April 2015

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

KPMG cutting through complexity

BMR & Associates

Foreword

I am pleased to enclose the April 2015 issue of FICCI's Tax Updates. This contains recent case laws, circulars and notifications pertaining to direct and indirect taxes.

A meeting of the Taxation Committee was held on March 20, 2015, to examine the suggestions and recommendations received from the members on the proposals contained in the Union Budget 2015-16. Based on the deliberations, FICCI's Budget Memorandum 2015-16 has been finalized and submitted to the Ministry of Finance on March 31, 2015. Chairman, Taxation Committee has met the Chairman, CBDT (on March 26, 2015) and the Revenue Secretary (on April 8, 2015) to discuss specific proposals for reconsideration.

The Central Board of Excise and Customs (CBEC) has requested FICCI for suggestions for improving the taxpayers' services being provided by it to the assessees. CBEC has proposed to set up a Directorate of Taxpayers' Services to bring in 'Customer Focus' in its dealings with the taxpayers as recommended by the Tax Administration Reforms Commission. A meeting of the Taxation Committee was held on 6th April, 2015, to identify the services and the manner of delivery which could be conveyed to CBEC, for improving its taxpayer's services. A note is being submitted to CBEC in this behalf.

On the taxation regime, Central Board of Direct Taxes (CBDT) has notified the rules on 14 March 2015 setting out the applicability and the requirement for applying rollback under the Advance Pricing Agreement (APA) programme as envisaged under the Finance (No.2) Act, 2014. The pre-filing consultation which was mandatory has been made optional. Therefore, going forward an applicant can directly file the main Advance Pricing Agreement application without filing for a pre-filing consultation.

The Customs, Excise and Service Tax Appellate Tribunal (CESTAT) has held (in the case of Delphi Automotive Systems) that the credit of service tax paid on the event management service for organizing the annual day function is related to the manufacturing activity and is therefore eligible for CENVAT credit. The function was organized every year for rewarding and entertaining the employees to encourage them to perform better. The CESTAT observed that organizing functions for the benefit of the employees has nexus to the business of manufacture for which the CENVAT credit is allowable.

In a Central Excise matter (CEAT Ltd. vs. Commissioner of Central Excise, Nashik) the Bombay High Court has held that interest under Sub Rule (4) of Rule 7 of the Central Excise Rules 2002 arises only where additional duty is payable consequent to final assessment order. In a case where the taxpayer cleared the goods on provisional assessment basis, submitted the required documents to the department for finalization of assessment, and also deposited differential duty before finalization of assessment, no interest was payable if the final assessment did not result in any additional duty liability.

We do hope that this newsletter keeps you updated on the latest tax developments.

We would welcome any suggestions to improve the content and the presentation of this publication.

A. Didar Singh

Recent Case laws

I. Direct Tax

Supreme Court Decision

Financial advisory services provided by a non-resident treated as 'consultancy service' taxable as Fees for Technical Services

The taxpayer, an Indian company entered into an agreement with a French company (Financial advisor) to seek services in preparation of a scheme for raising the finance and tie up for the required loan, for a power project in India. The services included, inter alia, financial structure and security package to be offered to the lender, providing an assessment of export credit agencies world-wide and obtaining commercial bank's most competitive terms, negotiations and documentation with lenders, structuring, negotiating and closing the financing for the project in a coordinated and expeditious manner. As consideration for these services, the French company was to be paid a 'success fee'. The taxpayer approached the concerned Assessing Officer (AO), for issuing a 'No Objection Certificate' (NOC) to remit the said sum. However, the AO refused to issue the NOC. The taxpayer preferred a revision petition before the Commissioner of Income-tax (CIT), under Section 264 of the Act, where the CIT permitted the taxpayer to remit the said sum to the French company by furnishing a bank guarantee for the amount of tax. Subsequently, the CIT revoked the earlier order passed under Section 264 of the Act, and directed the taxpayer to deduct tax and pay the same to the central government as a condition precedent for issuance of the NOC.

The taxpayer filed a writ petition before the High Court. The High Court held that the advice given to procure a loan to strengthen finances may come within 'technical' or 'consultancy' services. The 'Success fee' would thereby come within the scope of technical service under the ambit of Section 9(1)(vii)(b) of the Act. Accordingly, the taxpayer was not entitled to NOC.

The Supreme Court held that French company does not have a place of business in India. Since the taxpayer had not invoked the India-Switzerland tax treaty, the issue before the Supreme Court was whether the 'success fee' is Fees for Technical Services (FTS) under Section 9(1)(vii) of the Act. Perusal of Section 9(1)(vii) of the Act lays down the principle which is basically known as the 'source rule', i.e. income of the recipient is to be charged or chargeable in the country where the source of payment is located, to clarify, where the payer is located. The clause further mandates and requires that the services should be utilised in India. As per the principle of nexus, the nexus of the right to tax is in the source rule. The source rule would apply where business activity is wholly or partly performed in a source state. As a logical corollary, the state concept would also justifiably include the country where the commercial need for the product

originated, that is, for example, where the consultancy is utilised.

The expression, 'managerial, technical or consultancy service,' used under Section 9(1)(vii) of the Act, has not been defined in the Act and therefore, in the given factual matrix, the general and common usage of the said words has to be understood at common parlance. French company had the skill, acumen and knowledge in the specialised field i.e. to prepare a scheme for required finances and tie-up required loans for the project. The nature of services rendered by French company would come within the ambit of the term 'consultancy service'. Therefore, the tax at source should have been deducted on the amount paid as fees and could be taxable under the head 'FTS'.

