August 2015

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

Foreword

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

An Interactive session on Goods and Services Tax was organised by FICCI on July 17, 2015. The event provided an update on the current status of the GST framework and the challenges likely to be faced by the businesses in the country under the current proposed GST regime. The event also offered an opportunity to the stakeholders to discuss the suggestions for drafting the Central and the State GST Laws with Mr. VS Krishnan, Member, GST, Central Board of Excise and Customs.

A FICCI delegation led by Mr. Rajeev Dimri met Member (Legislation & Judicial), Central Board of Excise and Customs on July 28, 2015, to discuss the various problems related to the dispute resolution mechanism on tax matters in India and suggested measures to be taken by the Government to resolve the same. Also, a FICCI delegation led by Mr Harsh Mariwala, Chairman of the FICCI's Task Force on GST had met Dr. Arvind Subramanian, Chairman of the Committee constituted by the Ministry of Finance, to recommend possible tax rates under GST. FICCI has requested for a moderate Revenue Neutral Rate.

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

Consideration for providing various services in connection with prospecting, extraction or production of mineral oil are taxable on a presumptive basis under Section 44BB of the Act

The taxpayer and a foreign company had entered into an agreement by which the foreign company had agreed to make available supervisory staff and personnel having experience and expertise in reference to the operations and management of drilling rigs. The taxpayer had executed separate agreements for services to be rendered by such company in connection with prospecting, extraction or production of mineral oils. During the year under consideration, the taxpayer made payments to the foreign company for providing various services in connection with prospecting, extraction or production of mineral oil.

The Assessing Officer (AO) held that the said payment should be taxable as Fees for Technical Services (FTS) under Section 44D of the Act and not on a presumptive basis under Section 44BB of the Act. The Commissioner of Income-tax (Appeals) [CIT(A)] and the Income-tax Appellate Tribunal (the Tribunal) disagreed with the views of the AO and held the decision in favour of the taxpayer. However, the Uttarakhand High Court disagreed with the view taken by the CIT(A) and the Tribunal and held that the payments made by the taxpayer to foreign company were taxable as FTS under Section 44D of the Act.

The Supreme Court observed that the CBDT issued an Instruction No. 1862, dated 22 October 1990 to the effect that mining operations and the expressions 'mining projects' or 'like projects' occurring in Explanation 2 to Section 9(1) of the Act would cover rendering of services like imparting of training and carrying out drilling operations for exploration of and extraction of oil and natural gas. Therefore, payments made to a foreign company would be chargeable to tax under Section 44BB and not under Section 44D of the Act.

The works or services mentioned under the agreements is directly associated or inextricably connected with prospecting, extraction or production of mineral oil. The above facts would indicate that the pith and substance of each of the contracts/ agreements are inextricably connected with prospecting, extraction or production of mineral oil. The dominant purpose of the agreements was for prospecting, extraction or production of mineral oil though there may have been certain ancillary works being contemplated there under. Accordingly, it was held that the payments made by the taxpayer and received by the foreign company were assessable under Section 44BB and not under Section 44D of the Act.

Oil & Natural Gas Corporation Limited v. CIT (Civil Appeal No. 731 of 2007) (SC) – Taxsutra.com

Tribunal Decision

Restoration services relating to transmission of data and

telecommunication traffic are not taxable as FTS. Income reasonably attributable to business operations carried out in India in relation to such services shall be taxable as business income

The taxpayer is a company incorporated in Bermuda. The taxpayer had built a submarine fiber optic telecommunication cable to link telecom traffic amongst Western Europe, Middle East, South Asia, South East Asia and the Far East. The capacity in the said cable system had been sold to various landing parties, which are mostly national telecommunication companies belonging to different nations. In India, Videsh Sanchar Nigam Limited (VSNL) was one of the original landing parties in the FLAG cable system. For the purpose of selling the capacity in the cable system to various landing parties, including VSNL, a Capacity Sales Agreement (CSA) was entered into amongst Landing Parties.

