September 2015

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

KPMG
cutting through complexity

Foreword

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

On the request of Central Board of Excise and Customs (CBEC), FICCI carried out a comprehensive survey in association with KPMG to assess the taxpayers' experience of interaction with the Customs and Central Excise field formations as well as Ministry of Finance. A presentation on the results of the survey was made by FICCI – KPMG to senior officers of CBEC in the Annual Conference of Chief Commissioners on 25th August, 2015. The feedback from this survey is proposed to be used by the Central Board of Excise & Customs in setting priorities for reforming business processes.

The Taxation division has commenced the exercise of compiling suggestions for inclusion in FICCI's Pre Budget Memorandum 2016-2017 to be submitted to the Government. It is contemplated that the same would be sent to the Government in the second week of October, 2015. Accordingly, we request you to send your valuable inputs and specific suggestions for inclusion in the memorandum to Mr. J. K. Batra at jitendra.batra@ficci.com latest by September 21, 2015.

On the tax front, the Bangalore Tribunal in the case of Carl Zeiss India (P) Ltd. held that no disallowance under section 40(a)(i) of the Act shall be made in case of non-deduction of tax at source on payment made to a non-resident if the taxpayer has made such a payment on the basis of a 'nil' withholding certificate obtained from the tax officer under Section 195(2) of the Act. It was held that once the taxpayer had complied with the provisions of Section 195 of the Act and obtained a certificate from the tax officer in accordance with the requirement of Section 195(2), then the taxpayer cannot be penalised by invoking the provisions of Section 40(a) (i) of the Act during an assessment, with respect to the said amount paid to the non-resident.

In a matter involving wrong availment of CENVAT credit, the Customs, Excise and Service Tax Appellate Tribunal has held that even if a credit was considered to have been taken wrongly, disallowing the same requires quasi-judicial process involving issuance of a show-cause notice followed by a speaking order [Serco Global Services Pvt. Ltd. vs CCE].

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

Landing and parking charges of international aircrafts cannot be treated as 'rent' for the purpose of deduction of tax at source under Section 194-I of the Act

The taxpayer is a foreign company incorporated in Japan. It is engaged in the business of international air traffic. It transports passengers and cargo by air across the globe and provides related services. The taxpayer is a member of the International Air Transport Agreement (IATA). The International Civil Aviation Organisation (ICAO) has framed certain guidelines and rules on charges for airports and air navigation services. The Airport Authority of India (AAI) has levied certain charges on the taxpayer for landing and parking its aircrafts. On the basis of the letter of AAI, the taxpayer deducted tax on landing and parking charges at 2 per cent under Section 194C of the Act. The AO held that the payments for landing and parking charges were covered by the provisions of Section 194-I and not under Section 194C of the Act and, therefore, the taxpayer ought to have deducted tax at 20 per cent instead of 2 per cent.

The Supreme Court observed that under Section 194-I of the Act, the expression 'rent' is given a much wider meaning than what is normally known in common parlance. In the first instance, once the payment is made under lease, sublease or tenancy, the nomenclature given in the section is inconsequential and such payment would be treated as 'rent'. In the second place, such payment made even under any other 'agreement or arrangement for the use of any land or any building' would also be treated as 'rent'. Whether or not such building is owned by the payee is not relevant. The expressions 'any payment', by whatever name called and 'any other agreement or arrangement' have the widest import. Likewise, payment made for the use of any land or any building, widens the scope of the proviso. In the present case, the airlines are allowed to land and take off their aircrafts from the Delhi Airport, for which a landing fee is charged. They are also allowed to park their aircrafts at the airport upon payment of a parking fee. The Madras High Court in the case of Singapore Airlines Limited held that the landing and parking facility was not of 'use of land' per se but in respect of a number of facilities provided by the AAI which were to be necessarily provided in compliance with various international protocols. Therefore, the charges were levied not for land usage or area allotted, simpliciter. The substance of these charges was ingrained in the various facilities offered to meet the requirement of passengers' safety and on safe landing and parking of the aircraft and these were the considerations that governed the fixation of the charges. The aforesaid conclusion of the Madras High Court is justified based on sound rationale and reasoning.

The Supreme Court observed that perusal of IATA documents on the charges for airport and air navigation services, it indicates that there are various international protocols which mandate all such authorities manning and managing these airports to construct the airports of desired standards which are stipulated in the protocols. The services which are

required to be provided by these authorities, like the AAI, are aimed at passengers' safety as well as on safe landing and parking of the aircrafts. Therefore, it is not mere 'use of the land'.

The Supreme Court emphasised the technological aspects of the runways in detail to highlight the precision with which designing and engineering go into making the runways full proof for safety purposes. The objective is to show that the AAI is providing all these facilities for landing and take-off of an aircraft and in this whole process, 'use of the land' pails into insignificance. The charges which are taken from the aircrafts for landing and parking of the aircrafts are not dependent upon the use of the land. On the contrary, protocol prescribes a detailed methodology of fixing these charges. On a perusal of the charges on air-traffic which includes charges for landing, lighting, approach and aerodrome control, etc. it indicates that a cost analysis needs to be done for fixing these charges. When the airlines pay for these charges, and treating such charges as charges for 'use of land' would be adopting a totally naive and simplistic approach which is far away from reality.

Accordingly, it was held that landing and parking charges of international aircrafts cannot be treated as 'rent' for the purpose of deduction of tax at source under Section 194-I of the Act

Japan Airlines Co. Ltd. vs CIT [2015] 60 taxmann.com 71 (SC)

High Court Decision

Interest on tax refund is taxable as business income under the India-U.K. tax treaty since it is effectively connected with a PE in India. Section 44BB of the Income-tax Act dealing with the business of exploration, etc. of mineral oil is not applicable to interest on tax refund

The taxpayer, a non-resident company, is engaged in the business of oil exploration. During the year under consideration, the taxpayer received interest on income tax refund. The taxpayer computed tax on such tax refund at the rate of 15 per cent under Article 12 of the India-U.K. tax treaty relating with interest income. However, the Assessing Officer (AO) treated such interest as business income and assessed that under Article 12(6) of the tax treaty as the taxpayer was having a PE in India. The Commissioner of Income-tax (Appeal) [CIT(A)] and the Tribunal upheld the order of the AO.

The Uttarakhand High Court held that the interest earned on income tax refund is taxable as business income under the India-U.K. tax treaty since the debt claim in respect of which interest is paid is effectively connected with a PE in India.

The High Court has also held that Section 44BB of the Act was not applicable to interest on income tax refund since the amount of such an interest was not on account of the provision of services and facilities in connection with, or supply of plant and machinery on hire in the prospecting for, or extraction or the production of mineral oils.

B.J. Services Company Middle East Limited vs ACIT (Income Tax Appeal No. 01 of 2010)(Uttarakhand High Court) – Taxsutra.Com

Wheeling charges paid for transportation of electricity cannot be characterized as FTS under the Income-tax Act

During the Assessment Year (AY) 2005-06, a survey was carried out on the business premises of the taxpayer under Section 133A of the Act. During the course of the survey, it was noticed that the taxpayer had deducted tax at source (TDS) at 2 per cent under Section 194C of the Act on the wheeling charges paid to Power Grid Corporation India Ltd. (PGCIL). The taxpayer had separately entered into a Bulk Power Transmission Agreement (BPTA) with PGCIL for transmission of electricity.

The AO held that the taxpayer was not only using the transmission system set-up of PGCIL but also availing other services which are technical in nature. Accordingly, the wheeling charges paid by the taxpayer were classified as FTS, and were liable for TDS under Section 194J of the Act. The AO treated the taxpayer as an 'assessee in default' under Section 201(1) of the Act. The CIT(A) upheld the order of the AO. However, the Tribunal agreed with the taxpayer that what it had availed from PGCIL was not a technical service.

The Delhi High Court held that technical services cannot be understood in a rigid formulaic manner. It will vary from industry to industry. There will have to be a specific line of enquiry for determining what in a particular industry would constitute as rendering of a technical service. The High Court observed that the system operated and used by PGCIL for transmission of electricity is maintained by skilled technical personnel. This also ensures that PGCIL complies with the standards and norms put in place by the statutory regulations. The High Court observed that PGCIL is operating and maintaining its own system using the service of engineers and qualified technicians. A comparison could be made with the system of distribution of some other commodity like water. It might require the operation and maintenance of a water pumping station and the maintenance of a network of pipes. However, what is conveyed through the pipes and the equipment to the ultimate consumer is water. The equipment and pipes have no doubt to be maintained by technical staff; but that does not mean that a person to whom the water is distributed through using the pipes and equipment is availing of any technical service as such.

