the demand, interest and penalty which was confirmed by Adjudicating Authority.

United Distributor vs. CCE, Thane 1 [TS 413 Tribunal 2014 EXC CESTAT, Mumbai]

Duty on Domestic Tariff Area ("DTA") clearance by Export Oriented Units ("EOU") an excise levy, eligible for CENVAT

The issue before Ahmedabad CESTAT was to decide whether CENVAT credit is available of the duties paid in respect of goods manufactured and cleared by 100 percent EOU to taxpayer, located in DTA. The taxpayer preferred an appeal against order of Adjudicating Authority denying CENVAT credit of entire duty paid for goods received from 100 percent EOU under Rule 3(1) of the CENVAT Credit Rules, 2004 ("CCR"). Adjudicating Authority observed that Rule 3(1) of the CCR permits credit only of duty paid under First Schedule to Central Excise Tariff Act, 1985 ("CETA").

However, the taxpayer was of the view that whatever be the prescribed methodology for calculating applicable tax, credit of entire excise duty charged under section 3(1) of the CEA should be available. The taxpayer also contended that RA has erred in bifurcating the excise duty paid into Basic Customs duty and Education Cess and placed reliance on a catena of cases in support of the same. The taxpayer pleaded that the invoices issued by the EOU represented excise duty only, although measure of tax so paid indicated elements of customs duties and thus credit of the entire excise duties should be available to it.

On the other hand, the RA contended that Rule 3(1) of CCR allowed credit of only duties of excise whereas the duties paid by 100 percent EOU's included element of Basic Customs duties and Cess paid as per proviso to section 3(1) of the CEA. The RA submitted that duties paid under First Schedule of the CETA were only admissible for CENVAT credit. The RA further argued that a proviso could not be used to expand the main provisions / interpretation of the CEA, and in support relied on the ratio in case of S. Sundaram Pillai vs V. R. Pattabiraman [1985 AIR 582/1985 SCR (2) 643]

The CESTAT observed that if the argument of the RA, that a proviso cannot expand the effect of a main provision is accepted, then under the proviso to section 3(1) of the CEA, no duty more than the duty of excise leviable under the First Schedule to the CETA could be recovered from a 100 percent EOU. Accordingly, CESTAT held that the RA cannot take two different stands on recovering duties and on granting CENVAT credit. Thus, CESTAT held that the sum of total duties paid by a 100 percent EOU would represent the excise duty chargeable as per section 3(1) of the CEA. Further, CESTAT deduced from the invoices that the entire duty levied on invoice had been shown as excise duty paid under proviso to section 3(1) of the CEA. CESTAT by placing reliance on Gujarat HC ratio in case of CCE vs H. K. Moulders [2011 (268) ELT 43 (Guj)],

concluded that the duty indicated on the invoices was Central excise duty even though the method used for calculating the measure included elements of customs duties. Therefore, CESTAT held that the entire duty paid on the invoices would have to be considered as Central Excise duty paid under section 3(1) of the CEA and therefore, taxpayer is eligible to avail CENVAT credit of the entire duties levied on such invoices.

Gopala Polyplast Ltd. vs CCE & ST, Ahmedabad [TS 445 Tribunal 2014 EXC CESTAT, Ahmedabad]

CENVAT credit reversal exemption on supply to Special Economic Zone ("SEZ") developers 'retrospective', applicable pre-2008

The issue before Karnataka HC was whether exception to Rule 6(6) of the CCR was applicable to both SEZ units' and 'developers' wrt supply of goods prior to December 31, 2008. In other words, whether amendment vide Notification No. 50/2008-CE, extending the benefit of CENVAT credit reversal on inputs used for manufacture of goods cleared to 'SEZ units' and 'SEZ developers' was prospective or retrospective.

The taxpayer, was engaged in manufacturing admixtures, resin products and powder products. The taxpayer availed CENVAT credit of duty paid on inputs used in both dutiable and exempted final products cleared by it but did not maintain separate accounts for receipt, consumption and inventory of inputs in terms of Rule 6(2) of CCR. The taxpayer cleared final products to SEZ developers without payment of duty during the period January 2006 to December 2008.

On verification of returns, the RA noticed that the taxpayer has neither paid an amount equivalent to credit attributable to inputs used in the manufacture of goods cleared to SEZ Developers, nor did it opt to pay 10 percent of total price excluding taxes. Thus, the taxpayer was issued a show cause notice ("SCN") demanding duty which was confirmed under section 11AC of the CEA read with Rule 15(2) of the CCR along with interest and penalty. Accordingly, taxpayer preferred an appeal before Bangalore bench of CESTAT, which allowed the appeal on the ground that, amendment to Rule 6(6) of the CCR, vide Notification No. 50/2008-CE was clarificatory in nature and therefore its application was retrospective.