During the year under consideration, the taxpayer had received the payment from VSNL on account of the provision of standby maintenance activities, as provided in the earlier years. Further during the year under consideration the taxpayer had entered into an arrangement with certain telecom cable operators to provide restoration of traffic to their customers in the event of a disruption in the traffic on their cable system. Under these arrangements, if there is a disruption in the traffic on a particular segment of the cable operator, the taxpayer provides the alternative telecommunication link route through its own capacity in the cable.

The AO held that receipts from standby maintenance services and restoration services were technical in nature and therefore such services were taxable as FTS under Section 9(1)(vii) of the Act.

The CIT(A) held that payment for restoration activities was to be assessed as business income and was taxable in India under Section 9(1)(i) of the Act. The CIT(A) estimated the Indian income from restoration activity at 10 per cent of the global receipts.

Taxability of standby maintenance services/charges

The Tribunal held that standby charges is a fixed annual charge, which is payable not for providing or rendering services albeit for arranging standby maintenance arrangement, which is required for a situation whenever some repair work on the under-sea cable or terrestrial cable is actually required to be performed or rendered. It is a facility or infrastructure maintained for ready to use for rendering technical services or for repairing services, if required. There is no actual rendering of the services qua the standby maintenance charges. Accordingly, following the earlier years' precedence, it was held that the receipt on account of standby maintenance charges was not chargeable as FTS within the scope of Section 9(1)(vii) of the Act.

Taxability of restoration services

In the present case restoration activity does not fall within the nature of 'managerial' or 'consultancy services', because there was no rendering or managing by direction, regulation, administration or supervision of activities by the taxpayer to VSNL. Further the taxpayer does not provide any advisory services for arranging of restoration activities to VSNL. The taxpayer already had a cable system network in which it had

FICCI

spare capacity, which was provided to VSNL in case of disruption in a cable network. When a restoration calling party like VSNL avails the network link in the cable of the taxpayer, no transfer of technology is involved nor have any technical services been rendered.

If any technical equipment developed by a human has been put to operation automatically, then usage of such technology per se cannot be held as rendering of technical services. Transmission of data or telecommunication traffic through a cable is not rendering of a technical service but the use of a technical device. Such a standard facility for transmission of data and telecommunication traffic by cable operators cannot be termed as rendering of technical services and therefore it was held that consideration received from restoration activities was not taxable as FTS under Section 9(1)(vii) of the Act.

Taxability as business income

A portion of the cable length falls within the territorial waters of India from where it connects to Mumbai and from there it again goes to other countries. In case of a sale of the capacity, the landing parties become the complete owner of the capacity to the exclusion of the taxpayer as held in earlier years. However, the spare capacity which lies in the cable belongs to the taxpayer, through which it had provided the restoration network to VSNL.

The Tribunal held that all the business operations of the taxpayer related with restoration services were not carried out in India. Therefore, reasonable attribution of income from such operations has to be done. In such a situation, Explanation 1A to Section 9(1)(i) provides that, in case of a business of which all operations are not carried out in India, then the income of the business shall be deemed to accrue or arise in India only such part of the income, which can be reasonably attributable to the operations carried out in India. The Tribunal upheld the method of attribution of tax department, however the AO is directed to determine the income of the taxpayer which is to be taxed in India after apportioning the revenue on the basis of length of the cable in the territorial waters in India on the segments on which restoration has been provided.

Flag Telecom Group Limited v. DDIT (ITA No. 2255/Mum/2006 & 14 other Group Appeals)

Offshore sale of equipment is not taxable in India. Sale of designs and drawings for setting up a plant have taken place outside India and therefore not taxable in India and also does not result into royalty income in India

The taxpayer is a tax resident of Germany, engaged in the business of providing innovative and environmentally sound solutions for a variety of customers in the metals and minerals processing industry. During the Assessment Year (AY) 2010-11, the taxpayer earned revenue from the offshore supply of equipment to seven Indian companies (relating to the steel industry). Further the taxpayer sold drawings, designs and engineering documents to the customers for the operation and maintenance of the plant. The taxpayer had provided supervisory services in India and also was engaged by its customers for supervising the detailed engineering, installation and commissioning

FICCI

activity undertaken independently by the customer/third party vendors appointed by the customers. The taxpayer had a supervisory Permanent Establishment (PE) in India for supervisory services rendered on a standalone basis. Relating to supervisory services the taxpayer for the purpose of computation of profit for the AY under consideration computed the average profit margin earned by the comparable Indian companies, which worked out to 17.93 per cent of sales.