GVK Industries Ltd. vs. ITO [2015] 54 taxmann.com 347 (SC)

High Court Decision

Though most parts of the plant, to be installed outside India, were manufactured outside India but the taxpayer prepared engineering specifications, inspected the final product, etc. of the plant in the 100 per cent Export Oriented Unit and therefore was eligible for 10B deduction

The taxpayer is a company engaged in the business of manufacture, trading and export of engineering goods etc. and also has a 100 per cent Export Oriented Unit (EOU/Unit) located in an Export Processing Zone. In the relevant year, the taxpayer claimed exemption/ deduction under Section 10B on profit from the EOU. The AO, however, held that the taxpayer himself did not manufacture any goods but had removed various parts after testing and disassemble them for the purpose of export. Testing, painting or prepackaging for export cannot be construed as manufacture or assembling activity. Accordingly, the AO did not allow deduction under Section 10B. The Delhi High Court observed that a reading of the Section 10B of the Act indicates that it is a beneficial provision and has been enacted to give tax concession upto 100 per cent to an EOU engaged in production of articles, things or computer software. The taxpayer had carried out detailed engineering analysis of system design, equipment specifications, development and preparation of engineering drawings and thereafter, approval was taken from the client. At the next stage, the taxpayer issued technical specification and drawings of products for production, which was outsourced to third party vendors. During the course of production by the third parties vendors, process inspection and final inspection was undertaken by the taxpayer and after approval, the goods were dispatched from the vendor's factory to the taxpayer. The goods were then examined at the EOU and goes for in-house fabrication by the taxpayer. Subsequently, the goods were exported from India and erected at the site, tested and then commissioned.

Although, the High Court observed that it is apparent that the taxpayer did not self-manufacture most of the articles which were exported and used for setting up the plant, in Section 10B of the Act, the word 'production' has been used in addition to the word 'manufacture', and also an expanded scope and ambit is envisaged for the said term in the context in Explanation 4

of Section 10B. The tax department had also accepted that in case the plants installed outside India have been completely assembled in the Unit and exported as such, the taxpayer would qualify as manufacturer or a person engaged in production of articles or things. However, the benefit under Section 10B of the Act, as asserted by the tax department, is now denied for what was exported were separated or disassembled parts of the plant. The said fabrication and assembly had to be undertaken in view of size and logistics at the location where the plants had to be upgraded or set up. The reasoning of the tax department is not acceptable since it deflates the object and purpose of Section 10B of the Act. Export of goods and things can take various forms and Section 10B accepts and admits such interpretation.

Accordingly, the aforesaid activities qualify as manufacture or production of goods by the taxpayer himself and therefore, the taxpayer is entitled to benefit under Section 10B of the Act.

CIT vs. AAR ESS EXIM PVT. LTD. (ITA No. 551/2013 and 553/2013, dated 5 February 2015) – Taxsutra.com

Delhi High Court upheld the Revenue's stand of characterising AMP expense as an international transaction subject to transfer pricing. However, overrules principles laid down in the AMP Special bench ruling by holding aggregation approach appropriate for remunerating AMP functions

In 2013, in the case of LG Electronics India Private Limited vs. [2015] 167 TTJ 417 (Del) the Special Bench of the Delhi Tribunal (SB) delivered a ruling on the vexed issue of marketing intangibles. Subsequently, there were various conflicting decisions which led to a need for greater clarity and guidance on the issue that incessantly impacted the industry at large. In this regard, recently, the Delhi High Court (HC) in the case of Sony Ericsson Mobile Communication India Pvt. Ltd and several other connected matters (taxpayer) upheld that advertisement, marketing and sales promotion (AMP) expense constitute an international transaction subject to transfer pricing. While the High Court upheld the Revenue's jurisdiction to such transactions, it overturned various other aspects of the Special Bench ruling holding the application of such ratios are erroneous and unacceptable. Among its several findings in the case, the High Court held that distribution and marketing are intertwined functions and can be analysed together as a bundled transaction and that segregation of non-routine AMP expenditure using the bright line approach is not appropriate. The High Court also held that separate remuneration for the AMP activities may not be required if such compensation is already provided by way of lower purchase price or reduced payment of royalty.

The comparative findings of the Special Bench and the High Court have been summarised as below:

Issue	SB ruling	HC ruling
Whether AMP spend construes an international transaction?	AMP expense is an international transaction.	AMP expense is an international transaction as marketing and distribution function performed

Issue	SB ruling	HC ruling
		towards AE.
Whether bright line test is a tool/ method to bifurcate expense into routine versus non-routine?	Bright line expense is a tool to bifurcate AMP expenses into routine and non-routine.	Application of bright line test and concept of segregation of non-routine AMP expense lacks statutory backing.
Whether AMP expense is a brand building service?	Incurrence of non-routine AMP expense constitutes provision of brand building service to the AE.	Brand building as equivalent or substantial attribute of AMP would be largely incorrect.
Whether aggregation of transactions permissible?	Purchase of goods and AMP expense are separate transactions and cannot be aggregated.	AMP function can be looked as closely linked to and a part of overall marketing and distribution activity, hence can be aggregated.
Whether set off is permissible?	AMP function is to be separately compensated even if higher profitability is present in the distribution function.	Closely linked transactions set off should be permitted.
Whether economic ownership on intangibles is a reality and relevant for transfer pricing purpose?	Concept of economic ownership rejected.	Concept has given due cognizance.
Whether selling and distribution expense constitute AMP expense?	Selling and distribution expense not a part of AMP expenses.	Selling and distribution expense not a part of AMP expenses.

Sony Ericsson Mobile Communication India Pvt. Ltd vs. CIT (ITA No. 16/2014) – Taxsutra.com

Tribunal Decisions

Taxability of royalty paid for CDMA technology enabled in the handsets and equipments sold to Indian companies

The taxpayer, a company incorporated in the USA, is engaged in the business of design, development, manufacture and marketing of digital wireless communication products and services, based on Code Division Multiple Access (CDMA) technology. The taxpayer had four principal business units i.e. Qualcomm CDMA Technologies (QCT), Qualcomm Technologies Licensing (QTL), Qualcomm Wireless & Internet (QWI) and Qualcomm Strategies Initiatives (QST). In the business model adopted by the taxpayer, the licensees typically pay a non-refundable license fee in one or more instalments and ongoing royalty based on the sale of products incorporating or using the licensed property. The AO held that the royalty paid by the non-resident Original Equipment Manufacturers (OEMs) to the taxpayer was taxable in India.

The Delhi Tribunal held that when the royalty is for the use of technology in

manufacturing, it is to be taxed at the situs of manufacturing the product. Further when the royalty is for use of technology in functioning of the product so manufactured, it is to be taxed at the situs of use.