Although the wheeling charges may be fixed by the Central Electricity Regulatory Commission (CERC), that by itself is not a determinative factor. Once it is accepted that PGCIL transmits the electricity to the taxpayer through the network without any human intervention, it cannot be characterized as a provision of technical services under Section 194J of the Act. By virtue of the BPTA between the taxpayer and PGCIL, there is transportation of electricity from PGCIL to the taxpayer through the equipment and network required, statutorily to be maintained by PGCIL through its technical personnel using their technical expertise. However, this does not result in PGCIL providing technical services to the taxpayer. Therefore, the wheeling charges paid by the taxpayer to PGCIL for such transportation of electricity cannot be characterised as FTS.

CIT vs Delhi Transco Ltd (ITA No. 384/2012) (Delhi High Court) – Taxsutra.com

Conversion of interest payable into equity shares is treated as actual

payment within the meaning of Section 43B of the Income-tax Act

On 1 November 2002, a rehabilitation scheme was sanctioned by the Board for Industrial and Financial Reconstruction (BIFR) in the case of the taxpayer and it was prepared by the Industrial Development Bank of India (IDBI). On the loans borrowed by the taxpayer from IDBI, there was outstanding interest as on 31 March 2001. It was decided that IDBI could be allotted 14,30,000 equity shares of INR10 each, valued at INR14.3 million and the interest to the extent would be taken as having been paid as on 31 March 2002. During the AY 2002-03, the taxpayer filed a return of income on 31 October 2002 declaring a loss of INR20 million. In computing the returned loss, the unpaid interest to the IDBI of INR34.5 million was added back to the net loss as per the profit and loss account. Thereafter, a deduction of interest paid to IDBI to the extent of INR14.3 million was claimed. The basis for this claim was the allotment of shares in the above manner to IDBI on 30 March 2002.

The case of the taxpayer was reopened under Section 147 of the Act. The reasons for the reopening, as stated by the AO, was that the taxpayer had claimed and was allowed a deduction of INR14.3 million towards the allotment of shares to IDBI on conversion of 30 per cent of the simple interest in equity share capital. It was noted that since the rehabilitation scheme was sanctioned by the BIFR on 1 November 2002, the said deduction was not allowable during the AY 2002-03. The AO was of the view that in terms of Section 43B of the Act, deduction is allowable on actual payment basis and an allotment of equity shares in lieu of interest liability cannot be construed as actually paid as required under Section 43B of the Act.

The High Court held that the mere fact that the return of allotment was filed with the Registrars of Companies (ROC) only on 29 April 2002 or that the BIFR may have sanctioned the scheme only on 1 November 2002, would not change the actual date on which the shares stood allotted i.e. 30 March 2002. When pursuant to a settlement the creditor agrees to convert a portion of interest into shares, it must be treated as an extinguishment of liability to pay interest to that extent. In essence, there will be no further outstanding interest.

Consequently, the situation where an interest payable on a loan is converted into shares in the name of the lender/creditor is different from the situation envisaged in Explanation 3C to Section 43B of the Act viz., conversion of interest into 'a loan or borrowing'. In the latter instance, the liability continues, although in a different form. However, where the interest or a part thereof is converted into equity shares, the said interest amount for which the conversion is taking place is no longer a liability. Accordingly, the High Court accepted the plea of the taxpayer that the said conversion of a portion of interest into equity shares should be taken to be 'actual payment' within the meaning of Section 43B of the Act.

CIT vs Rathi Graphics Technologies Ltd. (ITA 780/2014) (Delhi High Court) – Taxsutra.com

Tribunal Decision

No disallowance under Section 40(a)(i) of the Act if the taxpayer has

not deducted tax at source based on a 'nil' withholding certificate obtained from the tax officer

The taxpayer, a company incorporated in Singapore, is a 100 per cent subsidiary of Carl Zeiss, AG Germany. The Carl Zeiss group manufactures and sells optical products. The taxpayer was mainly engaged as a front office for the Carl Zeiss group in India. The branch office of the taxpayer in India facilitates the sale of group products as well as provide sales support.

During the year under consideration, the branch of the taxpayer had made a payment of reimbursement of expenditure in respect of the services rendered by its head office through three senior management officials. The payment was made under the cost sharing arrangements and consequently claimed as a reimbursement to the head office. The branch obtained a nil withholding tax certificate from the tax officer before remitting the amount to its head office.

The Assessing Officer (AO) held that the services provided by the head office in this case, fall within the category of Fees for Technical Services (FTS) under Section 9(1)(vii) of the Act as well as the India-Singapore tax treaty. Since the taxpayer did not deduct tax at source, the said payment was disallowed under Section 40(a)(i) of the Act and added to the total income.

The Bangalore Tribunal held that the taxpayer had remitted the amount to a non-resident after obtaining a certificate from the tax officer under Section 195(2) of the Act. The tax officer while granting the certificate under Section 195(2) had duly recorded the fact that the payment in question is in connection with salaries and other cost of managerial and HR officials charged to the Indian branch which includes the cost of the MD, Chief Officer, HR quality and web administrator for IT application specialists. Thus, after considering the submissions of the taxpayer that the services provided by the non-resident from Singapore does not fall within the definition of FTS under Article 12 of India-Singapore tax treaty, the tax officer issued a 'nil' withholding certificate for making the remittance. Once the taxpayer had complied with the provisions of Section 195 of the Act and obtained a certificate from the tax officer in accordance with the requirement of Section 195(2), then the taxpayer cannot be penalised by invoking the provisions of Section 40(a) (i) of the Act during an assessment. Accordingly, without going into the issue of the nature of payment, whether FTS or not, it was held that once the taxpayer had complied with the provisions of Section 195 by obtaining the certificate under Section 195(2) of the Act, no disallowance can be made under Section 40(a)(i) of the Act with respect to the said amount paid to the non-resident.

DCIT vs Carl Zeiss India (P) Ltd. (IT(IT)A No.1251(B)/2014) (Bang)

Interest adjustment on advances made to an associated enterprise is upheld and the meaning of quasi capital elucidated

During the assessment proceedings, it was noticed that the taxpayer had invested INR2.17 million in the share capital of its Wholly Owned Subsidiary (WOS) in the United Arab Emirates (UAE) and had also advanced INR167.5 million to its WOS. The taxpayer contended that the entire amount advanced to the WOS was out of the proceeds of the taxpayer's Global

Depository Receipts (GDRs) issue and that the advance was in nature of a 'contribution towards the quasi capital of the said company'. The taxpayer argued on the basis of commercial expediency of an interest free loan. The Transfer Pricing Officer (TPO) argued that commercial expediency of the transaction was not relevant while ascertaining the Arm's Length Price (ALP) and the test should be made on the price at which such transactions would have been entered into by independent parties. The TPO proceeded to treat LIBOR plus 2 per cent as the ALP and made an adjustment. The CIT(A) confirmed the actions of the AO.

The Ahmedabad Tribunal held as follows:

- While determining the ALP, the transaction in the nature of 'quasi capital' has to be reviewed as a borrowing transaction between the AEs.

- Loan/commercial borrowing transactions are benchmarked on the basis of interest rate applicable on loan transactions, which under Transfer Pricing (TP) regulations, cannot be compared with a transaction which is something materially different than a loan transaction. Loans, which are in the nature of quasi capital, are treated differently than normal loan transactions.

- The expression 'quasi capital' loan or advance was not a routine loan transaction and the substantive reward for such an advance would not be 'interest' but an opportunity to own capital. Therefore, the comparison of quasi capital loans should not be done with commercial borrowings but with loans or advances which are given in same or similar situations.

- The Tribunal pointed out that in all the other Tribunal decisions, where references have been made to advances in the nature of quasi capital, the following situations were referred:

  - Advances were made as capital which could not be subscribed to due to regulatory issues and the advancing of loans was only for the period and till the same could be converted into equity,

  - Advances were made for subscribing to the capital but the issuance of shares was delayed.

- The relevance of quasi capital for ALP determination, should be from the comparability perspective of the borrowing transaction between the AEs and the source of funds shall be immaterial.

- Based on the above, the Tribunal upheld the decision of CIT(A) and confirmed the adjustment.