The AO held that the income earned by the taxpayer from the offshore sale of equipment accrues or arises in India and was taxable under the Act and the India-Germany tax treaty. The AO calculated a profit at 10 per cent of consideration from the offshore sale of equipment and held that it was chargeable to tax. Further, the AO held that the income earned from the supply of drawings and designs was taxable in India. Relating to supervisory services, the AO disregarded comparable companies adopted by the taxpayer and applied the net profit percentage at 27.5 as held by the Settlement Commission for Financial Years (FYs) 2007-08 and 2008-09.

The Tribunal held that income from offshore sale of equipment cannot be taxed in India either under the Act or under the India-Germany tax treaty, since all the activities relating to designing, fabrication, manufacturing and the sale of equipment took place outside India on a principal to principal basis. The consideration was also received outside India in foreign currency. Further, Indian customers were independent parties who made purchases on their own account and the transaction was made at arm's length.

The Tribunal held that sale of designs and drawings for setting up a plant amounts to the use of copyrighted article rather than the use of copyright and therefore, it is in the nature of business income. The designs and drawings sold by the taxpayer were used by Indian customers for internal business purposes for setting up of their plants and not for any commercial exploitation. Since the work relating to designs and drawings was done outside India and sale took place outside India, such income was not taxable either under the provisions of the Act or under the tax treaty.

For AYs 2008-09 and 2009-10 before the Settlement Commission and during the AY under consideration, the taxpayer admitted to have a PE in India to which the supervisory services were effectively connected, but no books of accounts were maintained for the same. In such circumstances, the factual finding of the Settlement Commission towards attribution of profits to the extent of 27.50 per cent on the revenue earned from supervisory activities in India cannot be faulted with and for the very same reason, the action of the AO in attributing profits at 27.50 per cent was upheld.

Outotec GmbH v. DDIT (ITA No. 431/Kol/2014) (Kol)

Consideration received under the Joint Development Agreement in the form of right to sell the constructed area cannot be charged to tax since the profit will be realisable only when the right is exercised

The taxpayer is engaged in the business, inter alia, as a builder in the capacity of a

FICCI

proprietor. The taxpayer was the owner of a piece of land held as stock in trade. The taxpayer entered into a Joint Development Agreement (JDA) with Menorah Realties Pvt. Ltd. (MRPT). Under the terms of this agreement, MRPT was to construct a residential apartment building at its cost. In consideration of the land of the taxpayer, MRPT was to give 40 per cent of total saleable construed area, parking spaces, and undivided interest in the said property. The taxpayer claimed that even though the development agreement entered into in the relevant previous year, no gains arose as a result of this agreement, since the proposed building project was not cleared by the regulatory bodies. The AO held that the capital gains will arise in the year in which full control and possession of the land in question is given. The AO observed that profit and gains arising from the transfer of a capital asset were taxable as income during the previous year in which the transfer took place. The CIT(A) upheld the order of the AO.

The Tribunal observed that the land transferred by the taxpayer was held as a part of the stock in trade. Once the land is held to be a part of the stock in trade, it ceases to be a capital asset under the provisions of Section 2(14) of the Act. Therefore, the provisions regarding capital gains are not attracted to the facts of the present case. Once it is held that the provisions regarding capital gains are not attracted, the definition of 'transfer' under Section 2(47) of the Act, and of Section 53A of the Transfer of Property Act have no bearing on the adjudication about taxability of notional profits in the hands of the taxpayer. When there is no transfer of asset insofar as a business transaction is concerned, there is no question of 'consequences' of such a transfer.