The Tribunal held that while FTS is a consideration for the work done, royalty is a consideration for use of an asset: tangible or intangible. The connotations of the expression 'intellectual property' (IP) cover much more ground than 'software' simplicitor and essentially includes use of any patent or patented technology which is embedded in a CDMA handset. Technology for mobile communication viz 'operating systems using CDMA technology' was invented by the taxpayer and the taxpayer owns vital patents in respect of the same. Accordingly, the royalty is for use of such patented technology while the point of its collection, as a measure of convenience and in consonance with the industry practice, is from the manufacturer when the patented product is put into use, by sale. It was necessary to examine whether the use of patent, for which the impugned payments have been made by the OEMs to the taxpayer, was on the manufacturing process of the handsets or in the use of the patented technology embedded in the CDMA handsets. As this aspect of the matter, is a highly technical aspect which may also need expert advice, the Tribunal remitted the matter to the AO for recording necessary factual findings after obtaining technical reports on the same.

Qualcomm Incorporated vs. ADIT [I.T.A. Nos.: 3701 and 3702/Del/2009, 5343/Del/2010 and 4608/Del/11, AY: 2005-06, 2006-07, 2007-08 and 2008-09] – Taxsutra.com

Amount received by a third party for merely providing seismic survey vessels are in consideration for prospecting, extractions or production of, mineral oils and therefore taxable under Section 44BB of the Act

CGG Services (CGG or the Charterer) is a non-resident company incorporated in France which was hired for carrying out geophysical prospection. CGG entered into three contracts with ONGC for providing personnel and equipment, plan and execute acquisition of 3D seismic data and basic 3D seismic data processing. For providing the services to ONGC, CGG further entered into a Charter Agreement with another French company (the taxpayer), a tax resident of France. As per the Agreement, the taxpayer provided two seismic survey vessels to CGG for carrying out the seismic operations on the offshore of India. The equipment and crew on the vessels were to be provided by taxpayer as per the specifications in the contract. The taxpayer offered the revenues from such leasing of vessels to be taxed under Section 44BB of the Act. The AO held that the equipment (vessel) rental received by the taxpayer are in the nature of royalty and are taxable under Section 9(1)(vi) of the Act. For this purpose, the taxable profit of the taxpayer has been estimated at 25 per cent of gross revenue.

The Delhi Tribunal held that the generation of income (operational income) attracts Section 44BB of the Act, and not the ownership of a ship. Only condition that is manifest in the Section 44BB of the Act is that plant and machinery should have been used, or to be used, in the prospecting for, extraction or production of mineral oils which includes petroleum and natural gas.

The agreement was for providing the vessel to CGG (hirer) for the specific purpose of carrying out geophysical prospection, and not for any other purposes like carriage of passengers, goods or livestock etc. Accordingly, these agreements cannot be classified as a time charter simplicitor. Section 44BB of the Act does not distinguish between a main contractor and a sub-contractor. Where the provision does not create any discrimination between the persons who actually does the activity of prospecting for or extraction or production, and the person who supplies the plants and machinery, the narrow interpretation of the provision (i.e. restricting the benefit of Section 44BB only to the main contractor) is thus not permitted. Accordingly, the revenues received under the Charter Agreements by the taxpayer from CGG for providing two seismic survey vessels are in consideration for the prospecting, extractions or production of, mineral oils and therefore taxable under Section 44BB of the Act. The nature of receipts on account of provision of supply of vessels on hire basis cannot have character of FTS under the Act.

Louis Dreyfus Armateures SAS vs. ADIT [2015] 54 taxmann.com 366 (Del)

Payment received on account of discounting 'future interest receivables' is taxable in year of receipt and it cannot be deferred in later year till the date of actual collection of interest

During the year under consideration, the taxpayer, a micro finance institution, sells its loan portfolios including the future interest receivable to commercial banks for obtaining capital refinancing funds and derived a gain. The taxpayer offered such gain on proportionate basis out of future receivable interest and amortised the balance amount to later years. The AO held that the entire gains received on sale of portfolio loans are taxable as income during the year.

The Hyderabad Tribunal held that the taxpayer has received the discounted amount as a part of sale consideration and therefore, the gain on the transaction has accrued during the year. Even though, there are certain deposits kept with the banks for the purpose, out of the total portfolio including the future interest, the taxpayer did receive certain amount which is in a way discounted interest on the future receivables. Had the taxpayer been accounting the interest receivables as and when accrued, without sale of the portfolio, it has to be admitted that future interest cannot be taken as income. However, when taxpayer bundles it and sells it as a portfolio for a discount, the amount did accrue and received on the date of entering agreement. Since the transaction happened on 19 March 2009, the entire amount is to be accounted as income on that transaction as a gain in such year.

The principles of bill discounting and accounting entries are similar to the portfolio sale/securitisation of loan portfolios, being the method involved being same, and therefore, the Tribunal upheld the orders of AO and Commissioner of Income-tax (Appeals) [CIT(A)]. Accordingly, the Tribunal held that the amount of discounted future interest received by the taxpayer during the year is taxable in such year.

Asmitha Microfin Ltd. vs. ACIT (ITA No. 137/Hyd/2013) – Taxsutra.com

In the absence of exempt income earned by the taxpayer, the provisions of Section 14A cannot be invoked

During the relevant year, the taxpayer has not made any claim of exempt income in its return of income and therefore contended that no disallowance under Section 14A of the Act can be made. However, the AO made the disallowance under Section 14A read with Rule 8D of the Income-tax Rules, 1962 (the Rules).

The Bangalore Tribunal held that the coordinate bench in the case of Bhuwalka Steel Industries Ltd. (ITA No.349/ Bang/2013) had relied upon the decisions of the various High Courts in coming to the conclusion that in the absence of exempt income earned by the taxpayer, the provisions of Section 14A cannot be invoked. In the case of Bhuwalka Steel Industries Ltd., the taxpayer did not earn any exempt income during the relevant year.

The Bangalore Tribunal relied on various decisions {CIT vs. Winsom Textile Industries Ltd. [2009] 319 ITR 204 (P&H), CIT vs. Corrtech Energy Pvt. Ltd. [2014] 223 Taxman 130 (Guj), JCIT vs. Shivam Motors (P) Ltd. (ITA.17/Lkw/2012, dated 12.11.2013) (Lkw), CIT vs. Shivam Motors (P) Ltd.,[ITA No. 88 of 2014, dated 5 May 2014 (All)] and held that the provisions of Section 14A could not be invoked in the present case. The CBDT Circular No.5 of 2014, dated 1 February 2014 which is contrary to these High Court decisions cannot therefore be the basis to sustain the disallowance made by the tax department. Accordingly, the disallowance made under section 14A of the Act was deleted.