Soma Textile & Industries Limited vs. ACIT [ITA No. 262 (Ahd) of 2012]

Deduction under Section 10A (for export of software services) is allowable in respect of a suo-moto transfer pricing adjustment carried out by the taxpayer in the income tax return

The taxpayer is engaged in the export of software and Information Technology enabled Services (ITeS). For the year under

consideration, the taxpayer filed its Return of Income (ROI) declaring nil income. In the ROI, the taxpayer claimed a deduction under Section 10A of the Act, in respect of the entire business income including the amount of the suo moto TP adjustment and arrived at nil total income. The AO, for the purpose of computing the deduction under Section 10A, disallowed the suo moto TP adjustment carried out by the taxpayer. The taxpayer placed reliance on the decision of Bangalore Tribunal in the case of iGate Global Solutions vs ACIT [2008] 24 SOT 3 (Bang). However, the AO referred to the provisions of the second proviso to Section 92C(4) of the Act and held that the taxpayer's claim defeated the purpose for which Section 92C of the Act was legislated. The CIT(A) upheld the action of the AO and relied upon the Karnataka High Court ruling in the case of Yokogawa India Ltd. [2012] 341 ITR 385 (Kar) and distinguished the decision of the coordinate bench in the case of iGate Global Solutions Ltd., holding that the methodology of computation of deduction under Section 10A of the Act was not brought to the notice of the Tribunal in the case of iGate Global Solutions Ltd.

The Bangalore Tribunal held as follows:

- The Tribunal referred to the ruling of the coordinate bench in the case of iGate Global Solutions Ltd., wherein the bench had allowed the deduction under Section 10A of the Act in respect of a suo-moto TP adjustment carried out by the taxpayer.

  The Tribunal also referred to the Hon'ble Karnataka High Court ruling in the same case of iGate Global Solutions where the High Court upheld the judgment of the coordinate bench and ruled that the AO erred in relying upon Section 92C(4) in a case where the ALP was determined by the taxpayer itself, whereas the said provision applies to a case where the ALP was determined by the AO.

- Following the above referred judgement, the Tribunal held that the taxpayer be allowed a deduction under Section 10A of the Act, in respect of the suo-moto TP adjustment carried out in the ROI.

- The Tribunal also held that judgement of the Karnataka High Court in the case of Yokogawa India Ltd. relied upon by the CIT(A) does not apply to the present case.

Austin Medical Solutions Pvt. Ltd. vs ITO [I.T.(TP)A. No. 542/ Bang/2012]

AAR Rulings

Management and procurement services do not make available any technical knowledge, skills, etc. and, therefore, are not taxable as fees for technical services under the India-U.K. tax treaty

The applicant is a company incorporated in the U.K. and is engaged in the development and supply of intrinsic safety explosion protection devices, field bus and industrial networks, etc. The applicant is a wholly owned subsidiary of MTL Instruments Group Ltd., U.K. (MTL U.K.).

MTL Instruments Private Limited (MTL India) is an Indian company, and a subsidiary of MTL U.K.. MTL India is

engaged in the business of manufacturing industrial control equipment used for process control in hazardous environments. The applicant entered into two service agreements with MTL India for providing management and procurement services.

The management services were provided through one of the employees of the applicant based in the U.K. designated as Group Operations Director (GD) by means of telephone calls, e-mails and occasional visits to India. While sitting in the U.K., the GD monitors the financial and operational progress of activities of MTL India. The GD also renders services with reference to human resource matters of MTL India such as hiring new personnel, setting up individual performance targets, assisting in performance appraisal, etc. The GD was also involved in quality and design reviews. As per this agreement, MTL India shall compensate the applicant for providing management services at cost plus 5 per cent and for this purpose only 50 per cent of the cost (total remuneration of the GD) is allocated by MTL U.K.

The second agreement was entered into for provision of procurement services with a view to reduce cost and avoid duplication of procurement efforts within the MTL Group. As per the agreement, the applicant had constituted a procurement team in the U.K. to look into the global sourcing requirements of raw materials within the MTL Group, including MTL India. The procurement team travels to different countries to visit suppliers and distributors to determine the best price that would be available to the group. Their services include setting up the material supply chain, logistic support and providing support to resolve technical issues with supplies from global sources. MTL U.K. was compensated for the procurement services on a cost to cost basis (without any mark up) and for this purpose only 30 per cent of the cost of the procurement term was allocated to MTL India.

The Authority for Advance Rulings (AAR) held that the consideration received by the applicant for management and procurement services is not taxable in India as per the provisions of the India-U.K. tax treaty since such services do not make available any technical knowledge, skills, etc. The AAR also observed that managerial services are not covered in the definition of FTS in the India-U.K. tax treaty and the same are routine managerial activities and hence, cannot be classified as technical or consultancy services. Further, the AAR observed that procurement services can never be classified as technical or consultancy in nature and therefore, such services are not FTS under the tax treaty.

Measurement Technology Ltd. (A.A.R. No 966 of 2010) (AAR) - Taxsutra.com

Payment for e-learning courses and online information resources is taxable as royalty under the India-Ireland tax treaty

The applicant is an Ireland based company, engaged in the business of providing on demand e-learning course offerings, online information resources, flexible learning technologies and performance support solutions (SkillSoft products). The applicant has entered into a reseller agreement with SkillSoft Software Services India Private Limited (SkillSoft India). Under this agreement, SkillSoft India is a distributor and has the right to license, market, promote, demonstrate and distribute

SkillSoft products by providing online access to such products.

SkillSoft India buys the SkillSoft products from the applicant on a principal-to-principal basis and sells the same to the Indian end users/customers in its own name. According to the applicant, it has developed copyrighted products by using software and techniques, on several topics which were electronically stored on its server outside India. These products are licensed to Indian end users/customers under the master licence agreement between SkillSoft India and Indian end users. SkillSoft India grants to the Indian end users a non-exclusive, non-transferable license to use and to allow the applicable authorised audience to access and use SkillSoft products. The products consist of two components namely the course content and the software through which the course content is delivered to the end customer. Its e-learning platforms are not instructor driven and have no element of human interaction in the learning programmes. The interaction is restricted to software enabled virtual interaction through text, images and graphics that are utilised to enhance the learning experience.

The issue before the AAR was whether payments received by the applicant on account of e-learning course offerings, online information resources, etc. is taxable as 'royalty' under Article 12(3)(a) of the India-Ireland tax treaty.

The AAR held that e-learning course offerings, online information resources, etc. are software and computer databases created by the applicant, included within the ambit of 'literary work' under Article 12(3)(a) of the India-Ireland tax treaty. Irrespective of the use of words like 'non-exclusive' and 'non-transferable' in the relevant agreements, there is a transfer of certain rights owned by the applicant. In terms of the tax treaty, the consideration paid for the use or a right to use the confidential information in the form of computer software, itself constitutes as royalty. Accordingly, payment for e-learning courses and online information resources is taxable as royalty under the India-Ireland tax treaty.

SkillSoft Ireland Limited (AAR. No 985 of 2010)(AAR) – Taxsutra.com

Notifications & Circulars

The income-tax department releases undisclosed foreign income and assets challan

Recently, the Income-tax department released undisclosed foreign income and assets challan in the form of ITNS 284, for payment of tax under the Undisclosed Foreign Income and Assets and Imposition of Tax Act, 2015.

The undisclosed foreign income and assets challan seeks details of PAN, AY, name and address, etc. An appropriate box needs to be ticked if the tax is being paid by the company (0020) or other than companies (0021). The challan also seeks bifurcation of the amount into income-tax, interest, penalty and others.

Source: www.taxsutra.com

India signs its first rollback agreement

The APA rollback rules were notified by the CBDT on 14 March 2015. The rules provide for an extension of the APA terms on the

pricing of international transactions for prior four years (rollback years) preceding the first year from which the APA is to be applicable.

In one of the cases where an APA rollback application was filed after notification of the rollback rules in March 2015, the CBDT signed a unilateral rollback APA. As per press report, the APA pertains to a U.S. multinational company and has been signed for a period of nine years, thus including protection from litigation for the past four years and future five years.