The principles of conservatism and considerations of prudence, in the accounting treatment require that no anticipated profits be treated as income until the profits are realised and at the same time, an anticipated loss to be deducted from commercial profits. Accounting Standard 2 referred in Section 145(2) of the Act, also states that inventories shall be valued at cost, or net realisable value, whichever is lower. Based on the accounting principles sanctioned by the statute and the law laid down by the Supreme Court in the case of Chainrup Sampatram v. CIT [1953] 24 ITR 481 (SC), anticipated losses are taken into account while anticipatory profits are ignored. When the market price of an item in the closing stock is less than its cost price to the business, the notional loss is allowed as a deduction. However, when the market price of an item in the closing stock is more than its cost price to the business, the notional profit is not brought to tax.

The Tribunal held that the taxpayer has got only a right to sell the constructed area in the project. It will only be realised and can even be quantified only when this right is exercised in part or in full. Until that stage comes, such profit cannot be taxed. Unlike in a case of a capital gain which arises on parting the capital asset at the first stage itself, it is a case of business transaction which is completed when the rights so acquired by the taxpayer are exercised. None can make profits by dealing with himself, as is the settled legal position in the light of the decision in the case of Sir Kikabhai Premchand v. CIT [1953] 24 ITR 506 (SC). Therefore, the anticipated business profits cannot be brought to tax on taxpayer's entering into a development agreement with MRPT in respect of the land held by the taxpayer as stock-in-trade.

Dheeraj Amin v. ACIT (ITA No. 1709/Bang/2013; AY: 2010-11)

Share premium cannot be regarded as part of the issued share capital hence not a part of the 'capital employed', but Foreign Currency Convertible Bonds are treated as 'debentures' and considered as a part of 'capital employed' while allowing deduction under Section 35D of the Act

The taxpayer is engaged in the business of development and export of various software products for the telecommunication industry. During the AY 2008-09, the taxpayer incurred expenditure to set up a new industrial unit and was entitled to claim deduction of such expenditure by amortising the said expenditure over a period of five years in accordance with the provisions of Section 35D of the Act. The expenditure was incurred in connection with acquiring shares of two companies. By implication, the AO accepted the amount claimed by the taxpayer under Section 35D of the Act. The Commissioner of Income-tax (CIT) in the exercise of his powers under Section 263 of the Act held that the deduction under Section 35D of the Act has been allowed in excess. The CIT held that the cost of acquisition of two businesses cannot be treated as 'Fixed Assets' under Section 35D of the Act, and therefore deduction in this regard cannot be accepted. The share premium collected on the issue of its share capital and the Foreign currency convertible bonds (FCCBs) cannot be regarded as a part of the capital employed for the purpose of deduction under Section 35D of the Act. The Bangalore Tribunal held as follows:

Investment in shares cannot be included in 'cost of project' under Section 35D of the Act

Perusal of the definition of 'cost of project' provided under Section 35D of the Act indicates that only the fixed assets, being land, buildings, leaseholds, plant, machinery, furniture, fittings and railway sidings (including expenditure on development of land and buildings), which are acquired or developed in connection with the extension of the industrial undertaking or for setting up of the new industrial unit, should be considered. In the present case shares acquired by the taxpayer cannot be treated as land or building, plant or machinery, etc., and therefore cannot be treated as 'cost of project' for the purpose of allowing deduction under Section 35D of the Act.

Share premium cannot be regarded as a part of the issued share capital while computing 'capital employed'

The provisions of Section 78 of the Companies Act provide for a limited fiction of treating share premium as part of paid-up capital for the purpose of reduction of the same. Section 78(2) of the Companies Act prohibits the use of share premium for any purpose other than the purposes set out therein. Therefore, share premium cannot be regarded as part of the 'issued share capital' for allowing deduction under Section 35D of the Act.

FCCBs can be considered as 'debentures' and taken as a part of 'capital employed'.

Section 2(12) of the Companies Act defines 'debentures' to include debenture stock, bonds and any other securities of a company, whether constituting a charge on

the assets of the company or not. FCCB is a bond and therefore it falls within the meaning of the term 'debenture' for the purpose of Section 35D of the Act. The FCCBs were issued under the Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 (the Scheme) wherein the meaning of FCCBs is given. In the light of the definition of debentures as provided in the Companies Act, 1956 and the meaning specified in the Scheme, FCCBs are to be regarded as debentures and consequently be considered as part of 'capital employed' for allowing deduction under Section 35D of the Act.

