TAX UPDATES

December 2014

(containing recent case laws, notifications, circulars)

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Foreword

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

A FICCI delegation led by Mr Sidharth Birla, President, had a meeting with Mr Shaktikanta Das, Revenue Secretary and other officials of the Department of Revenue on 3rd December, 2014, to discuss the core issues relating to taxation included in FICCI's Pre-Budget Memorandum.

Chairman of the FICCI's Task Force on GST participated in the meeting convened by the Hon'ble Minister of Food Processing Industries held on 11th December, 2014, to discuss the implications of introduction of GST on the Food Processing sector. The meeting deliberated on the principles for identifying items which should be exempted from the proposed GST and the items which should be subjected to a concessional rate of GST.

As a part of the "North Block Policy *Charcha*" – an informal discussion forum on current economic issues, a discussion was held on 15th December, 2014 in the Ministry of Finance on the impending GST. Chief Economic Advisor, Ministry of Finance and the Finance Secretary participated in the deliberations. The discussions provided an insight into the basis of the Revenue Neutral Rate of 27% and the factors which will influence this rate.

On the direct tax regime, the Delhi Tribunal in the case of Consulting Engineering Corporation held that the activities carried out by the Indian branch office were not of preparatory or auxiliary character under the India-USA tax treaty. The Indian branch represented a fixed place of business through which substantial work was carried out by the taxpayer and therefore, it constitutes a Permanent Establishment (PE) of the taxpayer in India.

In a case involving Export Oriented Unit, the Rajasthan High Court has held that the Export Oriented Units (EOU) do not have an option to pay excise duty on export and claim rebate thereafter (Vanasthali Textile Industries Ltd. vs UoI). The Court observed that provisions of Section 5A (1A) of the Central Excise Act are applicable and no duty is required to be paid on such exported goods. Accordingly no rebate is admissible in term of Rule 18 of Central Excise Rules read with Notification No.19/2004-CE.

A. Didar Singh

Recent Case laws

I. DIRECT TAX

High Court Decisions

Delhi High Court sets aside AAR's ruling on taxability of operational and other support services to group companies under India-Netherlands tax treaty

The taxpayer, a Netherlands company, entered into a technology and know-how license agreement with Perfetti India for providing technical know-how in relation to its manufacturing and sales of products for which brands were owned by the licensors. Simultaneously, the taxpayer also entered into support services agreement (SSA) with Perfetti India.

The taxpayer was of the view that the support services do not 'make available' technical knowledge, skill, etc., and therefore not taxable as Fee for Technical Services (FTS) under the India-Netherlands tax treaty. Subsequently, the taxpayer filed an application with the Authority for Advance Rulings (AAR).

The AAR held that the SSA clearly indicated that the intention of the parties was to assist Perfetti India by applying the experience of its sister concerns and group companies. Accordingly, the services providing the knowledge and experience of the confectionery industry to Perfetti India are technical in nature. Further, the AAR held that the phrase 'make available' under Article 12(5) of the India-Netherlands tax treaty has reference to technical knowledge, experience, skill, know-how or process and it does not contain the phrase 'consist of the development and transfer of a technical plan or design'.

Accordingly, the AAR held that the services under SSA when read with technology and know-how license agreement, fall within the purview of Article 12(5)(a) of the India-Netherlands tax treaty, since such services are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment of royalty described in Article 12(4) of the India-Netherlands tax treaty is received. Accordingly, payment for such services was taxable in India.

Aggrieved by the AAR's decision, the taxpayer filed a writ petition before the Delhi High Court. The taxpayer contended that any tax treaty between India and OECD Country could be looked into while construing the India-Netherlands tax treaty. However, the AAR in the present case has not considered India-Portugal tax treaty which is an OECD country. Further MOU concerning Fees for Included Service (FIS) referred in Article 12(4) of India-USA tax treaty concerning expression 'make available' was also not considered by the AAR. The AAR held that only India-Netherlands tax treaty needed to be looked into.

The tax department contended that the AAR was correct in not looking into the India-Portuguese tax treaty. However, in so far as India-USA tax treaty is concerned, a provision similar to that tax treaty has been incorporated in India-Netherlands tax treaty by virtue of Article 12(5) of the same, whereby the same 'make available' clause has been incorporated into India-Netherlands tax treaty by way of amendment. The AAR had not considered the said amendment.

In view of above, the Delhi High Court has set aside the AAR ruling and the matter has been remitted back for fresh consideration to decide the taxability of operational and other support services to group companies under the India-Netherlands tax treaty.

Perfetti Van Melle Holdings B.V. v. AAR [(W.P(C) 1502/2012)]

Section 194H TDS inapplicable as principal-agent relation absent

The taxpayer is engaged in business of readymade garments. A letter was received by the AO that the taxpayer had paid commission to HDFC bank on payments received from customers who made purchases through credit cards. Survey under Section 133A of the Act had been conducted on HDFC, who had provided card swiping machines to retail merchants, including the taxpayer. The AO held that the amount earned by the acquiring bank, i.e. HDFC in this case, was in the nature of 'commission' and should have been subjected to deduction of tax at source at the rate of 10 per cent under Section 194H of the Act. Since no TDS was deducted on the commission payment, the same was disallowed under Section 40(a)(ia) of the Act. The CIT(A) upheld the orders of AO. The Tribunal held that taxpayer had not violated provisions of Section 194H and consequently not liable for addition under Section 40(a)(ia) of the Act.

The Delhi High Court relying on decision of Gujarat High Court in the case of Ahmedabad Stamp Vendors Association v. UOI [2002] 257 ITR 202 (Del) held that there should be an element of agency in all the three situations as envisaged in clause (i) of the Explanation to Section 194H of the Act. The Supreme Court concurred with the said view of Gujarat High Court. The High Court further referred to Allahabad High Court ruling in the case of Chief Treasury Officer v. UOI [2013] 355 ITR 484 (All) which also held that the words 'by a person acting on behalf of another person' imply element of agency and must be present in all such services or transactions in order to fall within the expression 'commission' and 'brokerage'. The High Court in view of above concluded that section 194H of the act would not be applicable in instant case as HDFC bank was not acting as taxpayer's agent. The High Court observed that once payments were received by HDFC bank and credited to the taxpayer's account, a small fee was deducted by the bank for use of swipe machines. Thus High Court concluded that HDFC bank had not carried out any act on behalf of the taxpayer and thus the relationship between taxpayer and HDFC bank was not that of agent and principal. The High Court further opined that principle of doubtful penalisation which requires strict construction of penal provisions was another reason for non-applicability of Section 40(a)(ia) of the Act. The High Court noted that the aforesaid principle requires that a person should not be subjected to any sort of detriment unless the obligation is clearly imposed, since the provisions of section 40(a)(ia) of the Act was a deterrent and a penal provision same has to be construed strictly. The High Court concluded that when the words are equally capable of more than one construction, the one not inflicting the penalty or deterrent may be preferred.

CIT v. JDS Apparels Private Limited [TS-707-HC-2014(DEL)]

New unit formed with existing partners and employees of erstwhile firm eligible for benefit of Section 80IC

A newly set-up firm had claimed benefit of Section 80IC which was denied by AO on the ground that it was formed by splitting up or reconstruction of the erstwhile firm. The CIT(A) and the Tribunal had allowed the benefit of Section 80IC of the Act. Aggrieved, the Revenue preferred an appeal before Himachal Pradesh High Court. The Revenue argued that the firm was formed with same partners as in the erstwhile firm. It further stated that the workers of erstwhile firm were also shifted to the new firm and the control and management of the existing and new firm remained the same. Hence as new firm was formed by splitting up the existing business benefit of Section 80IC of the Act ought to be denied.