Source: www.economictimes.com

The CBDT discloses only limited information on APAs – Identity of taxpayers cannot be disclosed

In May 2014, an application was filed under the Right to Information Act, 2005 (RTI Act) by an RTI activist (the appellant) seeking information from the Central Public Information Officer (CPIO), Ministry of Finance (the respondent), on 10 issues relating to APAs signed by the government. In reply to this application, the CPIO denied the required information to the appellant by taking a plea under Section 8(1)(d) of the RTI Act which provides for nondisclosure of information which could harm the competitive position of a third party, unless the competent authority is satisfied that a larger public interest warrants the disclosure of such information. The first Appellate Authority upheld the decision of the CPIO and therefore, the appellant filed a second appeal.

Central Information Commission (CIC) order

In the second appeal before the CIC, it was observed that out of the 10 issues on which information was sought, three issues or information points were not covered under Section 8(1)(d) of the RTI Act. Accordingly, it directed the CBDT to provide complete and categorical information against the following three points to the appellant:

i. The estimated amount of transactions pertaining to APAs signed in India;

ii. The functional currency that is to be recognised for the proposed transactions under these APAs;

iii. The annual tax revenue likely to be earned by the CBDT as a result of entering into these APAs.

Information provided by the CBDT pursuant to the CIC order

In response to the aforesaid CIC order, the CBDT provided the following information in April 2015:

- The estimated total amount of transactions of the five APAs signed (as on date of receipt of RTI application in May 2014) was INR210.75 billion.

- The financial currency recognised is Euro and Indian Rupee for one APA each, U.S. dollar for two APAs and two currencies viz. U.S. dollar and Euro for the fifth APA case.

- Regarding the annual tax revenue likely to be earned from each APA, the CBDT replied that it cannot be forecasted by determining the profit margin of a particular transaction. The CBDT observed that determination of a profit margin in a certain transaction will not give any foresight of the total profits of the company, as other transactions will

also impact the nature of profit/loss of a company.

Source: www.taxsutra.com

India's Social Security Agreement with Canada comes into effect

India signed a Social Security Agreement (SSA) with Canada on 6 November 2012. The Employees' Provident Fund Organisation (EPFO) had issued a circular notifying that the SSA between India and Canada has come into effect from 1 August 2015.

This SSA aims at achieving equality on the principle of reciprocity to benefit the employees posted in another country, by their employers.

India has also signed other SSAs with Japan, Portugal and Australia; however, these are yet to come into effect. The India-Canada SSA is the fifteenth SSA that has come into effect.

Key benefits under the SSA:

- Exemption from social security contribution in the host country
- Totalisation of contributory periods
- Export of benefits

The implementation of the SSA between India and Canada is a welcome step as it can help save costs in international assignments between the two nations as well as take into account the social protection of international assignees. This could lead to increased economic activity between the two countries.

Source: www.epfindia.com

Taxpayers can now submit their ITR-V forms for the tax year 2012-13 and 2013-14 by 31 October 2015

Taxpayers who electronically file their income-tax returns without attesting it with a digital signature are required to send the physically signed return verification form (ITR-V) to the Centralised Processing Centre (CPC) in Bengaluru. The ITR-V form is required to be signed and sent via post (either speed or ordinary) within 120 days of e-filing the return.

Recently, the Director General of Income-tax (System) vide its notification has extended the time limit for sending the signed ITR-V form as follows:

- Return for the tax year 2012-13 (electronically filed during 1 April 2014 to 31 March 2015) – Upto 31 October 2015
- Return for the tax year 2013-14 (electronically filed during 1 April 2014 to 30 June 2015) – Upto 31 October 2015

Source: www.incometaxindia.com

II. SERVICE TAX

Supreme Court Decisions

Supreme Court ("SC") rules that service tax is not leviable on indivisible works contract prior to June 1, 2007

The question before the SC in this case was whether service tax can be levied on an 'indivisible works contract' prior to introduction of the service category of 'works contract service' vide Finance Act, 2007 with effect from June 1, 2007.

The SC referred to several landmark decisions on the taxation of works contracts and noted that the parliament was empowered to levy service tax only on the service element contained in 'indivisible works contracts', principally upholding its earlier decision in the case of Gannon Dunkerly. In view of the same, it was held that prior to June 1, 2007, the Finance Act did not lay down the charge or the machinery to levy and assess service tax on indivisible composite works contracts and merely sought to tax pure services like erection, installation and commissioning services. The SC confirmed that 'works contract' was a separate specie of contract, distinct from contracts for services simpliciter, and therefore had to be taxed specifically and separately. The SC upheld that the service component of a works contract is to include the eight elements laid down in the Gannon Dunkerly decision including apportionment of the cost of establishment, other expenses and profit earned by the service provider that was relatable only to supply of labour and services.

The SC further held that section 67 of the Finance Act, 2007 (post amendment) for the first time prescribed the machinery to value the aforesaid services portion for which consideration was not ascertainable, without including any element attributable to the property in goods transferred in such a contract. It was observed that Rule 2A of the Valuation Rules, alone complied with the constitutional requirement of segregating the 'service' component of a works contract from the 'goods' component. The SC also held that the Delhi HC decision in the case of GD Builders vs UOI and Anr [2013 [32] STR 673 (Del)] which upheld the levy of service tax on such indivisible contracts was incorrect. Resultantly, the SC held that levy of service tax prior to June 01, 2007 on indivisible works contracts was invalid as there was no charge or machinery for its taxation before this period.

CCE, Kerala vs Larsen & Toubro Limited and Others [Civil Appeal No 6770 of 2004, SC]

High Court Decisions

Availability of CENVAT Credit on maintenance or repair of windmills located away from factory

In the present case, the issue before the High Court ("HC") was whether the taxpayer is allowed to claim CENVAT credit on maintenance and repair service received at windmills which were located away from the factory.

The HC allowed the credit to the taxpayer on the ground that Rule 3 and Rule 4 of the CENVAT Credit Rules, 2004 ("Credit Rules"), which provide for credit on inputs and input

services received in the factory and input services received by the manufacturer, do not provide any input services should be received in the factory of the taxpayer. Further, reference was made to the decision of the same court in the case of Deepak Fertilisers & Petrochemicals Ltd, wherein credit was allowed on input services used directly or indirectly in relation to manufacture of finished goods.

CCE vs Endurance Technology Pvt Ltd [Central Excise Appeal No 14 of 2012, Bombay HC]

Tribunal Decisions

Rejection of refund of CENVAT credit (even if wrongly availed) requires quasi-judicial process involving issuance of Show Cause Notice and speaking order

The issue related to rejection of refund claims filed in terms of Rule 5 of Credit Rules read with Notification No 5/2006-CE (NT) dated March 14, 2006. The refund claims filed by the Revenue Authority ("RA") were rejected on the ground that ST 3 return did not show the balance amount for which refund was claimed by the taxpayer. Also, part of the refund due was adjusted against CENVAT credit amount alleged to be wrongly availed by the taxpayer.

The taxpayer contended that an inadvertent mistake of not showing correct balance in ST-3 cannot be the ground for rejection of the refund claim, especially when the taxpayer filed a revised return correcting the credit balance. Further, for the amount claimed to be wrongly availed and adjusted against the refund claim, no quasi-judicial proceedings were initiated by the RA.

The Customs Excise & Service Tax Appellate Tribunal ("CESTAT") in this case observed that the mistake in ST 3 was a rectifiable mistake, which was indeed rectified by tax taxpayer by filing revised ST-3 return. Further, with respect to the wrong availment of the credit, the CESTAT held that even if the CENVAT Credit was considered to have been taken wrongly, disallowing the same requires quasi-judicial process involving issuance of show cause notice followed by a speaking order. In light of the same, the CESTAT remanded the matter with the instruction to sanction refund claims within a period of 30 days of receipt of the order.

Serco Global Services Pvt Ltd vs CCE [Service Tax Appeal No 1858/2012, CESTAT New Delhi]

Offices other than 'head office' are also eligible to distribute credit under the mechanism of Input Service Distributor ("ISD") distribution

The taxpayer, a manufacturer of cement, is engaged in distribution of CENVAT credit on input services through its head office and regional offices. The RA was of the view that as per Rule 7 read with Rule 2(m) of Credit Rules, the term 'an office' merely included a 'head office', therefore only the head office was allowed to distribute credit and the credit distributed by regional offices was not permissible.

The CESTAT, while ruling in favor of the taxpayer, made the observation that 'an office' cannot be limited to a physical boundary, but should be interpreted as that

including different boundaries. It was observed that 'an office' was to be interpreted in the plural sense, and restricting the same to a 'head office' would defeat the spirit of section 13(2) of the General Clauses Act. The objective of the ISD mechanism would be to tackle the cascading effect of taxes and therefore the same should not be restricted to the location where the products were manufactured.