Anriya Project Management Services (P) Ltd. vs. DCIT (ITA No. 1799/Bang/2013) (AY: 2009-10)

Notification & Circulars

Indian Advance Pricing Agreements - Rollback Rules notified and Pre-Filing Consultation made optional

The Finance (No.2) Act, 2014 introduced the rollback provisions under the Advance Pricing Agreement (APA) programme. The rules have now been notified on 14 March 2015 setting out the applicability and the requirement for applying rollback. Further, pre-filing consultation which was mandatory has been made optional. Therefore, going forward an applicant can directly file the main APA application in the Form No. 3CED without filing for pre-filing consultation.

The salient features of the rollback rules are as below:

- The international transaction proposed to be covered under the rollback is to be the same as covered under the main APA.
- The rollback provisions shall be applied for all the rollback years in which the relevant international transaction has been undertaken.
- The manner in which Arm's Length Price has been determined in relation to an international transaction shall be consistent for all the years covered under the APA including the rollback years.
- To be eligible for the applicability of the rollback provisions, the applicant should have filed Return of Income and Form No. 3CEB (Accountants Report) on or before the statutory due date.

- The rollback provision will not be applicable for a particular year where the Income Tax Appellate Tribunal has passed an order disposing off the appeal prior to the date of signing of the APA.
- In case the application of the rollback provisions would result in reduction of the income offered to tax or increasing the loss as declared in the Return of Income for a particular year, the rollback provision will not be applicable for that year.
- The application for rollback was to be filed on or before 31 March 2015 in the case of applications filed before 1 January 2015 as well as in few cases where APA has been entered into before 1 January 2015. However, the deadline for filing application for rollback has been extended to 30 June 2015.
- Going forward the application for rollback has to be made (Form No. 3CEDA) along with the main APA application (Form No. 3CED).
- An additional fee of INR5 lakh is to be paid along with the rollback application.
- Important procedural aspects for giving effect to the rollback provisions have also been notified.

Notification on APA rollback rules issued by CBDT vide Notification No. 23/2015 [F.No.142 /14/2014-TPL] dated 14 March 2015

II. SERVICE TAX

High Court Decisions

Customs, Excise and Service Tax Appellate Tribunal ("CESTAT") has right to entertain an appeal with respect to rebate claims on services exported outside India

The taxpayer filed rebate claims for services exported outside India under the Act, which were allowed to the taxpayer by the order of the Commissioner of Central Excise (Appeals). The Revenue Authorities ("RA") preferred an appeal before the CESTAT. The CESTAT referred to the provision of Section 86(7) of the Act read with Section 35B of the Central Excise Act, 1944 ("CEA") which provides that no appeal would lie in respect of a rebate claim before the CESTAT. On appeal, the High Court ("HC") observed that CESTAT has missed considering sub-section (2A) of section 86 of the Finance Act, 1994 ("Act") which allows the Committee of Commissioners to object to orders of the Commissioner of Central Excise (Appeals) and to direct a Central Excise Officer to appeal on its behalf to the CESTAT. The HC relied on Glyph International Ltd. [2014 (34) STR 727] and held the appeal filed by the RA to be competent and maintainable.

Commissioner of Service Tax – I vs Ambe International [Central Excise Appeal No 54 of 2014, Bombay HC]

Relevant date for computing time limit for refund to exporters of service is 'date of receipt of consideration' and not 'date of export of service'

The RA were in appeal before the HC against the order of the CESTAT wherein it was held that the relevant date for calculating the time limit for grant of refund under Rule 5 of the Cenvat Credit Rules, 2004 (CCR) for a service exporter is the 'date of receipt of consideration' and not the 'date when the services were provided'. The CESTAT relied on the decision of the Mumbai CESTAT in the case of Eaton Industries Private Limited. The HC observed that the CESTAT has not recorded any contrary decision and when such decision has neither been appealed against nor has been reversed/overruled by any superior forum, the said judgment is binding. Further, the HC observed that the RA could not produce any contrary decision on the issue and upheld the decision of CESTAT.

CCE, Hyderabad vs Hyundai Motor India Engineering (P) Ltd [Central Excise Appeal Nos.2, 5, 6 and 9 of 2015, Andhra Pradesh HC]

Tribunal Decisions

Activity of running, developing, operating and managing a hotel under a license agreement would not qualify as 'management or business consultancy' service

The taxpayer along with certain institutional entities acquired a hotel business by way of acquisition of shares. Post transfer, the hotel owner remained as the owner of the hotel assets, however the running of the hotel business was transferred to the

taxpayer, thus it was not construed to be a sale of the hotel. Pursuant to a license agreement entered into between the taxpayer and hotel owner, the taxpayer was made responsible for running, developing, conducting, operating, managing, renovating, modernizing and expanding the hotel business. As a part of its activities, the taxpayer issued invoices, collected and discharged all taxes such as VAT/ luxury tax and incurred expenses required in running the hotel. For performance of these activities, the taxpayer received the net sales amount from running the hotel. The RA contended that the taxpayer provided 'management or business consultancy' services to the hotel owner and thereby was liable to pay service tax on the same. The CESTAT observed that in terms of the agreements, the taxpayer was involved in operation of the hotel on its own accord and it could not be said that the taxpayer was providing any management consultant service to the hotel owner. The CESTAT further observed that that the taxpayer was not receiving any consideration in the form of fee or commission, but received the entire sales amount which reinforced the position that it was involved in running the hotel business. Reliance was placed on the decision of the CESTAT in the case of BSR & Co vs Commissioner of Service Tax, Gurgaon [30 STR 242 Tr Del] and Board Circular no 1/1/2002-ST which collectively provided that only those consultancy or advisory services, that improved the management of a business entity, would be covered under the category of management consultancy services.

The Indian Hotels Company Limited vs Commissioner of Service Tax, Mumbai – I [Appeal No ST/27/12, CESTAT Mumbai]

Event Management Service for organizing annual day function is related to the manufacturing business and is eligible for CENVAT Credit

The taxpayer was engaged in manufacturing motor vehicle parts, among other products. The taxpayer availed credit on the even management services to organize its annual day function. The RA disallowed CENVAT Credit on such services on the ground that such services were not essential for undertaking the activity of manufacture.

