October 2015

# TAX UPDATES

**(containing recent case laws, notifications, circulars)**

Prepared in association with

# Foreword

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

FICCI organized an Interactive Session on "GST and Taxpayers' Services" in collaboration with the Ministry of Finance, Government of India on October 5, 2015 at Chennai. The programme was organized in association with the Southern India Chamber of Commerce and Industry (SICCI). The objective of the session was to provide an insight into the GST framework as currently envisaged, the manner in which businesses need to prepare themselves for a smooth transition to the GST and the measures proposed to be taken by the Government to revamp the tax environment by the time GST regime is in place.

A FICCI delegation led by President, FICCI, Dr. Jyotsna Suri, met the Revenue Secretary and officials from Central Board of Direct Taxes and Central Board of Excise and Customs on September 30, 2015. The meeting was convened by the Revenue Secretary to discuss new and innovative tax policy ideas for achieving higher investments and growth. Concerns were raised regarding high rates of Minimum Alternate Tax and Dividend Distribution Tax, Revenue biased approach of the tax department, provisions in the income tax law to tax capital etc.

In the taxation regime, the Organisation for Economic Co-operation and Development (OECD) had launched an Action Plan on Base Erosion and Profit Shifting (BEPS) in July 2013. OECD had identified 15 specific actions considered necessary to prevent BEPS, out of which the first set of recommendations have been released in September 2014. The OECD on 5th October 2015 issued final reports in connection with all its Action Plan to address BEPS, together with a plan for follow-up work and a timetable for implementation. Earlier reports have been consolidated with the remaining 2015 deliverables to produce a coherent set of recommendations for addressing BEPS. Many countries are poised to adopt changes to their international tax systems based on the OECD recommendations.

In a foreign trade policy matter, the Bombay High Court has observed that exporters promoting the Indian brands only were eligible for duty credit scrips under the Served From India Scheme (SFIS). The High Court observed that the intention of the SFIS scheme is to accelerate growth in the export of services and to create a unique Served from India brand. The object can be achieved by encouraging those entities and conferring benefits and incentives to such companies who create an Indian brand. The entity establishing a foreign brand of service will not quality and cannot be held eligible for the SFIS benefit since the brand of such entity is already created, existing and established.

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

## High Court Decisions

### Disallowance under Section 40(a)(ia) of the Act on account of non-deduction of tax at source cannot be made where the payee has deposited tax while furnishing of return of income

During the year under consideration, the taxpayer had made a payment to Ansal Properties and Infrastructure Ltd. (APIL) without deducting tax at source. The AO made a disallowance for non-deduction of tax since the taxpayer did not deduct tax under Section 194J of the Act while making a payment to APIL. Before the Tribunal, the taxpayer contended that in view of the insertion of the second proviso to Section 40(a)(ia) of the Act, the payment made could not have been disallowed, since the payee had deposited the tax while furnishing the return of income. The taxpayer relied on the decision of the Agra Tribunal in the case of Rajiv Kumar Agarwal ACIT (ITA No. 337/Agra/2013).

The High Court observed that second proviso to Section 40(a)(ia) of the Act and first proviso to Section 201(1) of the Act state that where a person fails to deduct tax at source on the sum paid to a resident or on the sum credited to the account of a resident, such a person shall not be deemed to be an assessee in default in respect of such tax, if such a resident has furnished his return of income under Section 139 of the Act and has paid the tax due on income declared in the return of income. No doubt, there is a mandatory requirement under Section 201 to deduct tax at source under certain contingencies, but the intention of the legislature is not to treat the taxpayer as a person in default subject to the fulfilment of conditions as stipulated in the first proviso to Section 201(1) of the Act.

In the present case, what is common to both the provisos to Section 40(a)(ia) and Section 201(1) of the Act is that as long as the payee/resident (which in this case is ALIP) has filed its return of income disclosing the payment received in which the income earned by it is embedded and has also paid tax on such income, the taxpayer would not be treated as an assessee in default. The High Court held that the reasoning of the Agra Tribunal in the case of Rajiv Kumar Agarwal as regards the rationale behind the insertion of the second proviso to Section 40(a) (ia) of the Act and its conclusion that the said proviso is declaratory and curative and has retrospective effect from 1 April 2005 merits acceptance.

Accordingly, no disallowance under Section 40(a)(ia) of the Act is required when the payee has deposited tax while furnishing its return of income.

*CIT vs Ansal Land Mark Township (P) Ltd (ITA No. 160/2015) – Taxsutra.com*

### The Bombay High Court stays demand of tax till the CIT(A) disposes of the appeal

The taxpayer had received a grant of INR400 million from the State of Maharashtra under the state government resolution. These funds were made available to the taxpayer for the purpose of acquisition of land to carry out a project for development of airports and Special Economic Zones (SEZs) within Maharashtra. The AO passed the assessment order for the relevant year, treating the receipts as revenue in nature and demanded tax. The taxpayer had, in terms of Section 220(6) of the Act, sought a stay of demand of tax consequent to the assessment order, pending for the disposal of its appeal before the CIT(A). The AO had granted a stay of demand to the extent of 50 per cent of the tax payable till the disposal of the taxpayer's appeal before the CIT(A). Aggrieved with the said stay order, the taxpayer carried the matter to the CIT, which had refused to stay the demand on the ground that deposit of the amount would not cause financial hardship to the taxpayer. Out of the total amount received, only a part was utilised to acquire the land. Thus, the same cannot be treated as capital receipts. Therefore, the taxpayer filed a writ petition before the High Court.