The High Court noted that the AO had observed that that the taxpayer had set up a new unit in a new building and installed new machinery. The taxpayer had also made fresh investments and only 1.31 per cent of the total value of the plant and machinery was purchased from the erstwhile firm, which was in conformity with the limit prescribed in Section 80IC(4) of the Act. The taxpayer had also purchased new land and constructed a new building on it. The installed capacity of taxpayer i.e. the new firm was 13 lakh fans, while that of the erstwhile firm was 6 lakhs. The taxpayer had also obtained different PAN and separate registration under the H.P. State Industrial Development Corporation and Department of Industries, Solan as Small Scale Industry, at different location. The taxpayer also had different customers.

In view of the above facts the High Court held that the AO was wrong as he had ignored the quantum of fresh capital, investment in plant and machinery, new building, new registration number and PAN. The new unit cannot be even presumed as reconstruction of the old existing business, much less the formation of the undertaking by splitting up the existing undertaking. The shifting of the employees would not affect the constitution of the new firm to avail the benefit under Section 80IC of the Act. In this regard, reliance was placed on the Supreme Court decision in the case of Textile Machinery Corp. Ltd. v. CIT [1977] 107 ITR 195 (SC), Delhi High Court ruling in Gedore Tools India Pvt. Ltd. [1980] 126 ITR 673 (Delhi) and Patna HC ruling in CIT vs. Ridhkeren Someni [1980] 121 ITR 668 (Pat). The High Court observed that in present case a new unit had emerged, which was physically separate industrial unit and it cannot be said that the same persons were carrying on substantially the same business in this case.

CIT v. Yash International Inc. [TS-666-HC-2014(HP)]

Toll Road being ‘building’ and not ‘plant’ is entitled to depreciation at lower rate

The taxpayer is a 100 per cent subsidiary of National Highways Authority of India (NHAI) and was formed with the sole object of constructing the highway and bypass on BOT basis. During the year under consideration, the taxpayer claimed depreciation at 25 per cent on toll roads stating that it is a plant. The AO restricted the claim to 10 per cent holding that roads are part of building and thereby disallowed the balance claim. The disallowance was sustained by CIT(A) and Tribunal on further appeal.

The High Court observed that on combined reading of definition of 'plant' and 'building' as given in clause 3 to Section 43 of the Act and in Note to Appendix 1 to the Rules, it is clear that a road is not a 'plant'. The note in Appendix 1 to the Rules stipulates that 'buildings' include roads, bridges, culverts, wells, and tubewells. It further observed that toll road was a capital asset which is the very business of the taxpayer and not an implement or a tool used by the taxpayer for his business. Small booths (manned or unmanned) are primarily a facility/convenience for collecting the usage charges of the road and nothing more and that would not change the characteristic of road. In view of the various decisions and position of law, the High Court concluded that toll road is a building and the hence it is subject to depreciation at the rates which are prescribed for building.

Moradabad Toll Road Co Ltd v. ACIT [TS-681-HC-2014(DEL)]

Note: It is to be noted that in a recent ruling, Bombay High Court in the case of North Karnataka Expressway Ltd [TS-679-HC-2014(BOM)] denied depreciation on toll road on the reason that taxpayer had no ownership over the BOT project.

Tribunal Decisions

Indian branch of a foreign company forms a PE in India - Profit attributed on the basis of 50 per cent of the global profit rate of the foreign company

Permanent Establishment

The taxpayer had a branch in India which was engaged in providing various services to taxpayer, viz., engineering, calculations as well as drawing of various architectural designs. Further 95 qualified employees were working in the Indian branch office for the associated enterprises (AEs) based in the US.

The Assessing Officer (AO) held that the taxpayer had a fixed place of business in India, in the form of branch office, through which the business of the taxpayer was partly carried out and therefore, in terms of Article 5(2)(c) of the India-US tax treaty, the taxpayer had a Permanent Establishment (PE) in India.

The taxpayer contended that the Indian branch was only engaged in providing the supporting services to the taxpayer which were in the nature of preparatory and auxiliary services and therefore, did not have a PE in India.

The Delhi Tribunal held that the branch office represents a fixed place of business of the taxpayer through which substantial work was carried out by the taxpayer, which constitutes PE of the taxpayer in terms of Article 5(2)(b) and (c) of the tax treaty. The branch was doing R&D work for the taxpayer and the same was being done exclusively by branch which was the core business of the taxpayer. This important facet of the Indian branch's work was not of preparatory or auxiliary character within the ambit of Article 5(3)(e) of the tax treaty. Accordingly, the Indian branch cannot be excluded from being a PE.

Attribution of profit

As per the Transfer Pricing analysis report, the taxpayer had adopted the markup to the cost at 1.83 per cent whereas the AO found that the net profit earned by the taxpayer in its tax return filed in USA was 8.5 per cent and 10.6 per cent for relevant years which was based on sales.

The taxpayer contended that the adoption of global profit rate of 8.5 per cent and 10.6 per cent was very high. Further the CIT(A) was not correct in directing the AO to calculate attributable profit at 50 per cent of the figure arrived at by the AO after applying 8.5 per cent and 10.6 per cent representing the global profit ratio of the taxpayer.

However, the AO contended that attribution of profit to the Indian PE on the basis of risk assumed, assets used and activities performed by the PE in the given set of activities allocated between the Head Office (HO) and PE was correct. The Indian branch in the status of PE does the entire designing and drawing work which includes the risk of design and drawing. The Indian branch also takes same risk as important designing and drawing calculations are carried out by the Indian company. Accordingly, the AO had allocated the profits applying Rule 10 of the Income-tax Rules, 1962 (Rules) which was rightly held to be attributable to the operations carried out by the PE in India.

The Delhi Tribunal observed that the CIT(A) had considered the fact that the Indian branch had taken some risks, as the important drawing and designing calculations are carried out by the Indian branch. The risk was not exclusively borne by the Indian branch or the US company and therefore, 50 per cent of the profit determined by the AO based on global profit rate, was attributed to the Indian PE.

Consulting Engineering Corporation v. JDIT (I.T.A.No.1597/Del/2009; Assessment Year: 2003-04)

No disallowance under Section 40(a)(i) in the hands of the deductor – Non-discrimination clause

The taxpayer was a subsidiary company of Mitsubishi Corporation Japan (MCJ) in India. Mitsubishi Japan operates worldwide through small business segment units called divisions and Liaison Office (LO).

During the Assessment Year (AY) 2007-08, the taxpayer made payments to MCJ for purchase of goods. The AO held that since Mitsubishi Japan had a PE in India, the taxpayer was required to deduct tax from the payments made to Mitsubishi Japan. Since, the taxpayer had failed to deduct tax at source under Section 195 of the Income-tax Act, 1961 (the Act), the payments were disallowed under Section 40(a)(i) of the Act.

The taxpayer contended that Section 40(a)(i) of the Act is discriminatory in character as no such disallowance was required to be made if the payments for purchases are made to a resident taxpayer. The AO held that neither such disallowance constituted discrimination, nor was it open to a resident taxpayer to invoke provisions of the tax treaty. The AO observed that the taxpayer was resident in India and was not eligible to claim the tax treaty benefits.

The Delhi Tribunal placing reliance on the ruling of DaimlerChrysler India Pvt Ltd v DCIT [2009] 29 SOT 202 (Pune) held that it is not necessary that the taxpayer, in whose case this non-discrimination is invoked, should be resident of, or even national of, the other contracting state.

The Tribunal had a chance to analyse the provision of Article 24(3) of the tax treaty, wherein, the Tribunal agreed with the scope of the deduction neutrality clause in non-discrimination provision under the tax treaty. Therefore, the Tribunal observed that a different treatment to the foreign enterprise per se is enough to invoke the non-discrimination clause in the India-Japan tax treaty.

The Tribunal relying on the decision of Rajeev Kumar Agarwal v. ACIT [2014] 149 ITD 363 (Agra), observed that disallowance under Section 40(a)(ia) of the Act cannot be made in respect of payments made to a resident taxpayer, even in case of non-deduction of tax at source, if related payments were taken into account by the non-resident recipient in its computation and appropriate taxes were discharged by the recipient, and return of income was filed. Accordingly, applying the non-discrimination clause, the Tribunal observed that when payments were taken into account by the non-resident recipient in its computation and appropriate taxes were discharged by the recipient, such payments are not liable to disallowance under Section 40(a)(i) of the Act.