Aggrieved by such order, the RA filed the present appeal. On perusal of Rule 6(6)(i) of the CCR prior to amendment, the HC observed that the benefit of non-reversal / maintenance of separate inventory was extended when the excisable goods were cleared to a "unit" in an SEZ and not on goods cleared to a "developer" of an SEZ. However vide Notification No. 50/2008-CE (NT) dated December 31, 2008, said benefit was also extended to "developer" of a SEZ for their authorised operation. While analysing the effect of 'substitution' of a provision in the place of an existing one, HC placed reliance upon the decisions of Supreme Court ("SC") in Shamrao vs. Parulekar vs. The District Magistrate, Thana, Bombay & Ors [AIR 1952 SC page 324], Shyam Sunder & ors. vs. Ram Kumar & Anr. [AIR 2001 SC page 2472] and Government of India vs. Indian Tobacco Association [2005 (187) ELT page 162 (SC)]. The HC also placed reliance upon the decision of Division Bench of the Karnataka HC, in the case of Sha Chunnilal Sohanraj vs. T. Gurushantappa [1972 (1) MYS.L.J. Pagae

327 DB], wherein it was held that, "When an amending Act has stated that the old subsection has been substituted by the new sub-section the inference is that the Legislature intended that the substituted provision should be deemed to have been part of the Act from the very inception."

The HC observed that, the Special Economic Zones Act, 2005 ("SEZ Act") was enacted to provide for establishment, development and management of the SEZ for the promotion of exports and for matters connected therewith. Further, it was also observed by the HC that section 151 of the SEZ Act, overrides the provision of all other laws for the time being in force.

The HC also held that although the definition of the word "export" in the SEZ Act, included supply of goods to a "Unit" or "Developer", in Rule 6(6)(i) of the CCR, the word "developer" was conspicuously missing before the 2008 amendment. In that context, amendment by Notification No.50/2008 was brought in to clarify the doubt.

It held that the amendment was clarificatory in nature and was brought by way of "substitution". Further the HC stated that, *"The effect of the said "substitution" is that the CCR are to be read and construed as if the altered words had been written into the CEA with pen and ink and the words "to a developer of the SEZ for their authorized operation" was there from the inception."* Reliance was also placed upon Circular No. 29/2006-Cus dated December 26, 2006, issued by the Central Board of Excise and Customs ("CBEC"). Accordingly, the HC dismissed appeals of RA.

Commissioner of Central Excise & Service Tax vs. Fosroc Chemicals (India) Pvt. Ltd. [TS 411 HC 2014 (KAR) EXC Karnataka HC]

Input credit on inputs directly supplied to job-workers is available, prior factory receipt irrelevant

The issue before Chennai Bench of CESTAT was to decide whether or not credit would be available where goods are received at job workers premises directly from principal supplier, instead of taxpayer's factory. The taxpayer was denied credit on Input and capital goods as availed under Rule 57(A) / 57Q of the erstwhile Central Excise Rules, 1944, and also imposed penalty under Rule 173Q. On an appeal by the taxpayer, Commissioner- Appeals ("Comm-A") set aside all the adjudicating orders and allowed the appeals. Being aggrieved, RA preferred the present appeals.

The RA argued that as per the MODVAT provisions, the primary conditions for availing credit was payment of duty on the inputs, receipt of goods in the factory and usage of inputs in the manufacture of final products which was not fulfilled by taxpayer. It was argued that non-observation of procedure is a substantial violation and therefore the adjudicating authority had rightly disallowed the credit and imposed penalty. In this regard, the RA placed reliance on SC ruling in CCE vs. Hari Chand Shri Gopal [2010 (260) ELT].

On the contrary, taxpayer argued that the Comm-A, has rightly allowed its appeals as it was revenue neutral case. It was submitted by the taxpayer that RA had taken additional grounds in its appeal, beyond the scope of SCNs, and therefore the appeal

could not transverse beyond SCN's and orders issued by RA. Moreover, the taxpayer contended that it had issued 57F4 challans to the job worker only after reversing the credit and the final credit was availed only on receipt of goods from the job workers. In order to support the contention, the taxpayer relied on plethora of cases.

CESTAT observed that taxpayer raised 57F4 challans to the job workers only after reversing credit in the books of account and availed credit only on receipt of goods from the job workers and further all transactions of movement and receipt were maintained by the taxpayer. CESTAT observed that the substantial conditions for availing credit on inputs under the provisions of 57A or 57Q were - (1) evidence of duty payment of inputs; (2) receipt of the inputs; and (3) usage of the inputs in the excisable goods.

In view of this, CESTAT held that in the instant case, all the three conditions are satisfied. It was also observed that though the goods had been directly supplied from the principal supplier to the job workers premises, the invoices raised thereby were in taxpayer's name.

Further, CESTAT distinguished SC ruling relied upon by the RA on the ground that it related to the denial of exemption notification benefit where the assessee had not followed the statutory requirements for manufacture of intermediate excisable goods. On the other hand, it accepted taxpayer's reliance on co-ordinate bench ruling in case of Otis Elevator Co. (I) Ltd. [2009 248 ELT 225] wherein it was observed, "Mere physical delivery of the goods at the instance of the appellants at a place of job worker cannot be sufficient to treat that the goods were not supplied to the appellants directly". The CESTAT stated that it was a case of revenue neutrality given that there was no dispute on the duty paid nature of inputs received by the taxpayer from the job workers premises. Therefore, CESTAT allowed credit to taxpayer. Accordingly, CESTAT rejected RA's appeal.