Subex Ltd. v. CIT (ITA No.689/Bang/2014) – Taxsutra.com

Net consideration of sale of shares and not the amount of indexed long term capital gain is to be taken into account while computing book profit under the provisions of Minimum Alternate Tax

The taxpayer is engaged in the business of investments, leasing and broking. During the year under consideration, the taxpayer had sold shares and earned about INR 1.9 billion which was net of Securities Transaction Tax (STT) paid. This amount was credited to the profit and loss account. While computing the tax liability under Section 115JB of the Act, the taxpayer had shown capital gains on the sale of shares which was claimed as exempt under Section 10(38) of the Act. In this computation, the taxpayer had made a note stating that the long term capital gain should be taken at about INR 1.72 billion which is after indexation. The tax liability as per the provisions of section 115JB was higher, therefore, taxes were paid as per book profit computed under Section 115JB of the Act. The AO held that the long term capital gain after indexation and the deduction of STT paid cannot be accepted for the purpose of computing book profit under Section 115JB of the Act. Accordingly, the AO computed the long-term capital gains at about INR 1.72 billion while computing tax under Section 115JB of the Act. The CIT(A) upheld the order of the AO.

The Tribunal observed that Section 115JB of the Act is a non-obstante provision and a complete code by itself. For computing the profit and the taxability under Section 115JB of the Act, it is mandatory for the taxpayer to compute profit as per profit and loss account prepared under the relevant provisions of the Companies Act, 1956. The relevant Schedule under the Companies Act for the preparation of statement of profit and loss account provides that in case of a sale of investments, net gain/loss should be disclosed. The Companies Act does not provide for long term/short term capital gain. In accordance with the requirements of the Companies Act, the taxpayer had credited the net profit on the sale of an investment.

Section 10(38) of the Act provides that income arising from the transfer of a long-term capital asset will not be included in the total income. The 'proviso' provides an exception to the said Section, which envisages that for the purpose of computing the book profit, the income by way of long-term capital gain shall be taken into account on which tax is payable under Section 115JB of the Act. Thus, while computing the book profit, income under Section 10(38) of the Act will not be reduced and this income in the present case

would mean income credited to the profit and loss account.

The concept of indexation while computing the long-term capital gain cannot be imported to the computation of book profit under Section 115JB of the Act as per the expressed provisions of the said section which is a complete code in itself. Accordingly, the net gains on account of sale of shares amounting to about INR 1.9 billion will be taken into account in computation of book profit and not the amount of long-term capital gain of about INR 1.72 billion after indexation.

Dharmayug Investments Ltd. v. ACIT (ITA No. 1284/Mum/2013) – Taxsutra.com

Any concerted action or arrangement with the third party involving Associated Enterprises (AEs) would attract the provisions of section 92B and is an international transaction between the taxpayer (an Indian company) and AE, requiring determination of Arm's Length Price (ALP) under section 92(1) of the Act

The taxpayer is into trading of high purity insulin formulation, insulin delivery system and other specified pharmaceutical products. Taxpayer classified the transactions of purchase of excipients, purchase of finished goods, payment for quality testing and receipt of subvention fee etc between taxpayer and Novo Nordisk A/S (AE) under the 'Distribution Segment'. The distribution segment was divided into two categories:- (i) Sale of products purchased locally (ii) Direct import and sale of products from Novo Nordisk A/S and Novo Nordisk Healthcare AG.

Sale of products purchased locally included Purified Insulin vials purchased from Torrent Pharmaceuticals Limited (TPL) which were manufactured by TPL from crystals imported from Novo Nordisk A/S. There were various agreements between the taxpayer, AE and TPL.

Transfer Pricing Officer (TPO) contended that TPL is merely a contract manufacturer and the terms of transactions between taxpayer and TPL are determined on the basis of transactions between TPL and Novo Nordisk A/S. Since Novo Nordisk A/S and the taxpayer are AEs, the provision of section 92B(2) are attracted and the transaction between TPL and Novo Nordisk A/S is deemed to be a transaction between two AEs and it is to be benchmarked. The TPO concluded that introduction of TPL for manufacturing and treatment of taxpayer as a trader is a case of introduction of a third party to avoid the greater scrutiny of transfer price, as the margins of manufacturer of insulin usually will be higher than trading. Thus, TPO proposed an adjustment.