Therefore, the Tribunal deleted the disallowance under section 40(a)(i) of the Act and ruled in favour of the taxpayer.

Mitsubishi Corporation India Pvt. Ltd v. DCIT (I.T.A. No.: 5042/Del/11) (Delhi Tribunal)

Determination of taxability of FTS on Installation and Commissioning and Training to employees

The taxpayer is an Indian company engaged in the business of printing and publishing of newspapers. The taxpayer needed a sophisticated plant and machinery (mail room equipment) that could collate the various pages of the newspaper, which assisted in printing, picking and stacking them and pack the newspapers for timely delivery.

The taxpayer entered into two contracts with FERAG AG, of which one was for the supply of the various components/units of the mail room equipment, and second was for installation and commissioning of such equipment in the premises of the taxpayer and training of the staff of the company for operation of this equipment to be supplied. The taxpayer did not withhold taxes at source on payments made to FERAG AG under the second contract.

The AO held the payments under the second contract as FTS and directed the taxpayer to withhold tax with appropriate interest thereon.

The activity of installation and commissioning of the equipment is 'assembly', hence not taxable

The Mumbai Tribunal held that the equipment was a complex equipment. The bid document stipulated that the units/components of the equipment would have to be installed and commissioned by trained and qualified personnel of the supplier, who shall, then provide training to the taxpayer's employees, on the operation and maintenance of equipment. The price quoted included installation, commissioning and training. However, the supply price was separately indicated in the contract of supply.

FERAG AG, had, in fact, supplied a pickup station, a gripper conveyor, stacker and automatic bundle addressing system, etc. All these units and components had to be fitted together in a manner that they were properly positioned, aligned and, connected to ensure optimum functioning, in the shortest duration. This activity can be called as 'assembly'. However, the word assembly has not been defined in the Act and has to be understood in common parlance. Therefore, the consideration paid towards these installation and commissioning services was only taxable in Switzerland in the hands of FERAG AG, by virtue of the provisions of Article 14 of the India-Switzerland tax treaty.

The activity of training taxpayer's employees is not 'assembly', hence taxable

However, the training of employees by FERAG AG was not considered by the Tribunal as assembly. The Tribunal held that the training period would not have been substantial and that too not essentially shop floor training, as to how to operate the equipment, which would have been training on the machine. Therefore, Article 12 of the India-Switzerland tax treaty shall apply on class room training. Accordingly, an estimate of 25 per cent of the training cost, as attributable to income from training would be reasonable.

ITO v. Bennet Coleman & Co. Ltd. (ITA No. 57/Mum/2009, ITA No. 7315/Mum/2008) (Mumbai Tribunal)

'Carriage fees' / 'Placement fees' liable for TDS under Section 194C and not 194J

The taxpayer is engaged in the business of distribution of television channels. Channels are distributed through cable operators. Due to bandwidth constraints with the cable network, it is up to the cable operator to decide which channel will reach the end viewer at what frequency. Accordingly, taxpayer makes payment to the cable operator to carry its channels at a particular frequency and it is referred to as 'carriage fees'/ 'placement fees'. The taxpayer deducted tax at source at the rate of 2 per cent under Section 194C of the Act. However the department contended that the payment made to the cable operators was for providing technical services to the taxpayer, therefore, liable for TDS under Section 194J at the rate of 10 per cent.

The Tribunal observed that the Punjab and Haryana High Court in the case of Kurukshetra Darpans (P) Ltd. v. CIT 169 Taxman 344 had held that as the expression 'work' as used in Explanation to Section 194C included inter alia broadcasting and telecasting including production of programmes for such broadcasting and telecasting, payments for obtaining TV signals would be liable for TDS under Section 194C of the Act. The Tribunal also observed that the Delhi High Court in the case of CIT v. Prasar Bharati (Broadcasting Corporation of India) 292 ITR 580 had held that as the work of broadcasting and telecasting of the programmes specifically falls under the ambit of provisions of section 194C it had to be preferred over the provisions of Section 194J of the Act.

In view of these decisions the Tribunal held that placement fee paid by the taxpayer to the cable operators should be subjected to TDS as per provisions of Section 194C of the Act.

ACIT v. UTV Entertainment Television Limited (ITA no. 2699/mum/201) (Mumbai Tribunal)

Payment made by taxpayer (media agency) to hoarding contractors for limited right of display of its client's advertisements is subject to TDS un-

der Section 194 C and not 194I of the Act

The taxpayer is engaged in the business of advertising. It books hoarding sites, owned by hoarding contractors, for displaying its client's advertisements. During the year under consideration the taxpayer deducted tax at the rate of 2 per cent under Section 194C while making payment to the hoarding contractors. The AO relying on the CBDT Circular No. 715 dated 8 August 1995 held that payments were subjected to Section 194I and therefore levied interest under Section 201(1A) of the Act.

The Tribunal observed that neither the hoarding sites were owned by the taxpayer nor taken on rent. The taxpayer had only the limited right to display its clients advertisement on that hoarding for a particular period of time. It also observed that the hoarding sites were booked by the taxpayer through hoarding contractors on behalf of its clients for display of their advertisement. It therefore held that the prime responsibility of payment of rent of the sites was of the hoarding contractor and not of the taxpayer. Considering the totality of facts and CBDT Circular No. 715, the Tribunal held that contract between the taxpayer and hoarding contractors was purely in the nature of contract for the work of advertising as defined in clause (iv) of Explanation to Section 194C of the Act and therefore payments were subjected to TDS under Section 194C of the Act.

DCIT v. Madison Communications Private Limited [ITA No 4991 & 4992 (Mum)/2013]

Assessment order issued on a non-existent entity (pursuant to amalgamation) is void and such defect is not curable

The tax payer (amalgamating company) amalgamated with the amalgamated company. Assessment order, pursuant to search action, was made on the tax payer on 31 December 2010 for AY 2003-04 to AY 2008-09. The appeal against the assessment order was filed on the grounds that the order is invalid as the same was passed after the taxpayer company had ceased to exist from 9 December 2009. The CIT(A) and the Tribunal agreed with the contention of the tax payer and held that assessment upon a dissolved company is impermissible.

On further appeal by the tax department, the High Court held that assessment proceedings on a non-existent company i.e. tax payer is invalid.

CIT v. Dimension Apparels Pvt. Ltd. (ITA No. 327, 328, 329, 330 and 332 of 2014)

Depreciation is allowed on goodwill under Section 32 of the Act

CGE Limited (CGEL) amalgamated with the taxpayer. As per the order dated 14 March 2003, passed by the Mumbai High Court, the assets and the liabilities appearing in the books of CGEL were shown as assets and liabilities of the taxpayer at the same value as they appear in the books of CGEL and the difference between assets and liabilities taken over and book value of investments in CGEL appearing in the books of the taxpayer was shown as Goodwill. The High Court approved the Scheme. The taxpayer had claimed depreciation on such goodwill. The Assessing Officer had denied such claim for depreciation.

On an appeal the Tribunal had confirmed the denial of depreciation. Taxpayer further appealed to the High Court. During the pendency of the High Court appeal the Supreme Court rendered its decision in the case of Smifs Securities holding that depreciation is allowable on goodwill under Section 32 of the Act. In view of the same, the High Court in taxpayer's case restored the issue back to the Tribunal for fresh decision on merits and in light of the Supreme Court decision.

Now on the restored matter, the Tribunal held that Goodwill is a depreciable asset eligible for depreciation under Section 32 of the Act. The Tribunal, following the ratio of Bombay High Court decision in the case of Sadanand Varde, further held that once the Scheme is sanctioned by the Court it ceases to be a contract and operates with force of statute and thus neither the nature nor the quantity of goodwill can be disputed.