India Cements Ltd vs CCE, Tirunelveli [Final Order No 40412/ 2015, CESTAT Chennai]

Reversal of CENVAT Credit proportionate to the turnover of exempt and taxable services would tantamount to sufficient compliance of Rule 6(3) of Credit Rules for FY 2007-08

The taxpayer was engaged in manufacture of both dutiable and exempted final product. During the disputed period of May 2007 to March 2008, the taxpayer availed CENVAT Credit on common input services based on the ratio of turnover of dutiable and exempted final products of the preceding financial year. However, the RA contended that since separate books of accounts under Rule 6(2) of the Credit Rules were not maintained by the taxpayer, the taxpayer shall be liable to pay ten percent of the sale price of the exempted goods as prescribed under Rule 6(3)(b) of the Credit Rules.

The issue before the CESTAT was whether the taxpayer has to mandatorily pay an amount equal to ten percent of the sale value of exempted final products, when separate accounts of the input/ input services are not maintained. The CESTAT made the decision in favour of the taxpayer and observed that:

- Rule 6(3) of the Credit Rules were amended on March 1, 2008 to provide an additional option to a manufacturer/ service provider with a taxable and exempted output of reversing proportionate CENVAT Credit used in relation to manufacture of exempted final products, as per the formula prescribed under Rule 6(3A) of the Credit Rules. Thereafter, the Finance Act, 2010 made such provisions applicable retrospectively

- Further in view of the decision given in the case of Rama Multitech Ltd even if separate accounts were not maintained, due to the retrospective amendment by Finance Act, 2010, a manufacturer would be entitled to reverse proportionate CENVAT Credit based on the ratio of the turnover of exempted and taxable output

- In view of the same, paying an amount equal to 10 percent of the sale value of the exempted goods cannot be forced upon the taxpayer as proportionate reversal of CENVAT Credit would amount to sufficient compliance of Rule 6(3) of the Credit Rules. It was observed that the judgment of the Bombay HC in the case of Nicholas Piramal India Ltd pertained to a period when the retrospective amendment to Rule 6(3) of the Credit Rules had not been made and therefore was not applicable

- An observation was also made by the CESTAT on the Bombay High Court

decision in the case of Nicholas Piramal India Ltd, which was relied upon by the RA. The Bombay High Court, in this case, had held that if separate accounts are not maintained as per Rule 6(2) of the Credit Rules, then Rule 6(3) of the Credit Rules would apply. In this regard, the CESTAT had observed that the decision in Nicolas Piramal's case pertained to a period when the retrospective amendment to Rule 6(3) of the Credit Rules had not been made and therefore was not applicable to the facts of the present case.

IPCA Laboratories Ltd vs CCE, Indore [Excise Misc Application no 53478/2014 & Excise Appeal No E/1021/2009-Ex[DB], CESTAT New Delhi]

Reversal of CENVAT Credit prior to clearance of goods would amount to meeting the condition of non – availment of CENVAT Credit as prescribed under Notification no 1/2006 – ST

The taxpayer failed to take note of the additional condition of non – availment of credit on input services, introduced vide Notification No 1/2006-ST dated March 1, 2006 ("Abatement Notification"), when the said notification superseded Notification No 15/2004- ST dated September 10, 2004. However, the said amount was reversed by the assesse prior to the order of the original adjudicating authority. The RA, placing reliance on the SC decision in the case of Chandrapur Magnet Wires Pvt Ltd, contended that the benefit of the Abatement Notification was available only if the credit was reversed before the clearance of the goods and before the date of payment of service tax respectively.

The taxpayer primarily placed reliance on the decision of the Allahabad HC in the case of Hello Mineral (P) Ltd and emphasized that reversal of credit amounted to non-availment and therefore as the disputed amount of CENVAT Credit was reversed prior to the order of the original adjudicating authority, the benefit of the Abatement Notification was available.

The CESTAT while discussing the case of Chandrapur Magnet opined that the observation of the SC did not necessarily imply that if credit was reversed after the removal of goods, the same would be unacceptable. Accordingly, the CESTAT had concluded that the Hello Mineral's decision would continue to hold as good law. Further the CESTAT also observed that non-reversal of CENVAT Credit in the case of the taxpayer was as a result of an oversight, as the same may have escaped attention of the taxpayer when the Abatement Notification substituted the earlier notification. Thus it was held that the benefit of the Abatement Notification was allowable to the taxpayer.

Punj Lloyd Ltd vs CCE & ST, Rohtak [Appeal No ST/60049/2013-CU[DB], CESTAT New Delhi]

Non-compliance with procedural requirements prescribed under Rule 6(3A) can be condoned provided actual reversals are carried out as per the legal provisions

The taxpayer was engaged in trading of imported goods alongside manufacturing automobiles. During FY 2011-12, the

taxpayer determined the amount of CENVAT Credit to be reversed to the extent it pertained to the trading turnover, by adopting Rule 6(3A) of the Credit Rules. The taxpayer made payments/ reversals as per this rules on March 13, 2012, along with applicable interest, and filed a letter intimating the authorities of such payment. The said letter did not contain all the particulars prescribed as are required under Rule 6(3A)(a) of the Credit Rules.

The question before the CESTAT, was whether the taxpayer was required to pay 5 percent of the value of its trading turnover, as prescribed under Rule 6(3)(b) of the Credit Rules, on account of non-compliance with Rule 6(3A) of the Credit Rules. Such non-compliance included non-filing of an adequate intimation before adopting this method of reversal and also of not making monthly proportionate reversals, as required under Rule 6(3A) of the Credit Rules.

The CESTAT after analyzing relevant legal provisions, held that as long as the taxpayer had reversed the proportionate credit used towards provision of exempted services, it would amount to sufficient compliance of Rule 6(3A) of Credit Rules. The key observations of the CESTAT were as follows:

- Monthly proportionate reversals are provisional in nature and therefore were not mandatory. Further, since the taxpayer paid the interest on such late reversal, the same should be in compliance with Rule 6(3A)

- Although the taxpayer did not furnish all the particulars prescribed by Rule 6(3A) of the Credit Rules, the required details were available with the Department vide the returns filed by the taxpayer and the same amounted to filing of relevant details in compliance with the rules

- It is a common practice to furnish the intimation at the beginning of the year, however a delay in filing the said intimation letter can be considered as a mere procedural lapse

Mercedes Benz India Pvt Ltd vs CCE, Pune-I [Appeal No E/85725/13-Mum, CESTAT Mumbai]

III. VAT/ CST/Entry Tax

High Court Decisions

Activity of provision of passive infrastructure to the telecom service operators would not be liable to VAT as a 'transfer of right to use'

The taxpayer, owner of passive Infrastructure assets (towers, prefabricated shelters, etc), was engaged in the activity of providing passive infrastructure, on a non-exclusive basis, to telecom operators. The taxpayer entered into a master services agreement with the telecom operators, and pursuant to the same provided access to the tower site for the purpose of installing, operating and maintenance of the telecom equipment ('active infrastructure') by the operators. Thus the taxpayer was engaged in providing services like site access availability to the operators and also providing necessary power back-up,

maintenance of temperature controls and security for the telecom equipment installed by the operators.

The taxpayer paid service tax on consideration earned from the telecom operators under the category of 'business support service'. However the RA sought to treat this transaction as a 'transfer of right to use' and demanded VAT on the same under the Madhya Pradesh VAT Act, 2002 ('MP VAT Act').