The taxpayer put forth the argument the function was organized every year for rewarding and entertaining the employees to encourage them to perform better, the annual day function was relatable to the business of manufacture of the taxpayer. The taxpayer placed reliance on the ruling of the Karnataka HC's in the case of Toyota Kirloskar Motor Ltd vs CCE, LTU, Bangalore [201 (24) STR 645 (Kar)] and of the Mumbai Bench of the CESTAT in the case of Endurance Technologies vs CCE Aurangabad [2013 (32) STR 95 (Tri Mum)] wherein it was held that organizing functions for the benefit of the employees has nexus to the business of manufacture for which credit is allowable. In view of the same, the CESTAT upheld the taxpayer's contention and accordingly allowed the credit.

Delphi Automotive System Pvt Ltd vs Commissioner of Customs, Central Excise & Service Tax, Noida [Appeal No E/3378/2012-EX(SM) & E/3389/2012-EX(SM), CESTAT New Delhi]

CENVAT Credit on outdoor catering service available to organizations having less than 250 workers

The taxpayer was engaged in provision of banking and financial services and business auxiliary services. During the Financial Year ("FY") 2006-07 to 2010-11, the taxpayer availed credit on outdoor catering services required for providing canteen facilities to its employees. The RA alleged that the taxpayer is not mandatorily required to provide canteen services to its employees and therefore denied credit. The RA further referred the decision of Bombay HC in case of Ultratech Cement Ltd, and urged that the judgment is applicable when it is a statutory requirement of the taxpayer to provide canteen facility to its employees under the Factories Act, 1948 ('Factories Act'). The CESTAT observed that while the Factories Act applies only in case of factories having more than 250 employees but that does not mean that the service is not essential for the taxpayer who are not mandatorily required to provide canteen facilities to its employees under Factories Act but still provide canteen facility to its employees. Thus, the appeal was decided in favour of the taxpayer.

Commissioner of Service Tax, Mumbai-I vs M/s Reliance Capital Asset Management Ltd [Appeal No ST/87507/2013-MUM, CESTAT Mumbai]

Proportionate refund for export of service to be computed based on the 'total CENVAT Credit taken' without adjusting the domestic tax liability

While considering the refund claim under Rule 5 of the CCR, the RA sought to deduct the domestic service tax liability from the 'total credit taken' for computing the proportionate refund relating to exports.

The CESTAT rejected the RA's claim and observed as follows:

- There is no logic in deducting the input credit on account of domestic service tax liability;
- The formula does not allow for such deduction; the formula has already factored this amount in the manner it has been formulated; and
- If the RA's contention is accepted, the word "total" in the formula would become irrelevant.

Commissioner of Service tax, Mumbai-I vs Global Markets Centre Pvt Ltd [Appeal Nos.ST/86286, 89522/2013-Mum & ST/86019, 86020, 86021, 86022/2014-Mum, ST/CO/91002/2014-Mum, Appeal No.ST/86286/2013-Mum, CESTAT Mumbai]

CENVAT Credit cannot be restricted where taxpayer does not avail exemption and pays service tax on exempted services on its own volition

The taxpayer was engaged in providing chartered accountants, among other services. The services of the taxpayer, involving representation before a statutory authority and services provided to units in Special Economic Zones ("SEZ"), were exempt from service tax under Notification 25/2006 dated July 13, 2006 and Notification 4/2004 dated March 31, 2004 respectively. In this case, as the taxpayer

provided composite chartered accountant services i.e. involving both representational as well as drafting and compliance chartered accountant services, and therefore deposited service tax on the entire quantum of chartered accountant services provided to its clients. Similarly the taxpayer did not avail the benefit of service tax exemption on services provided to the SEZ unit and discharged full service tax. The RA contented that CENVAT Credit should be restricted since the taxpayer provided both taxable and exempted services, even though the taxpayer had paid the service tax on its own volition without availing the benefit of exemption.

The CESTAT observed that there was no provision under the service tax law [unlike section 5A of the CEA, which stipulates that in case of absolute and unconditional exemption, the taxpayer cannot choose to pay service tax. The CESTAT also observed that Notification 4/2004 does not grant absolute and unconditional exemption since it requires the service recipient to maintain records. The CESTAT held that the taxpayer was not prohibited from paying service tax on exempted services. The CESTAT further held that the taxpayer did not provide both exempted and taxable services and accordingly the restriction of credit availment would not apply.

M/s Deloitte Haskins and Sells vs CCE, Thane-I [Appeal No ST/200 & 211/10, CESTAT Mumbai]

III. VAT/ CST/Entry Tax

Supreme Court Decisions

Purchase of goods in auction is liable to local sales tax in the State of auction and is not an interstate sale, even though the goods may be transferred outside the State after the sale

The taxpayer, a branch office, (registered in the State of Andhra Pradesh) purchased beedi leaves in an auction organised by the State of Andhra Pradesh and transferred the same to its head office located in Maharashtra. The taxpayer claimed exemption on the branch transfer turnover under the Andhra Pradesh General Sales Tax Act, 1957 ('AP GST Act') on the ground that it was in the nature of inter-state sale. The RA alleged that sale was a single point sale where taxpayer being the purchaser was located within the State and the taxable event therefore took place in the State of Andhra Pradesh. The matter came up for consideration before the Andhra Pradesh HC and the HC held that since the beedi leaves were primarily purchased for transport to the head office situated in the State of Maharashtra, the sale qualified as inter-state sale.

The SC reversed the decision of the HC and observed as follows:

- The sale of goods is between the State department and the branch office and there is no link between the State department and the head office;
- The incidence of sale is complete within the State of Andhra Pradesh once the branch office had rendered the payment for the beedi leaves;
- Only subsequent to payment and delivery of the goods, the taxpayer transports them to its head office outside the State of Andhra Pradesh;

- The final destination of consignment and route/ destination of beedi leaves is inconsequential to the sale transaction;
- Thus, the sale of beedi leaves and the movement of the same from State of Andhra Pradesh to Maharashtra were not inextricably linked to each other

Thus the SC held that the transaction was not in nature of inter-state sale and was liable to tax under the AP GST Act.

Commissioner of Commercial Taxes, Hyderabad vs M/s Desai Beedi Company [Civil Appeal No 5005 of 2007, SC)

High Court Decisions

Medicines, drugs, stents, valves, implants and other consumables provided to a patient during a medical procedure/ treatment shall not be liable to VAT

The taxpayers were engaged in providing medical services wherein medicines, drugs, stents etc ("medicines") were administered to patients during medical treatment. The RA alleged that supply of medicines in the course of medical treatment partakes the character of a 'sale' and would be liable to VAT under the provisions of the Punjab Value Added Tax Act, 2005.