DCIT v. Toyo Engineering India Limited (ITA No. 3279/M/2008)(Mumbai Tribunal)

'Sogo shosha' different from normal trading, no allocation for location saving and assembled workforce required; and Berry ratio an appropriate PLI where no funds are blocked due to inventory

The taxpayer is a wholly owned subsidiary of Mitsubhishi Corporation Japan (MCJ) which is one of the leading sogo shosha establishments in Japan. Sogo shosha is a Japanese expression which means general trading company engaged in both import and export of a diverse range of products.

In the instant case, the taxpayer was engaged in two segments namely, trading segment i.e. import of goods from an associated enterprise (AE) for resale and service fees/commission income segment pertaining to sales and marketing support services to the AE.

The taxpayer selected the transaction net margin method (TNMM) as the most appropriate method with Berry ratio (gross profit/operating expenses) as the profit level indicator (PLI). The taxpayer mentioned in its functional, risk and assets (FAR) analysis that it is essentially in the business of providing sales support and coordination activities in relation to international transaction, and therefore it will be akin to that of a service provider rather than that of a trader.

During the course of TP assessment proceedings, the Transfer Pricing Officer (TPO) rejected the PLI adopted by the taxpayer stating that in case of Berry ratio, entire international transactions relating to sales and services of commodities will remain out of PLI. Also, while considering operating expenses as the cost base, the cost of sales will get excluded from the denominator of the PLI used. The TPO proposed adjustment by selecting comparable companies with an arithmetic mean of 2.49 per cent and taking Operating Profit /Total Operating Cost (OP/TC) as the PLI for the combined segments i.e. trading and service.

Tribunal's ruling

The Tribunal pointed out the importance of inventory level as a crucial factor in determining the kind of activity the taxpayer has carried out and upheld the difference between sogo shosha (general trading) and normal trader. The Tribunal held that Berry ratio is an appropriate PLI where the business does not assume any significant inventory risk or perform any functions or add any value to the goods traded. Additionally, the Tribunal upheld that no additional allocation for location savings is required if the savings are directly flowing to the independent customers and do not add to the profits of the group as a whole. The Tribunal also clarified that the mere existence of a routine supply chain or human intangibles with a taxpayer does not automatically require additional returns to be attributed.

Mitsubishi Corporation India Pvt. Ltd. v. DCIT [ITA No. 5042/Del/11 – AY 2007-08]

OECD Developments on Base Erosion and Profit Shifting (BEPS)

BEPS Action 10: Proposed modifications to Chapter VII of the OECD Transfer Pricing Guidelines relating to low value-adding intra-group services

The Organisation for Economic Co-operation and Development (OECD) has issued a discussion draft report in relation to Action 10 ('draft report') under the Base Erosion and Profit Shifting (BEPS) Action Plan. The draft report contains simplified transfer pricing approach for low value-adding intra-group services which leads to revision in Chapter VII of the OECD Transfer Pricing Guidelines. The OECD has sought comments from the public on the draft report.

The Chapter VII of the OECD guidelines broadly provides guidance on the determination of intra-group services and charge for such services in accordance with the arm's length principle. The draft report is consistent with the present guidelines with minimal fine tuning, besides specific focus on the low value-adding intra-group services and an elective, simplified methodology to determine charges for such services.

The OECD expects that the measures proposed in the draft report would reduce the scope for erosion of the tax base through excessive management fees and head office expenses. It has proposed an approach to:

- Identify a broad range of common intra-group services, which command a very limited profit mark-up on costs;
- Apply a consistent allocation key for all recipients;
- Provide greater transparency through specific reporting requirements.

The key modifications proposed in the draft report are discussed below.

What constitutes 'low value-adding intra-group services'

Low value-adding intra-group services are defined to be the services which:

- are of a supportive nature;
- are not part of the core business of a multinational enterprise ('MNE') group;
- do not require the use of unique and valuable intangibles and do not lead to the creation of unique and valuable intangibles;
- do not involve the assumption or control of substantial or significant risk and do not give rise to the creation of significant risk.

The OECD has provided that the following activities would not qualify as low value-adding intra-group services:

- Services constituting the core business of a MNE group;
- Research and development services;

- Manufacturing and production services;
- Sales, marketing and distribution activities;
- Financial transactions;
- Extraction, exploration, or processing of natural resources;
- Insurance and reinsurance;
- Services of corporate senior management.

Simplified determination of arm's length charges for low value-adding intra-group services

The simplified approach prescribed under the draft report is based on determination of cost pools, allocation of low value-adding intra-group service costs, profit mark-up i.e. 2 per cent to 5 per cent of the relevant cost.

Application of the benefits test to low value-adding intra-group services.

The OECD has lowered the threshold for evaluation of the benefits test in respect of low value-adding intra-group services and provided the following guidance to the tax administration:

- The tax administration should consider benefits only by categories of services and not on a specific charge basis. Thus, the taxpayer need to only demonstrate that assistance was provided with, for example, payroll processing, rather than being required to specify individual acts undertaken that give rise to the costs charged.

- Further, a single annual invoice describing a category of services should suffice to support the charge and correspondence, or other evidence of individual acts should not be required.

Documentation and reporting

The draft report prescribes the information and documentation should be prepared and be made available upon request to the tax administration of any entity within the group, either making or receiving a payment for low value-adding intra-group services such as, description of the categories of low value-adding intra-group services provided, reasons justifying that each category of services constitute low value-adding intra-group services within the definition set; rationale for the provision of services within the context of the business of the MNE; description of the benefits or expected benefits of each category of services, etc.

II. SERVICE TAX

Tribunal Decisions

Employee secondment non-taxable as 'manpower supply / recruitment

The taxpayer was a part of group companies situated abroad and in the course of business operations, hired certain expatriate employees. These employees were either directly employed by taxpayer or were transferred from group companies to taxpayer in India. A letter of employment was entered between such employees and taxpayer for the duration of employment in India. Additionally taxpayer also deducted tax from their salaries and Form 16 was accordingly issued to them. The Revenue Authority ("RA") demanded tax along with interest and penalty on the basis that taxpayer had provided taxable service in relation to the recruitment or supply of manpower u/s 65(105)(k) of the Finance Act, 1994 (relating to service tax). On appeal, the Delhi Bench of the Customs, Excise and Service Tax Appellate Tribunal ("CESTAT") allowed the appeal of the taxpayer, holding that no tax would be payable in the instant case.

The matter came up for consideration before the Allahabad High Court ("HC") which observed that taxpayer had obtained services of expatriate employees wherein salaries were paid to them, tax was deducted and contributed to statutory provident fund in India. The HC noted that the RA had clearly overlooked the requirement that the service must be provided by a manpower recruitment or supply agency and it must be in relation to supply of manpower. Accordingly, the order of the CESTAT was upheld and Revenue Authority's contention was rejected on the basis that in the current case no taxable service in relation to supply of manpower was provided by manpower recruitment or supply agency.

Commissioner of Central Excise vs Computer Sciences Corporation India Pvt Ltd [Excise Appeal No. 173/2014), Allahabad HC]

Commission income of money transfer agents in India; non-taxable

The taxpayer was engaged as agents in the business of money transfer from abroad to persons situated in India, delivering money to the intended beneficiaries in India either directly or through sub-agents. The taxpayer received commission in convertible foreign exchange from their principal located outside India, for such services rendered. The taxpayer treated such service as exports under "Business Auxiliary Service'. However, RA were of view that the taxpayer was liable to pay tax on commission so received since the services had been rendered in India on the basis that the beneficiary of service was situated in India. Accordingly, show cause notices were issued and demands confirmed. Being aggrieved, taxpayer filed the present appeal.