The Madhya Pradesh HC placed reliance on the Karnataka HC decision in the case of Indus Towers Limited, and held that VAT was not leviable under the MP VAT Act on the activities of the taxpayer on the following grounds:

- 'Right to use' the passive infrastructure could be deemed to have been transferred to the telecom operators as there was no transfer of possession of the said infrastructure. Further, the title and interest in the passive infrastructure remained with the taxpayer, including any enhancements carried out on the same. Thus the essential pre-requisites of a 'transfer of right to use' were not made out

- Access of the telecom operators to the passive infrastructure was limited to carrying out operation and maintenance activities with respect to the installed equipment. Thus it amounted to provision of limited and permissive access, subject to restrictions imposed in the master services agreement. As this did not result in any title, right or tenancy in favour of the operator, it could not be concluded that possession to the passive infrastructure is transferred to the telecom operator

Bharti Infratel Ltd vs State of MP & others [Writ Petition No 5340/2013, Indore HC]

Tribunal Decisions

Airway Bills and Bill of Entry do not constitute valid documents of title for the purpose of sales under Section 5(2) of the CST Act, 1956

The taxpayer placed orders on foreign vendors for import of goods, on the basis of purchase orders received from buyers located in India. The goods were transferred by the taxpayer to buyers in India by way of endorsement of Airway Bills. Subsequently the buyers cleared the goods by itself from the customs port by filing Bills of Entry in their own name. The taxpayer claimed the benefit of 'sales in the course of import' ('SICOI') under Section 5(2) of the CST Act. However, the RA rejected the benefit taken by the taxpayer on the following grounds:

- As per the ruling of the Maharashtra Sales Tax Tribunal ('MSTT') in the case of Nawrojee Wadia & Sons (P) Ltd. (Appeal no 42 of 1989), Airway Bills do not qualify as 'valid documents of title' as per the Sale of Goods Act, 1930 and therefore cannot be said to have transferred the title in the goods to the buyers. Thus, the sale does not qualify as High Sea Sale ('HSS') as covered under the second limb of Section 5(2) of the CST Act

- The taxpayer further failed to establish an extricable link between the first

transaction for sale i.e. import and the subsequent purchase of goods, which is an essential requirement for a transaction to classify SICOI under first limb of Section 5(2) of the CST Act.

The MSTT upheld the contentions of the RA and rejected the benefit of sale in the course of import, on the following grounds:

- An inextricable link was not established between the goods imported and sold to buyers in India, as the part numbers contained in the purchase orders raised by the buyers were generic in nature and could not be linked specifically to the foreign supplier located overseas. The transaction of import and subsequent sale did not therefore qualify as a SICOI as there was no privity of contract between the buyers located in India and the foreign suppliers.

- The appellant was denied the benefit of HSS, on the ground that Airway Bills and Bills of Entry could not be considered as valid documents of title for the purposes of transferring title of goods to the buyers in India

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.

Avdel India Pvt Ltd vs State of Maharashtra [Second Appeal Nos 283 to 284 OF 2012, MSTT]

IV. CENTRAL EXCISE

Supreme Court Decisions

Activity of mounting water purification and filtration system on base frame amounts to 'manufacture'

The taxpayer, a job-worker was engaged in assembling various components supplied by the principal manufacturer into a Water Purification and Filtration System ('WPFS') classifiable under Tariff Heading 8421. The RA alleged that the assembling process carried out by the taxpayer resulted in the emergence of a new product known as WPFS having a different name and character, and thus amounted to 'manufacture' as per Section 2(f) of the Central Excise Act, 1944 ('Excise Act').

The taxpayer contended that the WPFS imported and mounted on a base plate was used in post mix vending machines installed at various customers' locations. Further the items comprising the WPFS could be sold independently to the customer for wall mounting, and getting the desired quality of water. However to avoid inconvenience and damage to the wall plaster of customers, was the same pre-mounted on a base frame and interconnected to form the WPFS.

The SC observed that the activity undertaken by the taxpayer of assembling all the items that were received from the principal manufacturer on a base plate, brought into existence a new and commercially different commodity, known as WPFS. Thus, it was held that the activity

undertaken by the taxpayer amounted to 'manufacture' within the meaning of Section 2(f) of the Excise Act.

M/s Poonam Spark (P) Ltd vs CCE, New Delhi [Civil Appeal No. 6692 of 2004, SC]

Barring explicit provisions restricting payment of tax from the CENVAT Credit pool, taxpayer cannot be precluded from utilizing CENVAT credit

As per Rule 173G of the Central Excise Rules, 1944 ('Excise Rules'), taxpayers were entitled to pay excise duty on a fortnightly basis, instead of consignment basis, by debiting the PLA or by utilizing available CENVAT Credit balances. The RA found that the taxpayer had late deposited excise duty for a period of 3 months, which led the RA passing an order against the taxpayer suspending the facility of clearing goods upon payment of duty on fortnight basis. The taxpayer was directed to deposit the duty on consignment basis for the next two months.

The taxpayer discharged duty liability on consignment-basis in cash through current account and also utilized credit balance from the CENVAT Credit account. The RA was of the view that CENVAT Credit could not be utilized by the taxpayer during the period where the forfeiture order was in place, as duty was not discharged on time by the taxpayer. This view of the RA was confirmed by the CESTAT.

The SC after analyzing the scheme of Excise Rules, concluded that the said provision does not debar taxpayer from utilizing credit, even when the facility of payment of taxes on a fortnightly basis has been suspended by the RA. It was observed by the SC, that the focus of the aforesaid Rule 173G of the Excise Rules referred to the manner in which duty was paid, and did not refer to the mode of payment of duty i.e. by PLA or CENVAT Credit. The SC also supported its conclusion by referring to Rule 8 of Central Excise Rules, 2002, which was amended effective April 1, 2005 (much after the period involved in the instant case), to provide a specific bar for utilizing CENVAT Credit in cases where the taxpayer is specifically instructed to discharge duty on a consignment basis in the event of a default in payment of duty. In view of the above, the SC held that excise duty was correctly discharged by the taxpayer, especially since during the period involved the un-amended provision of Rule 8 was applicable.

Jayaswal Neco vs CCE, Raipur [Civil Appeal No 1468 of 2004, SC]

SC rejects generic interpretation and grants relief on the basis of purposive interpretation of an exemption notification

The taxpayer was engaged in manufacturing paper out of pulp of gunny bags waste/ jute waste and claimed benefit of Notification 22/94-CE dated March 1, 1994 ('Notification'). The Notification prescribed a concessional rate of excise duty on paper and paperboard or articles made from non-conventional material. Further, the condition attached to the Notification prescribed that pulp used for the manufacture of paper should contain not less than 75 percent (by weight) of pulp made from materials other than bamboo, hardwood, softwood, reeds or rags. The RA contended that the taxpayer was not entitled to the benefit of the Notification, as

pulp of gunny bags waste/ jute waste amounted to pulp of 'rags', which was specifically excluded from the scope of the Notification.

The SC, after considering the intent and purpose behind the Notification, which was to encourage manufacture of paper by using non-conventional sources of raw materials, held that waste from gunny bags or jute bags would not fall under the category of 'rags'. The SC also drew reference to various technical/ dictionary meanings that interpreted both rag pulps and jute and came to the conclusion that both were completely different and rag pulp was one that was made from cotton waste or cotton textile material. In view of the same the benefit of the Notification was allowed to the taxpayer.

Coastal Paper Ltd vs CCE, Vishakhapatnam [Civil Appeal No 4908 of 2005, SC]

Order should be duly served on the affected person or his authorized agent for the purposes of meeting the requirements of service of decisions, orders, summons, etc prescribed under Section 37C(A) of the Excise Act

An adjudication order copy was served on the 'kitchen boy' employed by the taxpayer on daily wages. The taxpayer came to know about the said adjudication order after expiry of the limitation period prescribed for filing an appeal against such order. An appeal was filed by the taxpayer before the Commissioner (Appeals) and on the limitation aspect, the taxpayer contended that such order was not served appropriately on the taxpayer.

However the Commissioner (Appeals) rejected the appeal on the ground of being time-barred. Thereafter the matter was challenged before the CESTAT as well, which accepted the RA's version that the adjudication order was served correctly on the taxpayer. Subsequently when the taxpayer preferred an appeal before the HC of Uttarakhand, it was held that the appeal was a statutory right and therefore could not be preferred beyond the limitation period prescribed in the statute. As a result, an appeal was filed by the taxpayer before the SC.

The SC held that the service of adjudication order on the 'kitchen boy' was impermissible and led to miscarriage of justice. It was further held that according to Section 37C(A) of the Excise Act that dealt with service of decisions, orders, summons, etc an order must be tendered on the concerned person or his authorized agent. Accordingly, the SC condoned the delay for filing the appeal.

Saral Wire Craft Pvt Ltd vs Commissioner Customs, Central Excise & Service Tax & Ors [Civil Appeal Nos 5631-5632 of 2015, SC]

High Court Decisions

CESTAT authorized to extend stay of recovery of demand beyond 365 days – case referred to Larger Bench

The issue in the instant case was whether after introduction of the third proviso to Section 35C(2A) of the Excise Act, the CESTAT had any power to extend stay for recovery of demand, beyond a period of

365 days from the date when the stay order was originally passed.