CCE, Chennai IV vs. Hyundai Motors (I) Ltd. [TS 430 Tribunal 2014 EXC (CESTAT, Chenna]

Quashes Commissioner's order, without reasons as wholly perverse; Allows outward GTA credit

The issue before Delhi Bench of CESTAT was whether the taxpayer selling goods on Free on Road ("FOR") basis was eligible to avail CENVAT Credit of the service tax paid on outward transportation. The taxpayer was issued SCN's invoking extended period of limitation and disallowed CENVAT credit availed on outward transportation charges. Upon adjudication, the CENVAT Credit was disallowed and taxpayer was also directed to pay interest and penalties. Being aggrieved, taxpayer preferred the present appeal inter alia contending the following:

- As per terms of agreement executed between taxpayer and its customers, the sale was on FOR basis

- Thus, the final products were sold on 'FOR' basis to the customers, freight charges were included in assessable value of final product and applicable excise duty was discharged on the same;

- As per section 4(3)(c) of CEA, the place of removal was the customer's premises;

- Placed reliance on Punjab and Haryana HC pronouncement in case of Ambuja Cements vs Union of India [2009 (14) STR 3 (P&H)], where the HC in view of the CBEC Circular No. 97/8/2007-ST dated 23/08/2007 observed that the credit of the service tax paid on the transportation up to such place of sale would be admissible if it could be established that the sale and transfer of property in goods occurred at the said place.

On the other hand, the RA observed that taxpayer has failed to fulfill the conditions stipulated under section 4 of the CEA wrt the place of removal. Particularly, they also noted that as per condition no. III of the above noted circular, the taxpayer has failed to submit proof of freight charges being an integral part of the price of goods. Further, the RA also rejected the taxpayer's reliance on the ruling in Ambuja Cements as it dealt with different matters and were not relevant to the instant case.

The CESTAT noticed that the Adjudicating Authority's order contained no material contribution in terms of analyses or reasons. CESTAT by relying on SC's pronouncement, stated that verbiage and prolixity was no substitute for quality and held that the order was wholly perverse and a substandard exhibit of adjudication.

CESTAT further observed that, the place of removal would invariably be the factory gate; though the place of removal would depend on specific transactions and thus where the removal was pursuant to sales on FOR basis, where risk of goods was with the manufacturer until delivery to customer premises and where composite value of sales includes value of freight, the place of removal would not be the factory but rather at the customer's premises. Thus, in the light of these observations, CESTAT held that the conclusion was irresistible that as sales by taxpayer were on FOR basis, the taxpayer had legitimately availed CENVAT credit on the service tax paid on freight charges borne for such sales. Accordingly, the order of Adjudicating Authority was quashed.

Ultra Tech Cement v CCE & ST, Rohtak [TS 368 Tribunal 2014 ST CESTAT, Delhi]

Notification & Circulars

Import tariff of gold and silver amended

Import tariff value of Gold has been amended and notified to be US$ 396 / 10 grams and Import tariff value of Silver has been amended and notified to be USD 575 / kilogram. New tariff values for 10 other import items also notified.

No 95/2014 - Customs (NT) dated September 30, 2014

Delhi VAT – waiver of penalty under amnesty scheme shall be made only where proper books and records are maintained; no waiver where false records/ accounts maintained

Delhi Govt. clarifies that penalty ought to be waived under Amnesty Scheme where

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maintenance of books of accounts has resulted in creation of tax deficiency and consequent assessment under section 32, besides penalty assessment under section 33; however, no relief available in absence of tax deficiency and penalty imposed for false preparation of records / accounts.

Circular no. 12/2014 -15 dated September 11, 2014

Date for filing reconciliation returns under DVAT extended to November 28, 2014

Delhi Govt. extends last date for filing online reconciliation returns in Form 9 for the FY 2013-14, as prescribed under Rule 4 of Central Sales Tax (Delhi) Rules, 2005 to November 28, 2014; Such returns required to be filed by dealers effecting inter-state sales / stock transfers against statutory forms at concessional rate / who claim deduction from taxable turnover against E-I / E-II forms or I / J forms

Circular no. 13/2014 -15 dated September 26, 2014

Karnataka State Government notifies that CST dealers can now generate "C Forms" online

Karnataka VAT Authorities clarify that dealers who have wrongly uploaded purchase and sales data under "Electronic uploading of Purchase and Sales Statement" ("eUPaSS") can use "Revision" facility to rectify details as well as revise e-Returns

Circular No.17/2014-15 - CCW/CR-44/2013-14 dated September 22, 2014

CBEC calls for improvement in passenger facilitation at international airports, in order to create good image of the country and department

CBEC calls for improvement in facilitation of passengers at international airports; Chief Commissioners of Customs to ensure that every Customs officer newly posted at international airports mandatorily undergoes training in relevant rules and regulations as well as in the manner of dealing with international passengers; Moreover, "Help Desks" shall be set up at prominent places immediately after immigration in the arrival hall and similarly in departure hall of international airports

Instruction No. F. No.450/148/2014-Cus.IV dated September 19, 2014

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