The matter came up for consideration before the Mumbai Bench of CESTAT. CESTAT observed that the service recipient in the given case is the principal who was located abroad and the commission was undoubtedly received in convertible foreign exchange. In the absence of specific rules to determine the place of provision of service during the period under concern, reliance was placed on 'Place of Provision of Service Rules' effective from July 1, 2012. CESTAT highlighted that as per Rule 3 of Place of Provision Rules, 2012, place of provision of service would be the location of the recipient of service. In instant case, service recipient was the principal who paid the consideration for service and who was situated outside India; therefore, place of provision of service should be treated as falling outside India. Further reliance was placed on Delhi Tribunal ruling in Paul Merchants Ltd. and CCE vs Fine Forex Ltd. [2014-TIOL-328-CESTAT-DEL] wherein similar situation, it was held that transaction involved amounted to export of service. CESTAT, therefore concluded that services undertaken by taxpayer for its principal located abroad, amounted to export of service and hence, not taxable in India. Accordingly, taxpayer's appeals were allowed.

Wall Street Finance Ltd & Weizman Forex Ltd vs Commissioner of Service Tax, Mumbai [Appeal No. ST/289/09, CESTAT Mumbai]

Input credit distribution of Rule 6(5) of CCR services for dutiable & exempted goods is allowed in full

The taxpayer was engaged in the activity of manufacturing pharmaceutical products at various units located in India. While some units did not pay excise duty, other units were engaged in manufacture of both dutiable as well as exempted goods. The Head Office of taxpayer, which carried out trading activities, distributed CENVAT credit under Rule 6(5) of Cenvat Credit Rules, 2004 ("CCR") to other units in full so long it did not pertain to units exclusively engaged in manufacture of exempt goods / trading. RA contended that 100 percent credit of services mentioned in Rule 6(5) of CCR could not be taken and distributed. Also, while taking credit on specified services under Rule 6(5) of CCR, taxpayer was not entitled to take credit attributable to trading activity as during the relevant period, 'trading' was neither covered under excise nor as 'exempted service'. Hence, credit attributable to trading was required to be reversed. RA also filed an appeal on the ground that while redistributing credit, taxpayer was required to include turnover of goods manufactured by loan licensee units on its behalf. On adjudication, credit was disallowed. Being aggrieved, taxpayer filed the present appeal.

The matter came up for consideration before the Mumbai Bench of CESTAT which observed that there was no bar to avail credit on services covered under Rule 6(5) of the CCR by a unit who is engaged in the activity of manufacturing of both dutiable as well as exempted goods or rendering taxable and exempted services and hence, taxpayer was entitled to claim full credit in respect of same. However, no credit attributable to trading would be available since trading at that time, was neither covered under Excise nor exempted service. Accordingly, CESTAT disposed of taxpayer's appeal in above terms.

Commissioner of Central Excise, Belapur vs Elder Pharmaceuticals Ltd [Appeal No. E/86490, 86863, 88794/13, CESTAT Mumbai]

Nexus between the input and input service and the output and output

service for availment of CENVAT credit

The taxpayer was manufacturer of chemicals and had availed CENVAT credit of various input services in relation to manufacturing activity such as legal services, maintenance service, account and audit service etc. The taxpayer had constructed and rented an immovable property on which service tax was applicable under 'Renting of Immovable Property Service' category. The taxpayer utilized the credit taken on services received in factory in relation to manufacturing activity, for discharging service tax liability towards 'renting of immovable property' service. RA issued a show cause notice ("SCN") to deny the manner of utilization of credit and recovery thereof. Upon adjudication, the demand was confirmed with interest and penalties. Aggrieved, taxpayer filed an appeal.

The matter came up for consideration before the Mumbai Bench of CESTAT. CESTAT observed that the basic principle that for CENVAT Credit, there has to be a nexus between the input and input service and the output and output service. Rule 3 of CCR stipulates that credit can be taken only in respect of input and input service that have gone into manufacture of output or which are used in or in relation to rendering of output service. In the instant case, the credit earned from input / input service had no nexus with the rendering of output service of renting immovable property. In this regard, CESTAT directed taxpayer to make pre-deposit of the entire amount of CENVAT credit wrongly utilized, on compliance of which the balance dues (interest, penalty) would be waived.

Dai Ichi Karkaria Ltd. vs Commissioner of Central Excise, Pune I [Appeal No. ST/87439/14, CESTAT Mumbai]

III. VAT/ CST/Entry Tax

High Court Decisions

Can't apply "Ejusdem generis" to broaden legislature's intention

The taxpayer was engaged in the manufacture and sale of G.K.Aerosol, Hit Aerosol, Hit Rat and Hit Line, which are used as Home Insecticides on which taxpayer had charged and collected VAT at 4 percent. However, RA were of view that Entry 23 of Schedule III of Karnataka Value Added Tax, 2003 ("KVAT"), which was substituted by Act No.5 of 2008 effective from August 1, 2008 expressly provided for goods which are excluded. It was submitted that the term exclusion cannot be interpreted with respect to only phenyl, liquid toilet cleaners, floor cleaners, mosquito coils, mosquito repellents, but it had expressly used the expression "and the like" used for non-agricultural or non-horticultural purposes and by applying principle of *Ejusdem generis*, not only mosquitoes, but, if all the flies are killed by the use of insecticides, then such insecticides are excluded from entry and therefore, would be liable to pay tax at 12.5 percent Being aggrieved, taxpayer filed writ petition.

Before the Karnataka HC it was pointed out that the words "and the like" are not the same as "namely" or "such as". Therefore, wherever the words "and the like" are used, even if the principle of "ejusdem generis" is applied, the words "and the like" will have to go with the description of each items in the class and it cannot be broadened to include the items which were not conceived in the entry. Thus, it was noted that the exclusion was with reference to phenyl, liquid toilet cleaners, floor cleaners, which kills invisible germs or bacteria which constitute a class by themselves. Further, HC stated that where a word has a scientific or technical meaning and also an ordinary meaning according to common parlance, it is in the latter sense that in a taxing statute the word must be held to have been used, unless contrary intention is clearly expressed by the legislature. Reliance was placed on the SC ruling in Porritts & Spencer (Asia) Ltd. v State of Haryana [1978 (42) STC 433]. Therefore, the words "and the like" in the context has to be understood as "referring to germs and bacteria", which are not visible or mosquitoes, which are visible, but goods which are used as repellant.

It was held that if the intention of the Legislature was to exclude all insecticides or pesticides used for non-agricultural or non-horticultural purposes, they could have done so by using only those words without expressly mentioning phenyl, liquid toilet cleaners, floor cleaners, mosquito coils and mosquito repellants. Therefore, by applying the principles of "Ejusdem generis", we cannot include those items, which are not even intended by the Legislature. In the instant case, products manufactured provided instant kill solution to all rodent and insect problems and therefore could not be considered as repellant. Thus it was observed that the goods manufactured by taxpayer were insecticides falling under Entry 23 of Schedule-III of the KVAT liable to tax at 4 percent. Accordingly, taxpayer's appeals were allowed and RA revision petition was dismissed.

State of Karnataka vs Godrej Consumer Products Ltd [Sales Tax Revision Petition No 320/ 2012 & 2-18/ 2013, Karnataka HC]

Point of determining interest liability on account of non-submission of statutory declaration form

The taxpayer filed returns for the period April 2005 to March 2006 in which it disclosed inter-state sale and paid tax at the rate of 4 percent thereby availing benefit of lower rate of taxation under Section 8 of the Central Sales Tax Act ("CST"). The taxpayer stated that it would furnish Form 'C' in respect of said sale. The facts of the case envisage two situations:

a) In course of assessment proceedings, the taxpayer could not produce Form 'C'. The HC held that where there is a short payment of CST on sales disclosed in periodic returns on account of non-furnishing of Form 'C' on the part of taxpayer, interest should be levied from the date of furnishing returns; and
b) The RA rejected Form 'C' furnished by taxpayer on the plea that it was defective. In such a situation, it was held that where there is a short payment of CST on account of rejection of Form C by Assessing Authority, interest should levied from the date of assessment order.