The HC relied on the decisions of the HC in the cases of Tata Main Hospital and International Hospital Private Limited respectively and observed that:

- A transaction or a part thereof, which is essentially a service, would not qualify as a sale within the meaning of Sales of Goods Act, 1930, to attract value added tax ('VAT');
- The fiction of deemed sale applies only to such situations that are provided within sub-clauses of Article 366(29-A) of the Constitution of India, which permit severance of the service element from the sale element and empowers the State to tax the element of sale;
- Article 366 (29-A) of the Constitution of India does not cover medical services provided by hospitals;
- The dominant purpose of a hospital is to provide medical treatment which necessarily involves supply of medicines, drug, stunts, implants etc without which medical services cannot be completed

In view of the observations made above, it was held that the supply of drugs, medicines, implant, etc were integral to medical services/ procedures and cannot be severed to infer a 'sale' liable to VAT.

Fortis Health Care Limited and Anr vs State of Punjab and Ors [Civil Writ Petition Nos 1922-1924 of 2012, Punjab & Haryana HC)

Transfer of right to use goods arises on the payment of periodic lease rentals

The taxpayer was engaged in the business of leasing of vehicles. Transactions of transfer of right to use goods were taxed at the rate of 4 percent under the erstwhile Delhi Sales Tax on Right to Use Goods Act, 2002. Thereafter the Delhi VAT, 2004 ("DVAT Act") repealed the erstwhile act with effect from April 01, 2005 ("Effective Date"). Under the DVAT Act, the VAT rate on transfer of right to use vehicles was

prescribed as 12.50 percent, whereas under the erstwhile act, the same was 4 percent. The transitionary provisions under the DVAT Act prescribed that the tax imposed applies to all transfer of right to use transactions 'to the extent the right to use goods' is exercised after March 31, 2005. With respect to agreements for transfer of right to use executed prior to the Effective Date, for which rental payment was received after the Effective Date, the taxpayer contended that the taxable event of transfer of right to use goods had already taken place before the Effective Date and therefore the higher rate of tax under the DVAT Act would not apply.

The HC observed as follows:

- It is clear that tax is payable under the DVAT Act on transactions of transfer of right to use to the extent the right to use the goods is exercised after the Effective Date. The expression "to the extent that the right to use goods is exercised" would necessarily refer to and can only refer to instalments or lease rentals paid on or after the Effective date. The hirer exercises his right to use goods by making payment of the periodic lease rentals.
- 'Turnover' under the DVAT Act is defined to mean the aggregate of the sale price. In cases of transfer of right to use goods, the lease rental due and payable during the relevant tax period constitutes 'sale price' and consequently lease rentals received formed part of 'turnover' under the DVAT Act.

Thus the HC observed that the RA was correct in levying tax on the lease rentals at the rate of 12.50 percent.

Orix Auto Infrastructure Services Ltd vs Commissioner, DVAT, Delhi & Ors [Sales Tax Appeal No 47/ 2014, 49/2014 and 50/ 2014, Delhi HC]

Honeycomb partition frames are parts of railway coach and are not to be classified under the residual entry

The taxpayer was a registered dealer under the Karnataka VAT Act, 2003 ("KVAT Act") and was engaged in the manufacture of honeycomb partition frames for railway coaches, which were designed as per the requirements, drawings and specifications provided by the Indian Railways. The honeycomb partitions were sold exclusively to the Indian Railways for use as a partition in the rail coach, and not placed in the open market for sale to customers for different uses. The taxpayer paid VAT at the rate of 5 percent on such partitions, under the specific entry provided for rail coaches, engines, wagons and parts thereof. The RA alleged that the honeycomb partition frames were generically available in the market, and merely because the same were used in rail coaches, it cannot be said to be a part of a rail coach and thus the partitions were to be taxed under the residual entry with the higher tax rate as they were unscheduled under the KVAT Act.

The HC observed that as the partitions were manufactured in accordance with the specifications of the Indian Railways, once they were used as a partition of a railway coach it became a part of the same. Further it was observed that in common parlance, it was impossible to think of a rail coach without the partition.

The HC also drew an analogy of partitions to batteries that were sold to the railways which were taxed under the specific entry of 'part thereof', considering batteries were an integral part of rail coaches, engines and wagons. Thus the HC held that honeycomb partitions fell within the specific entry and was liable to tax at 5 percent.

The State of Karnataka vs Honey Comb International Inc [STRP No 39 of 2014 & 73 to 79 of 2014, Karnataka HC]

Request to re-open assessment cannot be denied when 'Form C' and 'Form F' were produced subsequently

The taxpayer produced Form F and Form C on the day of passing of the final assessment order and requested to reopen the assessment. The RA refused to re-open the assessment and proceeded to pass the final assessment order. The HC observed that the RA has powers to extend the time for filing the forms and also that the RA cannot deny the request of the taxpayer to reopen the assessment when such forms were produced subsequently. The HC observed that the only aspect that the RA has to consider is as to whether there was sufficient cause for re-opening the assessment. The HC quashed the Assessment Order with a direction to RA to consider the forms submitted subsequently and pass a fresh order on merits.

Tata Global Beverages Limited vs CTO [Writ Petition No 2524 of 2015, Madras HC]

Taxpayer not required to furnish indemnity bond in cases where the original Form 'C' is lost by the RA

The taxpayer submitted original Form C's to the Commercial Tax Officer and paid necessary taxes, the officer acknowledged receipt of such forms upon submission by the taxpayer. Thereafter a notice, followed by an order, was issued by the RA to the taxpayer stating that original Form C's were not filed by the Taxpayer. The RA refused to accept duplicate copies of the Form C's, and insisted that the taxpayer produces an indemnity bond with respect to the misplaced original Form 'C', even though the original forms were misplaced by the RA.

The HC held that the requirement to furnish an indemnity bond by the taxpayer would arise only if the taxpayer itself was responsible for misplacing the original declaration forms. As the taxpayer had furnished the original forms, which were acknowledged by the concerned officer, the HC set aside the order passed by the RA and held that there is no need to furnish an indemnity bond. The taxpayer was permitted to file the duplicate copies of Form 'C' in such a case.