The Larger Bench of the CESTAT in the case of Haldiram India Pvt Limited, while interpreting the said proviso, had held that the CESTAT had power to extend stay beyond the period of 365 days. However the Delhi HC reversed the CESTAT's decision and held that the CESTAT had no power to extend a stay beyond a period of 365 days. This decision was based on an earlier ruling of the Delhi HC in the case of Maruti Suzuki (India) Ltd wherein it was held that the Income Tax Appellate Tribunal did not have the power and jurisdiction to extend an interim stay beyond 365 days, even if the assessee was not at fault, basis Section 254 (2A) of the Income Tax Act, 1961 ('IT Act'). The same was on the ground that the aforesaid provision of the Excise Act was identically phrased as the third proviso to Section 254 (2A) of the IT Act.

On reference, the HC observed that unlike the provision in the IT Act, there was no explicit provision in the Excise Act that stated that the stay shall stand vacated even if the delay in disposing the appeal was caused for reasons not attributable to the assessee. Accordingly, the HC Court while holding that even in terms of the third proviso to Section 35 C (2A) of the Excise Act, the CESTAT would not be denuded of the power to extend the stay beyond 365 days in deserving cases, referred the matter to the Larger Bench for resolution.

CCE, Delhi vs Brew Force Machine Pvt Ltd [Central Excise Appeal No 27/2015, Delhi HC]

Tribunal Decisions

Time limit prescribed under Section 11B of the Excise Act with respect to refund claims does not apply to tax payments made under 'protest'

The taxpayer was engaged in the activity of construction of residential flats. During the period July 2006 to July 2008, there was dispute between the taxpayer and the RA as to whether the activity of construction of residential flats, ultimately sold to buyers, is a transaction of sale of goods or provision of services. Pending settlement of the dispute, the taxpayer paid the service tax under protest and also disclosed the same to the service tax authorities in letters, in the light of lack of a prescribed form under which tax could be paid under protest. The taxpayer paid such service tax without collecting the same from its buyers and intimated the buyers accordingly. The said dispute was settled in the year 2008 in favour of the taxpayer, as a consequence of which, the taxpayer filed a refund claim in September 2008 for the service tax paid under protest. The RA denied the refund claim on the grounds that the same was time barred under Section 11B of the Excise Act and also on the ground of unjust enrichment.

The CESTAT, upon examination of the letters furnished by the taxpayer, observed that the service tax was in fact paid under protest by taxpayer. It was held by the CESTAT that the provisions of section 11B of the Excise Act would not be applicable to deposits made under protest and the refund claim would not be considered as time-barred. The CESTAT also concluded that there was no unjust enrichment as the

price agreed with buyers was not inclusive of service tax, and that the amount recoverable as service tax was reflected in the Balance Sheet of the taxpayer and also certified by the chartered accountant. Hence, the taxpayer's eligibility to refund was upheld.

Ind Swift Lands Ltd vs CCE & Service Tax [Service Tax Appeal No 53064 of 2014-ST(SM), CESTAT New Delhi]

Pre-deposit mandatory with respect to appeals filed post amendment in Section 35F of Excise Act in August 2014

The taxpayer did not pay pre-deposit of 7.5 percent while filing an appeal. The taxpayer took the position that the amendment to Section 35F of the Excise Act (imposing mandatory pre-deposit) was made effective from August 8, 2014 with the enactment of Finance (No 2) Act, 2014, and therefore would not apply to matters where show cause notices were issued before such amendment. The issue before the CESTAT was whether such appeal filed by the taxpayer was maintainable considering the fact that the pre-deposit was not paid.

The CESTAT, referring to the decision of the SC in the case of Hossein Kasam Dada, held that it was very clear that the amended provisions requiring payment of pre-deposit would not apply to stay applications and appeals that were pending before an appellate authority prior to commencement of the Finance (No 2) Act, 2014 as the same was not retrospectively applicable. It was further held that this amendment took away the discretionary power of the Tribunal requiring payment of pre-deposit by assessees. In view of the same, it was held that if any stay application or appeal was filed after the amendment i.e. post August 8, 2014, then the amended provisions related to pre-deposit would necessarily apply. Thus the appeal filed by the taxpayer was held to be non-maintainable.

Maneesh Export, EOU vs CCE [Appeal No E /85591, 85628, 85629/15-Mum, CESTAT Mumbai]

In case of non – FOR sales, payment of freight charges and arrangement of transit insurance charges by the seller, would not lead to the inference that the seller had retained ownership of the goods during transit

The taxpayer made certain sales to buyers, both on FOR and non – FOR terms of delivery. With respect to non – FOR sales, in some cases the freight was borne by the taxpayer and the balance was paid by the buyer, while in some cases the entire amount of freight was paid by the buyers. Separately, the taxpayer had taken a general insurance policy against damage to such goods during transit, and charged proportionate amount of premium payable on the same from its buyers. Although such insurance policy was taken in the name of the taxpayer, in case any damage was caused to the goods in transit, the taxpayer claimed compensation of the same from the buyers.

The RA sought for inclusion of freight and transit insurance charges in the assessable value on which excise duty was payable by the taxpayer in the case of non – FOR sales on the ground that the ownership to the

goods was transferred at the buyer's premises.

The CESTAT, ruled in favour of the taxpayer, and held that since the freight and transit insurance charges were arranged by the taxpayer at the request of the customer, the same are not includable in the assessable value of the goods. The decision of the CESTAT was based on the following important observations:

- Although goods were insured by the taxpayer in its own name, the entire compensation received from the insurance company on account of any loss or damage to goods during transit was passed on to the buyers. Thus, the taxpayer only arranged the transit insurance on behalf of the customers and could not be treated as the owner of the goods on this ground. In this regard, reliance was placed on the judgment delivered in the case of Associated Strips and Escorts JCB Limited

- On perusal of the sales invoices issued to its buyers, it was observed that the taxpayer explicitly disclosed that the goods are dispatched at the customers risk and the taxpayer would not be responsible for any loss/ damage of goods after the goods had left the unit

GSC Toughened Glass Pvt Ltd vs CCE, J&K [Appeal No E /1506-1508,1543/2006-EX, CESTAT New Delhi]

No cause for reversal of CENVAT credit on inputs sold as a part of slump sale of on-going factory along with raw materials, packing materials etc as there is no "removal" from factory

The taxpayer had sold a manufacturing unit by way of slump sale comprising of land, building, raw materials, packing materials and work in progress stocks. The RA demanded reversal of CENVAT Credit on the inputs transferred under the slump sale arrangement on the ground that the same are not used by the taxpayer in its manufacturing process.

The taxpayer contended that inputs were not removed from the factory of the manufacturer and the factory was sold along with stock of inputs and capital goods; and the buyer of the unit used such inputs to manufacture finished goods which are cleared upon payment of excise duty. It was further contended that under Rule 10 of the Credit Rules, inputs as well as input credits are allowed to be transferred to the buyer of the factory and therefore no credit is required to be reversed on the inputs sold to and lying in the factory of the buyer. In this case, reliance was also place on the decision of Allahabad HC in the case of Majestic Auto Ltd, wherein credit on capital goods (on which MODVAT credit was taken) remained installed in the same premises which was leased out and continue to be engaged in the manufacture was allowed.

The RA sought to deny the benefit of Rule 10 on the ground that the only one of the manufacturing units was transferred by the taxpayer and therefore Rule 10 would not apply in case of part transfer of the factory.

The CESTAT decided the matter in the favour of the taxpayer stating that Rule 10 shall be applicable even in case of part sale of factory. The CESTAT upheld that

favourable order passed by the Commissioner (Appeal) on the ground that in the absence of physical removal of the goods from the factory, no credit is required to be reversed.

CCE vs Hindustan Lever Limited [Appeal No. E/1489/09-MUM, CESTAT Mumbai]

V. CUSTOMS

Supreme Court Decisions

Notification would be in force and effective only from the date it is published in the official gazette and offered for sale

The taxpayer imported edible oil and cleared some portion of the consignment immediately upon payment of customs duty as per the notified tariff values. Subsequent clearance of the balance quantity of edible oils was denied by the RA on the ground that on the same date i.e. August 3, 2011, when the Bills of Entry were filed by the taxpayer for the clearance of goods, a notification was issued increasing the tariff value applicable on imports of edible oils. The said notification was sent for publication after the normal business hours, a few minutes before midnight of August 3, 2011.