Tribunal Ruling

Agreements entered between Novo Nordisk A/S and TPL is a concerted action or arrangement which is brought out in a form which apparently is intended and framed in such a manner so as not to attract the provisions of section 92B of the Act. The parties to the arrangement are Novo Nordisk A/S, taxpayer and TPL and since one of the parties to the transaction is a non-resident, conditions specified in Sec 92B(1) are satisfied.

Tribunal held that the concept of a transaction between two residents who are AEs being regarded as international

transactions was implicit in the transfer pricing provisions in India, if it impacted or eroded the tax base in India. It was observed that if the cost of crystal/raw materials purchased by TPL is not subjected to the test of ALP, it could result in erosion of tax base in India. Hence, the supply of excipients by Novo Nordisk A/S to TPL was in effect an international transaction.

The transaction between TPL and the taxpayer for manufacture of mono component and highly purified insulin in vials cannot fall within the ambit of provision of section 92(1) of the Act as the tax base erosion could happen only at the point of supply of insulin crystals to TPL by Novo Nordisk A/S.

Tribunal also disregarded the evaluation of international transactions in a combined approach, stating that the two transactions, i.e. supply of raw material and sale of imported products have no connection with each other whatsoever and can be evaluated individually and hence directed the TPO to evaluate the transactions separately.

Tribunal also ruled on a selection of comparables in ITES Segment, and ALP determination of expenditure incurred under Clinical Trial Activities segment.

Novo Nordisk India Pvt. Ltd. v. DCIT [IT(TP)A No. 122/Bang/2014]

Notification & Circulars

India signs one of the first APA in the IT – ITES industry

The APA program was introduced in India through the Finance Act, 2012 as a method of proactive dispute resolution, which came into effect on 1 July 2012. Although the introduction of APA was perceived as a positive step taken by the Government of India as a measure to curb unprecedented litigation that had greatly affected investor sentiment, the taxpayers were apprehensive of the practical challenges associated with its actual implementation. Amidst the prevailing uncertainty, Indian taxpayers have filed over 550 APA applications till date; of which majority of the applications seem to be in the services sector, more so in the IT–ITES sector. The IT-ITES industry has always been under constant pressure from the Transfer Pricing authorities with expectations of high margins, resulting in huge transfer pricing adjustments and leading to endless litigation.

Opening a new and much awaited chapter in tackling ever-increasing transfer pricing disputes in the IT– ITES industry, KPMG in India assisted one of the prominent IT-ITES industry players in signing an APA with the CBDT, Government of India. This being one of the first APAs in the IT-ITES industry in India, should pave the way for signing many other such APAs in due course, thereby improving the currently aggressive transfer pricing environment. This positive development is also likely to encourage many others in the industry to consider the APA route in achieving certainty and reducing the Transfer Pricing disputes, especially the players in IT and ITES industry.

India signs Mutual Agreement Procedures (MAP) with Japan in the manufacturing sector

MAP is an alternative dispute resolution mechanism available to taxpayers for resolving disputes that give rise to double

taxation. The mechanism is available to taxpayers by virtue of India's Double Taxation Avoidance Agreements (DTAA) with several countries. Article 9 (dealing with AEs) and Article 27 (dealing with MAP) of the Indian DTAAs provide guidance on how to invoke MAP in the situation of a transfer pricing adjustment. MAP works concurrently with the existing dispute resolution processes under the domestic Indian tax laws. With the involvement of the respective Competent Authorities (CAs) of each country, MAP aims at achieving mutually negotiated settlements, thus avoiding the incidence of double taxation for the taxpayer. The MAP mechanism works towards arriving at an approach that is mutually acceptable to the governments of both countries, thus bringing tax neutrality and avoiding an incidence of double taxation.