The HC held that in the former situation, the taxpayer had prior knowledge that in the event of failure to submit declaration in Form 'C', it would be liable to pay tax under

CST. Hence it was conscious of the tax liability. Thus, the short-payment made by taxpayer resulted in depriving State of the relevant revenue. Hence, taxpayer was held to be liable for making payment of tax along with interest for delayed payment, from the date it was liable to pay tax to compensate the delay. However, in the latter situation, the declaration was given by taxpayer but had been rejected by RA on account of it being defective. Since only upon such rejection, taxpayer becomes liable to pay tax, then the liability to pay interest on such amount of tax would arise only from the date of determination of the said disputed fact and not from the date on which return was filed enclosing defective return.

State of Karnataka vs Maintec Technologies (P) Ltd [2014 (11) TMI 34, Karnataka HC]

IV. CUSTOMS

High Court Decision

Levy of Redemption fine and penalty is justified in case of mis-declaration of goods with an intention to avail Duty Exemption Entitlement Certificate ("DEEC") Scheme benefit

The taxpayer imported 'Stainless Steel Coil AISI 304' and filed a Bill of Entry ("BOE") claiming exemption from payment of duty under the DEEC Scheme. On examination of the imported goods by experts, it was stated that the goods were of second quality and conformed to AISI 304 grade in terms of chemical composition. Accordingly, the taxpayer withdrew the earlier Bill of Entry ("BOE") and filed a fresh BOE declaring the product as 'Stainless Steel Coil Second Quality Grade AISI 304'. The RA disputed that the goods have been incorrectly declared in the original BOE and thus it was a case of mis-declaration with an intention to avail the benefit of DEEC scheme. Therefore confiscation of goods was ordered for with an option to pay redemption fine and penalty and the same were paid by the taxpayer. However, taxpayer challenged such levy of redemption fine and penalty before the CESTAT. CESTAT, by noting that the taxpayer has subsequently filed the correct BOE and paid the redemption fine and penalty, reduced the quantum of fine and penalty. Being aggrieved, the taxpayer preferred an appeal before the Madras HC.

The HC observed that even though three questions of law were raised by the taxpayer, the learned counsel of the taxpayer was not seriously disputing the findings of the RA and CESTAT. Therefore, HC observed that the only question which requires deliberation is regarding the quantum of the redemption fine and penalty. HC held that the CESTAT has been lenient in reducing the quantum of redemption fine and penalty and in a proven case of mis-declaration, the confiscation of goods and imposition of redemption fine and penalty is justified and therefore, the order passed by the CESTAT is appropriate and does not require to be interfered. Accordingly, the HC upheld the order of the CESTAT.

Ganpathy Agencies vs Customs, Excise & Service Tax Tribunal of Chennai [CMA No. 3573/2006, Madras HC)

Tribunal Decisions

Erection, commissioning of imported equipment a condition of sale; Design / engineering charges taxable

The issue before the Bangalore Bench of CESTAT was whether cost of design and engineering towards erection, commissioning and installation of imported equipment would be includible in the Assessable Value ("AV") for calculation of customs duty. The taxpayer imported and installed a sinter plant at its unit in Durgapur from an overseas supplier. The terms of agreement provided that supplier was also to provide the design and details engineering, complete equipment supply and technical services for the proposed plant at Durgapur in India. The RA were of the view that as per the contract between the parties there was separate charge for design; engineering fee and that should be added to the AV. On adjudication, it was held that the taxpayer had suppressed and did not declare the amount of advance paid by them besides appropriating the amount of duty paid by them in respect of advance. With regard to design and engineering charges also, it was proposed to appropriate the duty paid and also impose penalty. Besides imposing penalty, redemption fine of Rs.2 crores was also imposed. Being aggrieved, taxpayer preferred the present appeal.

The matter came up for consideration before the Bangalore Bench of CESTAT, which observed that as per the agreement the total contract value consists of engineering design fee, price for equipment and refractory supply and thus, the CESTAT rejected the taxpayer's argument that design and engineering part was exclusively related to post importation activity. CESTAT also noted that the total contract value included the engineering design fee, technical knowhow, technology usage charges and also engineering design of sinter plant itself. CESTAT observed that the head basic design would include equipment selection for utilities of sinter plant, providing specification of steel products for steel structural engineering, etc. Further, it was observed that the supplier was also responsible for supply and design of all the equipment. Thus, the CESTAT held that it is a turnkey project and placed reliance on the SC ruling in the case of Mukund Ltd. [2000 (120) E.L.T. 30]. As regards technical supervision, CESTAT observed that the nature of technical supervision, design and engineering charges have to constitute part of the AV since it is a condition of sale. Further, CESTAT also observed that there was no indication that the taxpayer had the liberty to get the erection, commissioning and installation done by someone else and thus, it was part of the same contract. In respect of penalty, CESTAT stated that design / technical charges is always a disputable item and requires interpretation of the agreement and therefore penalty was not imposed on taxpayer. CESTAT set aside confiscation of goods and imposition of redemption fine in lieu of penalty and concluded that, the taxpayer was liable to customs duty on design and engineering and technical supervision charges. Accordingly, CESTAT allowed the taxpayer's appeal.

Jai Balaji Industries vs CC and ST [TS 491 Tribunal 2014 Cust, CESTAT Bangalore]

V. CENTRAL EXCISE

High Court Decisions

Credit not reversible on 'used input and capital goods' removed from Domestic Tariff Area (“DTA”) to Electronic Hardware Technology Park (“EHTP”)

The taxpayer is engaged in manufacturing business and operates through two units viz. DTA and EHTP units. The issue before the Karnataka HC was whether the taxpayer is required to reverse CENVAT credit on movement of used inputs and capital goods from its DTA unit to its EHTP unit without payment of duty. The RA were of the view that the credit of duties paid on used inputs and capital goods is required to be reversed by the taxpayer. Further, the EHTP unit has not received excisable goods directly from the factory of manufacturer or its warehouse and hence the condition stipulated in the Notification No.22/2003 for availing outright exemption is not fulfilled. Further, it was also submitted that the taxpayer had imported capital goods on which CENVAT credit had been availed by DTA unit and was cleared without payment of duty to EHTP unit under the cover of CT-3. On the other hand, the taxpayer contended that it had cleared the goods under the prescribed procedure against form CT-3 and therefore, there is no requirement for reversal of credit. Further, the taxpayer also contended that the judgment in case of Lakshmi Automatic Loom Works Ltd. vs CCE [(2008 (232) E.L.T. 428 (Tri-LB)] has no application to the facts of the instant case.

After taking note of the provisions and Larger Bench ruling, HC observed that EHTP is entitled to procure goods duty free subject to fulfilment of prescribed conditions and that the Lakshmi Automatic Loom ruling (supra) dealt only with reversal of input as such and not removal of used capital goods. As regards inputs, HC observed that taxpayer was not liable to reverse credit as it had paid duty on purchase and thereafter with the permission of the RA, removed it to EHTP unit. Therefore, taxpayer was rightly entitled to refund of the CENVAT credit reversed. Further, HC rejected RA’s contention that the taxpayer has not brought the excisable goods directly from the factory of manufacture or warehouse and therefore they were not entitled to the benefit of Notification No.22/2003. It was noted that in the instant case, the taxpayer purchased the capital goods as well as inputs for its DTA unit on which duty was paid and thereafter, with the permission of the authorities in form CT-3, the inputs were removed from DTA unit to the EHTP unit. Further, HC observed that the taxpayer did not remove the goods on as such basis but removed after considerable use and therefore there was no liability to reverse the credit. In light of Notification no. 22/2003, which granted exemption, HC held that EHTP unit is entitled to exemption of payment of duty and therefore, the taxpayer rightly reversed credit on such goods when they were moved to EHTP unit and claimed refund.