The question before the SC was essentially regarding the date of applicability of the impugned notification. The SC opined that for a notification to come into force, it must be published in the official gazette and also it should be offered for sale on the date of its issue by the Directorate of Publicity and Public Relations of the Board, New Delhi. In the present case it was held that although the first condition was fulfilled by publishing the notification in the late evening hours of August 3, 2011, the second condition was not as it was only offered for sale on August 6, 2011 considering August 4, 2011 and August 5, 2011 were holidays.

Thus it was held that as both conditions were not fulfilled, the notification could not be held to be effective as on August 3, 2011 and therefore the demand of differential duty was not justifiable.

Union of India & Ors vs Param Industries Ltd & Ors [Civil Appeal No 7801-7811 OF 2004, SC]

Notification & Circulars

Clarifications regarding issuance of Show Cause Notice ("SCN") and conclusion of proceedings

Central Board of Excise and Customs ("CBEC") has provided certain important clarifications in relation to closure of proceedings upon voluntary discharge of tax/ duty by taxpayers. Summary of the same is as follows:

- Issuance of an SCN is not mandatory in cases involving the extended period of limitation where the taxpayer pays the tax/ duty, interest and 15 percent of penalty, and makes a written request to the RA seeking waiver from issuance of a written SCN

- In case the taxpayer has placed a written request seeking waiver from issuance of a written SCN, then such

taxpayer may make payment of tax/duty, interest and reduced penalty of 15% within 30 days from the date of receipt of such request letter by the department. It has been clarified in the circular that such payment can be made by the taxpayer even before this request letter is received by the RA

- The conclusion of proceedings would need to be compulsorily intimated to the taxpayer in writing

Circular No 137/46/2015-ST, dated August 18, 2015

Constitution of new CESTAT bench at Allahabad

A new CESTAT bench has been created in Allahabad that will hear all appeals arising in the State of Uttar Pradesh, and the same would be effective from September 1, 2015.

Notification no 1/ 2015 dated August 14, 2015 [CESTAT, New Delhi]

Directorate General of Foreign Trade ("DGFT") clarifies the procedure for availment of Merchant Exports from India Scheme ("MEIS") & Service Exports from India Scheme ("SEIS") benefits by Importer Exporter Code ("IEC") holders having units in Special Economic Zone ("SEZ") or Export Oriented Unit ("EOU")

Vide this Public Notice, DGFT has introduced the following amendments in the Handbook of Procedures to clarify the procedure for filing applications under the MEIS and SEIS Scheme by SEZ/ EOU units:

- IEC holders having units in SEZ/ EOU shall apply to concerned Development Commissioner ('DC'), SEZ for availing the benefit under the said schemes

- IEC holders having units in SEZ/ EOU as well as Domestic Tariff Area ("DTA"), shall file separate applications to concerned DC, SEZ and Regional Authority, DGFT respectively

- Duty Credit Scrips issued under MEIS shall be issued with a single port of registration, being the port of export. SEZ's being non - EDI ports, the duty credit scrips shall be registered at the SEZ port and in case the scrip holder intends to use the scrip for import from another port, the concerned DC shall issue Telegraphic Release Advice ('TRA')

DGFT Public Notice No 30/2015 – 20 dated August 26, 2015

Introduction of e-governance under the Haryana VAT Act, 2003 ('HVAT Act') and other amendments

Certain noteworthy amendments have been carried out in the HVAT Act by promulgating an Ordinance. Some of these have been highlighted below:

<u>E-governance related amendments:</u>

- An enabling provision for the purpose of implementing electronic governance for online filing of returns, submission of statutory forms, communication pertaining to assessment and audit proceedings, etc, has been introduced.

- Provisions of the IT Act, 2000 relating to digital signatures, electronic governance etc have been made applicable to the HVAT Act in this regard.

- A provision has also been inserted which states that once the dealer has given consent to using the official website, then all returns/ documents/ statutory forms etc filed on the official website by the dealer shall be deemed to be submitted. Similarly a provision has been inserted which states that any VAT department communication (order/ certificate/ notice/ etc) which is prepared on an automated data processing system, would not be deemed to be invalid merely because it has not been personally signed by the commissioner or his subordinate officers

Other amendments:

- Availability of input credit on purchases shall be subject to actual payment of tax by the selling dealer into the Government Treasury

- A time limit of carrying out the provisional assessment within six months from the date of detection of the tax evasion within the financial year has been introduced

- Time limit for re-assessment under Section 17 of HVAT Act has been increased to eight years from the close of the year or three years from end of year in which the final assessment order was passed, whichever is later

Haryana Ordinance No 3 of 2015 dated August 3, 2015

Relaxation of provisions related to mismatch of sale and purchase data under Annexure 2A and 2B of the VAT return under Delhi VAT Act, 2004 ('DVAT Act')

Under the DVAT Act, sale and purchase transactions of dealers are matched for verifying its authenticity before allowing input tax credit. Vide this Circular, following aspects have been clarified in order to mitigate difficulties arising due to mismatch in credits:

- Matched transactions of a period would be hard coded i.e. after filing of return, such transactions would be unaffected by any subsequent revisions in the return. Accordingly buyers would not be burdened with unnecessary mismatches caused due to revision of return by selling dealers, if the entries are already matched

- In cases where both the buying and selling dealers may have made a mistake in reporting the transaction, the buying dealer may approach the assessing authority with a communication from the selling dealer admitting the mistake. On verification of the transaction, the assessing authority may allow both dealers to revise their respective entries in the Annexures by revising the return

Circular No 21 of 2015-16 dated September 1, 2015

New Composition Scheme for works contract notified under the Mizoram VAT Act, 2005

Vide this Notification, a new composition scheme for works contract has been brought into effect under Mizoram VAT Act, 2005 ("Mizoram VAT Act") wherein a works contractor has the option of paying VAT at the rate of 4 percent of the total aggregate value of works contract. Salient features of the same have been laid down in Notification no J 19013/1/2005-Tax dated May 20, 2015 issued under the Mizoram VAT Act.

Notification No J.19013/1/2005-TAX dated May 20, 2015

Verification of Form 'C' and Form 'F' under Rajasthan VAT

Vide this Circular, certain clarifications have been provided in light of mismatches between the purchase and sale of goods between buying and selling dealers. The same are as follows:

- In cases where the field officers have cancelled the Form 'C' issued to dealers on account of mismatch in sales, the field officers shall be required to inform the reason for cancellation of forms in writing to the assessing authority of the selling dealer

- In order to bridge the gap between the sale and purchase, assessing authorities have been directed to initiate penal action where goods purchased against Form 'C' are not used for any of the purposes prescribed under Section 8(3) of the CST Act

- Assessing authorities have also been directed that in cases where goods purchased against Form 'C' are stock transferred outside the state against Form 'F', it shall be ensured that the goods so stock transferred are re-sold by the branch of the dealer itself, as per the requirements of the CST Act, and not any other person including agent(s) of such dealer

- Assessing authorities have also been directed to verify genuineness of Form 'F' issued to dealers and levy penalty in case where they are not found to be genuine, authorizing them to initiate a complaint under the Indian Penal Code

Circular No F 16(97)Tax/CCT/14-15/6328 dated August 3, 2015

Restriction on Input Tax Credit ('ITC') claimed on goods purchased from units under Assam Industries (Tax Exemption) Scheme, 2015

Vide this Notification, the Assam VAT department has imposed a restriction on ITC claimed by dealers on purchases made from an industrial unit eligible for remission of VAT under the Assam Industries (Tax Exemption) Scheme, 2015 ('eligible unit'). In cases where goods are purchased by dealers from eligible industrial units, and if such goods are sold by the dealer outside Assam or exported out of India or stock transferred outside Assam, then the dealer shall not be entitled to claim ITC on such purchases for the amount of VAT that is shown to be charged on the invoice issued by the industrial unit.

Notification No FTX71/2014/93 dated July 3, 2015

Nagaland VAT authorities mandate 'electronic uploading of sales and purchases invoice details' for settlement of ITC claims

Vide this Notification, electronic uploading of sales and purchases invoice details has been made mandatory for every VAT registered dealer (who issues or receives tax invoices from another VAT registered dealer) for the purpose of claiming ITC, with effect from April 01, 2015.

The dealer shall apply for a login user ID and Password from the Superintendent of Taxes under whose jurisdiction the firm is registered, and shall access the service through the department's web portal www.nagalandtax.nic.in.

Notification No CT/LEG/130/2006 dated July 29, 2015