The Government of India is keen to settle long pending MAP disputes and related discussions have gained momentum especially with countries like Japan, U.K. and USA. In order to achieve the framework for resolving pending MAP cases, CAs of these countries and India are meeting twice or thrice in a year. Though, several cases concluded under MAP in the past predominantly relate to corporate tax issues, the transfer pricing issues have also started coming up for discussions.

Moving forward in this direction, KPMG has recently assisted a large company in the manufacturing sector in resolving their transfer pricing dispute through a MAP with Japan. The MAP has been signed in less than a year of application with just about two meetings between the CAs of India and Japan. This is a positive development for the taxpayer community and is reflective of the Government of India’s commitment to make bilateral dialogues with other countries, an effective means of resolving disputes in the field of transfer pricing.

II. Indirect Taxes
Recent Case law
High Court Decision

Once tax arrears are paid under special settlement provisions, no interest can be demanded

In the present case, the taxpayer had applied for settlement under the Andhra Pradesh Sales Tax (Settlement of Disputes) Act, 2001, (Settlement of Disputes Act) by filling Form-I before the Deputy Commissioner to settle the dispute and was issued a Certificate of Settlement in Form-III on payment of 50 percent of the tax demanded. Subsequently, two years after the settlement of the dispute, the taxpayer received a demand notice demanding interest on the amount settled for the aforementioned Assessment Years. Aggrieved by the same, the taxpayer filed a writ petition before the Telangana and Andhra Pradesh High Court.

The taxpayer contended that once the tax amount is settled and a Certificate of Settlement in Form-III has been issued, no interest can be demanded on the same. However, Revenue contended that interest is regularly applicable on delayed payment of tax; hence, it was outside the scheme of the Settlement of Disputes Act. Further, the revenue submitted that there was no clear provision under the Settlement of Disputes Act for levy of interest on the amounts paid by the dealer under the APGST Act.

The HC observed that once the taxpayer has discharged dues under the Settlement of Disputes Act and a Certificate of Settlement has been issued, the taxpayer is deemed to be discharged from his liability to make payment of balance amount of tax, interest and penalty in dispute. Accordingly, High Court allowed the writ petition filed by the taxpayer and quashed the demand notices issued by the Revenue.

Siemens Limited v. Commercial Tax Officer (TS-329-HC-2015(TEL and AP)-VAT)

Concessional tax claim to be allowed on subsequent submission of statutory forms

In the instant case, the issue before the HC was whether tax levied at a higher rate on account of non-submission of statutory forms was sustainable even on belated production of statutory forms.

During the course of the assessment for the FY 2008-09, the taxpayer produced available C Forms and H Forms and requested for additional time to collect the balance statutory forms from its customers. On the basis of the documents submitted, the Assessing Authority issued a notice to the taxpayer proposing to levy a higher rate of tax on the turnover not covered by such statutory declaration forms. After considering the objections filed by the taxpayer, the Assessing Authority passed an Assessment order demanding tax from the taxpayer. Subsequently, the taxpayer produced the remaining C Forms and H Forms; however, the Assessing Authority did not consider the same. Aggrieved, the taxpayer filed an appeal before the Joint Commissioner (Appeals) which was dismissed considering such appeal as time barred. Subsequently, the taxpayer filed writ petitions before the Karnataka High Court.

The taxpayer contended that all the relevant forms were submitted subsequent to the assessment order and the Assessing

FICCI

Authority was bound to take the same into consideration and pass re-assessment order. The revenue, however, contended that the taxpayer had been given an opportunity to produce the statutory forms, but the taxpayer failed to submit the same.

The High Court held that even on the belated production of statutory forms, the statutory authority is bound to take into consideration the same and give the benefit of reduction of tax. High Court also placed reliance on Circular dated 7 June 2006 which clearly stated that the Assessing Authority is bound to consider the statutory forms produced belatedly. In view of the above, the High Court allowed the writ petition and the assessment order was quashed and the matter was remanded.

Weir BDK Valves v. The Commissioner of Commercial Taxes (Karnataka) & others (TS-321-HC-2015(KAR)-VAT)

CUSTOMS

Validity of Stay order

In the present case, the taxpayer sought extension of stay before the CESTAT on the ground that their appeals had not come for hearing for no fault of the taxpayer.