As regards duty on removal of used capital goods to EOU unit, HC observed that the liability to pay duty on capital goods arises after the capital goods have been removed as such. The HC placed reliance on several rulings to interpret the term 'as such' and held that no duty was leviable in respect of removal of used capital goods. HC observed that as the said inputs were removed with the previous permission of the department as reflected in form CT-3, therefore, there was no liability to pay the duty / credit. Since the credit was reversed under protest, the taxpayer was entitled to the refund of the said amount. Accordingly, HC dismissed RA's appeal.

CCE, Bangalore vs Solectron Centum Electronics Ltd [CEA No.49/2009, Karnataka HC]

Export Oriented Units ("EOU") do not have an option to pay duty on export and claim rebate

The taxpayer was a 100 percent EOU and had filed rebate claims against export which was initially sanctioned by the RA. However, subsequently, the RA preferred an appeal before the Commissioner Appeals ("Comm-A") by contending inter alia that the taxpayer, being an EOU, was not required to export the goods on payment of duty as per section 5A (1A) of the Central Excise Act, 1944 ("CEA") in terms of the absolute exemption provided under the Notification no. 24/2003- CE dated March 31, 2003 and hence is not eligible for rebate claims. Further, the RA were also of the view that until de-bonding, all the exports made by the taxpayer would be deemed to be made by the EOU and not under the DTA limit and therefore the taxpayer was also not eligible to rebate on such exports. The Comm-A allowed the appeal of the RA. Further, an appeal was also filed before the revisional authority which held in favour of RA on the reason that the taxpayer, being an EOU, was not required to pay duty on exports and therefore the refund is inadmissible.

The matter came up for consideration before the Rajasthan HC which held that in view of Notification no. 24/2003-CE and section 5A(1A) of the CEA, the taxpayer was not liable to pay any duty. HC also held that there is no condition for availing exemption from payment of duty of goods cleared for export. The EOU has to clear all the goods manufactured by them for exports. Further, such units can clear goods to DTA with prior permission of the development commissioner and since no prior permission of commissioner was sought, the revisional authority had correctly arrived at this conclusion. HC also held that since there is no condition in the notification for availing exemption of goods manufactured by EOU and cleared for export, the provision of section 5A(1A) of the CEA are applicable and no duty was required to be paid on such exported goods. Accordingly, it was held that the rebate claimed is not admissible in terms of Rule 18 of CE read with Notification no. 19/2004 and HC accordingly upheld the order of revisional authority.

Vanasthali Textiles Industries Limited vs Union of India [WP No. 16942/2012, Rajasthan HC)

Tribunal Decisions

Credit reversible on final products becoming exempt under Rule 6, not Rule 11 of CCR

The issue before the Mumbai Bench of Customs, Excise and Service Tax Appellate Tribunal ("CESTAT") pertained to eligibility to credit on inputs used in relation to manufacture of final products, out of which few products became exempt subsequently. The taxpayer was engaged in manufacture of Menthol Flake, Menthol Crystals, De-Mentholized Oil ("DMO") and other essential oils / flavouring agents derived from DMO. Two of the above listed products were exempted from levy of excise duty. The RA were of the view that as per the provision of Rule 11(3)(ii) of CCR, the taxpayer is required to reverse the entire value of credit availed on raw material in stock and under manufacturing process. Further, the RA were also of the view that in respect of sales return, the taxpayer is not eligible to re-credit of tax paid on export of subsequently exempted product.

The taxpayer contended that credit availed till products were taxable should be available for utilization. Since only two of the four products were exempted, the taxpayer contended that the RA have wrongly invoked Rule 11(3)(ii) of the CCR which is applicable when only one final product is being made out of one or more CENVAT credit availed inputs and that final product has become fully exempt from duty or in case of more than one final product being manufactured out of cenvated inputs, all the final products have become fully exempt from duty. The taxpayer also submitted that the provisions of Rule 6(1) of the CCR would not be applicable to the instant case since at the time of receipt of the inputs, all the final products were dutiable. Thus, neither Rule 11 nor Rule 6 of CCR would be applicable to the facts of the instant case and hence credit of duty earlier paid would be available in terms of Rule 16 of Central Excise Rules, 2002 ("CER").

CESTAT observed from a combined reading of Rule 6(1), 6(2) and 6(3) of CCR, that credit in respect of goods used in manufacture of exempted final products is not available. CESTAT agreed with taxpayer's contention that Rule 11(3)(ii) of CCR would be unfit to apply. However, CESTAT rejected taxpayers contention that that Rule 11(3) is not subject to provisions of Rule 6 and held that Rule 11 of CCR is in accordance with the general principles of the CENVAT credit, that no credit would be admissible in respect of inputs or input services which have been used in or in relation to manufacture of the exempted final products. Thus, CESTAT held that taxpayer is eligible to avail credit of tax paid on stock of materials to be used in manufacture of taxable goods. Further, CESTAT held that in respect of clearance of exempted final products, an amount equal to CENVAT credit on inputs used in the manufacture of final products shall be payable. As regards credit of duty earlier paid on sales return consignment, CESTAT opined that credit has been correctly taken under Rule 16 of CER. Accordingly, CESTAT disposed of taxpayer's appeal and remanded the matter back to the RA for re-quantification of demand and penalty.

Swati Menthol & Allied Chemicals vs CCE, Meerut II [Excise Appeal No. 1500/2010, CESTAT Mumbai]

Credit available on Capital goods used for manufacture of both dutiable and exempt products at different points of time.

The issue before the Delhi Bench of CESTAT was whether CENVAT credit under CCR was available to manufacturer on capital goods which were used for production of exempt goods and subsequently for dutiable goods. The taxpayer was engaged in the business of manufacturing exempted fruit pulp based drink and dutiable aerated drink. The taxpayer installed capital goods for manufacturing fruit pulp based drinks. However, with certain software changes and minor adjustments such capital goods could also manufacture aerated drinks. Further, such fact was also evident from the certificate issued by the manufacturer of such capital goods. When the RA initiated investigations, it was found that the capital goods in question, on which credit had been availed, were used exclusively in manufacture of the exempt product. Thus, RA were of the view that the taxpayer is not entitled to CENVAT credit on such capital goods. Accordingly, an SCN was issued and adjudicated, and a demand for recovery of CENVAT credit availed, along with interest and penalties, was raised. An appeal was preferred by the taxpayer before CESTAT and subsequently also before the Allahabad HC. However, the HC directed the CESTAT to reconsider the matter in light of the aforesaid manufacturer's certificate.

CESTAT observed that CENVAT credit on the machinery cannot be denied from the very beginning, as the taxpayer's intention was to use the said capital goods for manufacture of both dutiable and exempt products. CESTAT also observed that it was not necessary that the capital goods should be used both for manufacture of dutiable as well as exempt finished products simultaneously. CESTAT stated that credit would be admissible even if the machinery was used at different points of time for dutiable and exempted final goods. However, CESTAT also mentioned that if at the time of receipt of capital goods, the capital goods were used only for manufacture of exempted final products and later on for manufacture of dutiable goods or if later the products became dutiable, then the credit would not be admissible as per CESTAT's observation in case of CCE, Indore vs Surya Roshni Ltd. [2003 (155) E.L.T. 481 (Tri. Del)]. But if there was clear intention right from the beginning that the capital goods were to be used for both purposes, credit could not be denied merely because the machinery manufactured exempted goods first and dutiable goods later and placed reliance on Gujarat HC's observation in case of CCE, Vadodara II vs Gujarat Prepack [2009 (234) E.L.T. 409 (Guj.)]. Thus, considering the directions from Allahabad HC, and the certificates submitted by the taxpayer, CESTAT concluded that the taxpayer could avail the credit subject to furnishing evidence which proved its intention to use capital goods for manufacture of both exempted and dutiable products

Brindavan Beverages Pvt Ltd. Vs CCE, Meerut [Excise Appeal No. 432/2007, CESTAT Delhi]

Allows Special Additional Duty ("SAD") exemption & education cess credit utilisation on EOU - DTA stock transfer

The issue before Mumbai Bench of CESTAT pertained to eligibility of SAD exemption on stock transfer of goods from EOU to DTA units as well as CENVAT credit utilisation for duty payment by an EOU. The taxpayer was a 100 percent EOU engaged in manufacture and export of goods. Apart from export, the taxpayer also cleared goods to third parties as well as to its own units located in DTA, by availing concessional rate of duty in terms of Notification No. 23/2013-CE dated March 31, 2003.