M/s Sree Kumar Engineering Works vs The Assistant Commissioner (CT) [WP nos 3110 to 3112 of 2015 and MP no 1 of 2015 in each WP, Madras HC]

IV. CENTRAL EXCISE

High Court Decisions

Interest under Rule 7(4) of the Central Excise Rules, 2002 ("CER") arises only where additional duty is

payable consequent to final assessment order

The taxpayer was engaged in manufacturing of tyres, tubes and flaps for supply to the replacement market, as well as to original equipment manufacturers. With respect to the replacement market, goods were cleared to depots/ distribution centres/ agents. As the price at which goods are sold in the replacement market was not known at the time of clearance (due to certain statutory deductions), the taxpayer cleared goods on a provisional assessment basis under Rule 7 of the CER. Thereafter the taxpayer submitted the requisite documents before the department for finalization of assessment, and also deposited differential duty before finalization of assessment. Subsequently when the final order was passed by the department, no additional duty was determined to be payable by the taxpayer.

The RA demanded interest under Rule 7(4) of the CER on the amount of differential duty paid by the taxpayer, on the ground that the liability to pay interest would arise if any amount due and recoverable is paid belatedly.

The HC analyzed the provisions of Rule 7(4) of the CER and judicial precedents available on this issue, and observed that the interest liability would arise only if duty is finally determined while passing the final assessment order and the assessee does not pay the duty as per that order. The HC held that the interest demanded by the RA was unwarranted since the final assessment did not result in any additional duty liability. The HC also observed that if it was the intention of legislature to levy interest in cases where duty was been paid prior to finalization of assessment, it would have been specifically provided so in the Rule.

CEAT Limited vs CCE, Nashik [Central Excise Appeal No 115 of 2014, 120 of 2014 & 121 of 2014, Bombay HC]

Area based exemption from excise duty cannot be extended to National Calamity Contingent Duty ("NCCD"), unless specifically provided

The taxpayer availed the benefit of the area based excise duty exemption under Notification No 50/ 2003 dated June 10, 2003 ('Notification 50/2003'), that was issued pursuant to the Industrial Policy for the State of Uttaranchal and Himachal Pradesh. Under the said Industrial Policy, the taxpayer was granted 100 percent outright exemption from payment of excise duty for a period of 10 years, on scheduled goods cleared from a new industrial undertaking set up in a specified location.

The RA issued a show cause notice to the taxpayer seeking to deny the exemption to NCCD, on the ground that although NCCD is a duty of excise, the same was not specified for exemption in Notification 50/2003.

The HC observed that the notification was required to be read in a plain and simple manner and that exemption from NCCD cannot be granted simply by applying the principle of liberal interpretation. The HC further observed that Notification 50/2003 has to be interpreted in the light of words employed by it, and not on any other basis. Thus, the HC held that exemption to excise duty under Notification 50/2003 cannot be extended to any duty of excise that was not specifically mentioned in the Notification.

Bajaj Auto Limited vs Union of India [Writ Petition No 2222 of 2011, Uttarakhand HC]

Time limit for taking CENVAT Credit is procedural and credit should not be denied in case of bona fide delay

The taxpayer did not have adequate space within its factory premises for storing inputs. In this regard the taxpayer was permitted to bring goods in smaller lots and avail the entire credit attributable to such inputs on receipt of the last and final lot of the inputs in the factory premises. As the last and final lot was received in the factory premises after expiry of six months from the date of invoice (time limit prescribed under erstwhile Excise Rules), the credit was sought to be denied by the RA.

The HC referred to Trade Notice no 67 issued in June 1996 which clarified that in case of shortage of space for storing inputs, credit shall be taken only when the entire quantity of inputs is received inside the factory premises for use in production. The HC held that the Rules prescribing time limit were only procedural in nature and that the taxpayers were entitled to the credit in the absence of deliberate delay and bona fide action based on specific direction of the RA.

M/s Century Laminating Com vs CCE, Meerut [Central Excise Reference No 19 of 2001, Allahabad HC]

Tribunal Decisions

Reversal of CENVAT credit irregularly availed, but reversed before utilization, amounts to credit not availed at all

The taxpayer mistakenly availed CENVAT credit of certain inputs while availing the benefit of excise duty exemption under a notification, which stipulated a condition that no CENVAT credit should have been taken. However, the taxpayer reversed such credit before utilizing the same, once the irregular availment was pointed out by the department. The RA sought to deny the benefit of the excise duty exemption to the taxpayer since the condition in the exemption Notification was violated. The CESTAT relied on the decision in the case of Hello Minerals Water (P) Ltd [2004 (174) ELT 422 (All)] and Chandrapur Magnet Wires (P) Ltd [1996 (81) ELT 3 (SC]) and held that reversal of CENVAT credit initially availed but reversed without being utilised should be treated at par with CENVAT Credit not availed at all. Thus the taxpayer was held to be eligible for the benefit of the excise duty exemption.

M/s JCT Limited vs CCE, Jallandhar & Ludhiana and Vice Versa [Excise Appeal Nos 330-331 of 2009 and 555-556 with 1048-1049 of 2009, CESTAT New Delhi]

Notification & Circulars

Instruction regarding adjudication of Central Excise and Service Tax Cases booked by Directorate General of Central Excise Intelligence ("DGCEI")

This circular seeks to simplify and streamline the process of adjudication of central excise and service tax cases booked by the DGCEI by amending Circular No 994/01/2015 dated February 10, 2015. Accordingly, new guidelines have been announced for assigning cases

for adjudication amongst the Additional Director General (Adjudication) and the field Commissioners.