The CESTAT observed that any stay order passed by the Tribunal, if it is in force beyond 7 August 2014, it would continue till the disposal of the appeals and there is no need for filing any further applications for extension of orders granting stay either fully or partially.

Ramesh Dalmia v. CC (2015-TIOL-1320-CESTAT-MUM)

Notification & Circulars

Notification issued regarding the use of digital signature and maintenance of records in e-format

Central Government has issued Notification to specify the conditions, safeguards and the procedures for the issue of invoices, preservation of the records in electronic form, authentication and issue of invoices using digital signatures.

Notification No.18/2015 dated 06 July 2015

Foreign Trade Policy Trade Notice

Operationalization of online payments through debit/credit cards

For the purposes of trade facilitation and ease of doing business, Directorate General of Foreign Trade (DGFT) had already operationalized online filing of various applications. Now, online payment facility and payment through 'credit and debit cards' have been made available.

Trade Notice No 7/2015 dated 09 July 2015

Merchandise Exports from India Scheme

Amendments / Additions have been made in Table 1 (containing list of country groups) and Table 2 [containing ITC (HS) code wise list of products with reward rates] of Appendix 3B for the purpose of claiming MEIS benefit.

Public Notice No 27/2015-2020 dated 14 July 2015

VAT

Maharashtra

The Bombay High Court , in the case of Tata Sons Limited held that the transfer of right to use goods of incorporeal or an intangible character such as trademarks, copyrights, patents, etc. is liable to VAT and that there need not be any exclusive and unconditional transfer. Further, the High Court distinguished the Supreme Court verdict in the case of Bharat Sanchar Nigam Limited as it dealt with altogether different controversy. Accordingly, the transaction should attract tax even if there may be multiple transferees and the transferor continues to use goods. Subsequently, the Maharashtra VAT Department has issued circular that VAT shall be applicable on the transfer of right to use intangible goods to multiple users.

Trade Circular No. 11T of 2015 dated 13 July 2015

With effect from 1 July 2015, electronic payment facility for payment of tax under Maharashtra Tax on the Entry of Goods into Local Areas Act, 2002 has been made available. Currently, this facility is optional and may be made mandatory in due course.

Trade Circular No. 9T of 2015 dated 1 July 2015

Tamil Nadu

The facility for issuing manual C and F Forms to the dealers for all the missed out invoices and for any mistakes in the already generated online forms (both current and backlog period) has been extended from 31 May 2015 to 30 September 2015.

Circular No.24/2015 CC4/678/2014 dated 20 June 2015

Rajasthan

Android based mobile application viz 'Raj VAT' has been made available on Google Play Store which can be used for generating Form VAT-47A (declaration for imports by registered dealer) and Form VAT-49A (declaration for carrying goods outside the state by registered dealer). The mobile application can be used for obtaining Form VAT-47A / Form VAT-49A by filing in certain mandatory details as maybe required. The mobile application will also provide a facility to track the status of the Forms.

Circular- No. 03/2015-16- No. F.16 (95)/Tax/CCT/14-15/5958 dated 23 June 2015

Bihar

With effect from 10 July 2015, the exemption limit for carrying the prescribed documents (i.e. declaration, invoice, etc.) while transportation of goods within the state of Bihar has been increased from INR 75,000 to INR 2,00,000.

Notification No. Bikrikar/Vividh-43/2011/3605 dated 10 July 2015

Gujarat

It has been clarified that the provisional refund shall be granted within 90 days of receipt of application. The departmental officer will grant the provisional refund as

per the procedure prescribed in the notification. The maximum amount of refund granted shall not exceed 90 percent of the total amount claimed provisionally.

Circular No. GUJ/VAT-20A/15-16/170/145 dated 18 Jun 2015

"This newsletter has been prepared with inputs from KPMG and does not express views or expert opinions. The newsletter is meant for general guidance. It is recommended that professional advice be sought based on the specific facts and circumstances. This newsletter does not substitute the need to refer to the original pronouncement"