Further, the taxpayer did not pay SAD under section 3(5) of Customs Tariff Act, 1975 claiming exemption in respect of clearances of finished goods to its own DTA units on stock transfer. However, the RA were of the view that the taxpayer was not eligible to exemption as no sales tax was paid. Additionally, the RA were also of the view that the taxpayer has wrongly utilized CENVAT credit of Education Cess and Secondary and Higher Education Cess for payment of aggregate customs duties under proviso to section 3 of the CEA. On adjudication, both demands were confirmed along with interest and penalty. Being aggrieved, the taxpayer preferred the present appeal and argued that the conditions of Notification No. 23/2003-CE were fulfilled as goods were otherwise not exempt from sales tax as such and for this reason, it availed SAD exemption in case of stock transfer. Further, it had paid sales tax in respect of other DTA clearances as well and that the same had been included in the demand calculation. On the issue of cess, taxpayer contended that it is a central excise duty and not customs duty and placed reliance on AAR decision in the case of GE India Industrial Pvt Ltd vs CC [2013-TIOL-01-AAA Cus]. On the other hand, the RA vehemently argued that SAD exemption was unavailable since sales tax was not leviable on inter-unit transfer and that it could not be said that State Government had exempted the goods, when sales tax itself was not leviable and placed reliance on Larger Bench ruling in case of Moser Baer India Ltd vs CCE Noida [2009 (240) ELT 25 (Tri LB)].

On perusal of the Notification No. 23/2003, the CESTAT held that the benefit was available to the taxpayer since the goods were liable to sales tax on sales to DTA. CESTAT further held that the reliance on Moser Baer ruling was misplaced because in that case, sales tax was not leviable in the first place, in view of exemption to EOU from payment of sales tax. On the other hand, AAR decision supported the taxpayer's case as the subject matter of that case related to stock transfer from SEZ unit to DTA, and it was held that exemption would be available. On the issue of wrong availment of CENVAT Credit, CESTAT observed that the law had not been read correctly by Adjudicating Authority. The duty paid by the taxpayer was excise duty under section 3 of CEA and not customs duties. Sec 3 of CEA merely provides that central excise duty payable would be aggregate of customs duty; therefore taxpayer had correctly utilized CENVAT credit in respect of cess of excisable goods towards payment of duty / cess leviable thereon. CESTAT also noted the coordinate bench's ruling in the Taxpayer's own case and set aside the demand.

VVF Limited vs CCE Belapur [TS 494 Tribunal 2014 EXC, CESTAT Mumbai]

Denies advertising credit for manufacturing "soft drinks concentrate", as final products exempt

The issue before Ahmedabad Bench of CESTAT pertained to admissibility and utilisation of CENVAT Credit in respect of advertisement services availed towards exempted final product, in manufacture of non-alcoholic beverages base ("NABB") / soft drink concentrate. The taxpayer is engaged in manufacture of NABB or soft drink concentrate. The taxpayer availed CENVAT Credit of the service tax paid on advertisement services availed by its Headquarter, under Input Service Distributor ("ISD") invoices. However, RA disputed that NABB concentrate was used in the manufacture of Frooty and Appy which are fully exempt from excise in terms of Notification No. 03/2006-CE. Therefore, credit on advertising services with respect to exempted goods cannot be availed by taxpayer on ISD certificates issued by Headquarter. Accordingly, demands were confirmed and penalties were imposed on both the taxpayer and ISD. Being aggrieved, the taxpayer filed the present appeal. The taxpayer contended that services availed by the Headquarter with respect to advertisement of end products would be admissible as input services under Rule 2(l) of CCR, as the concentrate manufactured by taxpayer increases production of end products (for which advertising is done), which in turn would also increase the consumption of final products. Further, the taxpayer also submitted that the cost of advertisement is included in the AV of NABB. In this regard, the taxpayer placed reliance on Bombay HC ruling in case of Coca Cola India Pvt Ltd. vs CCE, Pune [2009 (15) STR 657], wherein it was held that credit of advertisement services availed on the finished soft drinks was admissible for the manufacture of soft drink concentrate. Further, the taxpayer also contended that credit should not be denied due to procedural lapses.

The CESTAT observed that the instant issue had been settled in the case of ECOF Industries Pvt Ltd. vs CCE, Bangalore [2010 (17) STR 515 (Tri-Bang)]. In that case, it was observed that procedural irregularities can be ignored while allowing CENVAT Credit, but such credit should not pertain to inputs / input services used in the manufacture of exempted goods. In view of this, CESTAT stated that in the instant case, credit cannot be made available on exempted final goods just because cost of advertisement expenses had been included in the AV of NABB concentrate. Moreover, CESTAT noted that Bombay HC ruling in the case of Coca Cola Ltd. did not deal with whether the soft drinks manufactured from the concentrates were fully exempted or duty was paid by the ultimate bottlers. Therefore, said case would not be applicable since final products in the present case are fully exempt. As regards extended period invocation, CESTAT upheld the same on the basis that the taxpayer never approached RA to seek clarification whether such credit of advertisement services can be availed on fully exempted products. CESTAT also observed that RA could not know from a CENVAT document issued by ISD whether the credit distributed thereunder pertained to services availed for exempted final product or not. The same came to the knowledge only after initiation of investigation. Accordingly, CESTAT dismissed the appeals of the taxpayer.

Parle Agro Pvt Ltd vs CCE, Vapi [2014-TIOL-2260, CESTAT Ahmedabad]

Notification & Circulars

Import tariff of gold and silver amended

Import tariff value of gold has been amended and notified to be 391 / 10 grams and import tariff value of silver has been amended and notified to be USD 551 / kilogram. New tariff values for 10 other import items also notified.

Notification No 100/2014 - Customs (NT) dated October 31, 2014

Maharashtra VAT Authorities has instructed dealers having tax liability less than 10 lakhs to upload monthly / quarterly VAT returns along with the annexures

Government of Maharashtra instructs dealers liable to file returns under Rule 17 (4)(c) and (d) of MVAT Rules (viz. non-retailer dealers whose tax liability < Rs 10 lakhs in previous year & other registered dealers) and who have not uploaded monthly returns along with annexures for the period April to July 2014 and quarterly return for April to June 2014, to upload the same electronically for the period ending September 30, 2014 in the prescribed templates.

Notification No. VAT/AMD-2014/1B/Adm-8 dated October 16, 2014

TN VAT Authorities issues instructions for verification of non-filers for determining their tax liability

Government of Tamil Nadu issues instructions pursuant to directions from Finance Secretary:

• To inspect premises of non-filers to verify whether they are doing business from registered business place and to determine tax liability;
• Mandates one non-filer to be chosen by Joint Commissioner for each circle and enlists criteria for inspection; and
• Directs submission of a compliance report at end of every month

Circular no. 45/2014 dated October 7, 2014

SEZ: Harmonization of rules, formats and fees in all zones

Commerce Ministry harmonizes rules, formats and fees across all SEZs; Standardizes format for utilization of goods by Developers / Co-Developers (Certificate of Chartered Engineer), Lease Deed, Annual Performance Report & information required for renewal of the Letter of Approval.

Notification No. D/12/25/2012-SEZ dated October 28, 2014

SEZ: Digitization of applications/permissions by SEZ Units/ Developers.

Commerce Ministry calls for digitization of applications / permissions for SEZ units / developers with effect from November 1, 2014. Applications inter alia include approval for authorized operations, quarterly / half yearly returns, grant of exit permission (in principle approval) from SEZ Scheme. They shall be received through module developed by NSDL.

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