Circular No 1000/7/2015-CX dated March 3, 2015

Central Board of Excise and Customs ("CBEC") revises audit norms to be followed by Audit Commissionerates ("ACs")

The CBEC, vide its Circular dated February 27, 2015, has revised the norms to be followed by the ACs while conducting audits. Previously, the selection of units for an audit and the frequency of conducting the audit were solely based on the quantum of tax paid by the taxpayer. Under the revised norms, several other audit criteria have been introduced. Some of the key highlights of the new guidelines, are as follows:

- AC to release an annual plan by May 31 every year proposing the names of the taxpayers to be audited in the course of the year, and the month in which the visits to units by the audit officers would be scheduled;
- Indicative duration of the conduct of audit and the approximate number of audits to be carried out during the year has also been laid down to ensure increased audit coverage;
- New norms introduce risk based selection of taxpayers for audit and set a jurisdiction based criteria, as opposed to uniform norms prevalent across the country. The taxpayers would be bifurcated into large, medium and small categories;
- Categorization of taxpayers would be done on the basis annual value of clearances / services rendered and amount of duty/ service tax paid. The threshold limits for this categorization would be fixed based on internal factors. Further, the thresholds may vary among various ACs.
- Revised norms also prescribe that the ACs may select a few units randomly or based on the risk perception in each category of small, medium and large units
- The zonal units of the Directorate General of Audit would co –ordinate the audit of multi-locational units
- A taxpayer may be given 'accredited' status basis its proven track record of compliance. Such taxpayers would be audited at the frequency of not less than 3 years

The above guideline would be effective from July 1, 2015.

CBEC Circular No 995/2/2015-CX dated February 27, 2015

Timely disposal of registration applications

A circular has been issued by the Advisor, CBEC, giving instructions to the Chief Commissioners of Excise & Service Tax for taking necessary steps to ensure disposal of registration applications. The instructions have been given in order to ensure that the new applications filed after the presentation of the budget are disposed-off within the prescribed time limit of two days. Further the circular gives instructions for disposal of past applications latest by March 15, 2015.

CBEC DO Letter by Advisor, CBEC

Bhogat Port notified as an eligible coastal port for trading in crude petroleum

Vide this Notification, CBEC has amended Notification No 64/94 – Customs (NT) dated November 21, 1994 to include Bhogat port in Gujarat as an eligible coastal port under Section 7(1)(d) of the Customs Act, 1962 ('Customs Act') for the purpose of carrying on trade in crude petroleum.

CBEC Notification No. 24/2015-Customs (NT) dated February 16, 2015

Expansion in the list of ports notified for export and import purposes under Export Promotion Schemes

Vide this Notification, the list of ports notified for export and import under various Export Promotion Schemes, have been amended to include Vishakapatnam, Calicut and Melapakkam Village (Arakkonam Taluk, Vellore District)

Notification No 5/2015-Customs dated February 20, 2015

Instructions on withdrawal of prosecution filed in a court

In light of the ruling of the SC in the case of Radheshyam Kejriwal vs State of West Bengal [2011 (266) ELT 294 (SC)], the CBEC has clarified in a circular that in cases of exoneration of assessee on identical allegations in criminal proceeding as in quasi-judicial proceedings, on the finalization of the order, the Chief Commissioner shall issue direction to Central Excise Officer to file application (through public prosecutor) to request the Court for withdrawal of prosecution in accordance with law. This principle shall also apply to the prosecution filed under the Act and Customs Act.

Notification No 6/2015-Customs (ADD) dated March 3, 2015

Mandatory documents required for export and import from / into India

Vide this Notification, Directorate General of Foreign Trade ("DGFT") has prescribed the following documents to be mandatory for the purposes of export and import from/into India:

- Bill of lading / airway bill
- Commercial invoice cum packing list / separate commercial invoice and packing list
- Shipping bill / bill of export in case of export from India and bill of entry in case of imports into India

The concerned regulatory authority may notify additional documents for import or export of goods which are subject to policy conditions. Additional information may be also sought by the authorities in other cases of import/ export. The Notification would be effective from April 1, 2015.

DGFT Notification No 114 (RE-2013)/2009-2014 dated March 12, 2015

Amendment to Rajasthan VAT (Third Amendment) Rules, 2006

Vide this Notification, certain amendments have been to the Rajasthan

VAT Rules, 2006. The key amendments are mentioned below:

- Amount on which tax is paid by a sub-contractor is allowed as a deduction while calculating taxable turnover pertaining to works contract;
- Time period for furnishing revised returns in case of any errors/ omissions reduced from 9 months from end of relevant year, to within 15 days from last date of submission of annual return;
- Appeals and application for condonation of delay under the Rajasthan Value Added Tax Act, 2003 ("RVAT Act") to be filed online;
- New rules have been introduced to facilitate e-governance and a host of changes have made to the format of the periodical VAT return and the annual return

Notification S O 257 No F 12 (23) FD/TAX/2015-193-Dated March 9, 2015

Schedule V appended to the RVAT Act, amended

Vide this Notification VAT rate for all the products listed under Schedule V appended to the Rajasthan Value Added Tax Act, 2003 has been increased from 14 percent to 14.5 percent with effect from March 9, 2015

Notification S O 263 No F 12 (23) FD/TAX/2015-199 dated March 9, 2015

Single Application facility extended for registration under the Maharashtra VAT Act, 2002 ("MVAT Act"), Central Sales Tax Act ("CST Act") and Maharashtra State Tax on Professions, Trades, Callings and Employments Acts, 1975 ("PT Act")

Vide this circular, the Commissioner of Sales Tax has prescribed an online procedure for a single application for obtaining registration under the MVAT Act, CST Act and the PT Act, which were earlier required to be made separately under the relevant Acts. The procedure prescribed also involves a facility for online uploading of documents necessary for the purpose of registration. As per the circular, the new procedure has been put in place with effect from March 9, 2015. Certain revised procedures in this regard have also been provided as an annexure to this circular

Trade Circular No 4T of 2015 Mumbai dated March 9, 2015

Codification of existing commodity codes under Tamil Nadu VAT Act

The existing commodity codes have been re-codified with comprehensive nine digit sequence codes for better clarity and accounting. The new codes would be effective from April 1, 2015 and would need to be adopted by all the dealers while filing the return from April 2015 onwards

Proceedings No.Acts Cell-5/20414/2014 dated March 12, 2015

Tamil Nadu state budget proposes to withdraw provisions related to input tax credit ('ITC') reversal

As per the Tamil Nadu state budget proposals, the provisions relating to reversal of ITC of 3 percent for interstate

sale against Form C, and reversal of ITC for interstate sales without Form C, are proposed to be withdrawn. The proposal is intended to make manufacturing industries in Tamil Nadu more competitive with counterparts in the neighboring States.

Speech of Thiru O.Panneerselvam, Hon'ble Chief Minister, Government of Tamil Nadu, presenting the Budget for the year 2015-2016 to the Legislative Assembly [at page 71 point (b)]