The High Court observed that the rejection of the application for stay, on the ground that no financial difficulty is caused by the deposit, is contrary to the decision of the High Court in the case of UTI Mutual Fund vs ITO [Writ Petition No.523 of 2013]. The Bombay High Court in the case of Mumbai Metropolitan Region Development Authority vs DDIT [Writ Petition No.2348 of 2014, dated 29 October 2014] (Bom) had held that financial hardship is a factor which may have some bearing, if the authorities concerned are not convinced on a strong prima facie case in favour of the applicant. A strong prima facie case would be where the issue is covered by the decision of a superior forum or by a consistent practice to the contrary being followed by the tax department in the case of the taxpayer in the earlier years. The taxpayer pointed out that in earlier years commencing from AY 2005-06, the taxpayer had been receiving funds from the state government as grants for the acquisition of land. At no point in time had the tax department considered it as revenue in nature.

The taxpayer filed a statement indicating that out of the INR1.55 billion received, commencing from FY 2004-05 upto 2007-08, an amount of INR1.53 billion had been utilised for acquisition of land. The Commissioner of Income-tax [CIT] did not at any point of time, before disposal of the application, give the taxpayer any chance to explain the receipt and utilisation of funds. The assessment order being appealed against, does not rely upon the aforesaid fact of receipt and utilisation of funds. Therefore, the taxpayer had no occasion to point out these figures on its own. All the aforesaid factors would indicate that due consideration has not been received at the hands of the CIT. The CIT(A) has already commenced the hearing of the taxpayer's appeal filed from the assessment order. In view of the fact that the CIT(A) is seized of the matter and hearing it, it would be appropriate that given the peculiar facts of this case, the tax department does not adopt any coercive proceedings till such time as the CIT(A) disposes of the taxpayer's appeal arising out of such assessment order and for the period of two weeks thereafter. However, as the hearing has already commenced, the CIT(A) is being directed to dispose of the appeal as expeditiously as possible, preferably on or before the 15 December 2015.

*Maharashtra Airport Development Co. Ltd. vs DCIT [Writ Petition No.1471 of 2015] (Bom)*

## Levy of interest under Section 234B is automatic if prescribed conditions are met with, even when a calculation is provided in the form attached with the assessment order

During the year under consideration, the AO did not provide any direction in the assessment order for the levy of interest under Section 234B of the Act. The appellate order in the present case merely stated that interest is payable under Section 234B of the Act. The Tribunal held that since no direction had actually been given in the assessment order for payment of interest, the taxpayer's case would be covered by the decision of CIT vs Ranchi Club Ltd. [2001] 114 Taxman 414 (SC).

The High Court observed that the Supreme Court's decision in the case of CIT vs Ranchi Club Ltd. [2001] 114 Taxman 414 (SC), is a one line order which merely states that there was no merit in the appeals, and accordingly the civil appeals were dismissed. Following the Supreme Court's decision in the case of JK Synthetics Ltd. vs Commercial Tax Officer [(1994) 94 STC 422], the High Court in the case of Ranchi Club Ltd. vs CIT [1996] 222 ITR 44 (Patna) had held that the taxpayer is not supposed to pay interest on the amount of tax which may be assessed in a regular assessment under Section 143(3) or best judgement under Section 144 as the taxpayer is not supposed to know or anticipate that his return of income would not be accepted. The High Court further held that interest is payable in future only after the dues are finally determined.

The moment a taxpayer who is liable to pay advance tax has failed to pay such tax or where the advance tax paid by such a taxpayer is less than 90 per cent of the assessed tax, the taxpayer becomes liable to pay simple interest at the rate of one per cent for every month or part of the month. A levy of such interest is automatic when the conditions of Section 234B are met.

The facts of the present case are squarely covered by the decision in the case of Kalyan Kumar Ray vs CIT [1992 Supp (2) SCC 424], inasmuch as it is undisputed that Form I.T.N.S.150 contained a calculation of interest payable on the tax assessed. Accordingly, this form must be treated as a part of the assessment order in a wider sense, in which the expression has to be understood in context of Section 143, which is referred to in Explanation 1 to Section 234B of the Act.

*CIT v. Bhagat Construction Co. Pvt. Ltd. (Civil Appeal No. 1169 of 2006) – Taxsutra.com*

## The Delhi High Court held that a KPO service provider cannot be considered as a comparable for benchmarking international transactions entered into by an entity rendering voice call services or other low-end IT enabled services. Principles for choosing comparables under TNMM are also laid down

The taxpayer provides voice call services and operates on a cost plus form of remuneration. The taxpayer adopted TNMM and selected eight comparables rendering voice call services. The Transfer Pricing Officer (TPO) rejected the taxpayer's documentation, undertook a fresh search of comparables and made a TP adjustment. The DRP provided partial relief in respect of selection of comparables and confirmed the TPO's position to include eClerx Services Limited (eClerx) and Vishal Information

Technology Limited (Vishal) as comparables holding that these companies also provide Information-Technology Enabled Services (ITeS). The Tribunal upheld eClerx and Vishal to be comparables holding that no further sub-classification under ITeS is warranted for the purposes of a comparability analysis and rejected the taxpayer's arguments that eClerx and Vishal should not be considered as comparables as they have earned abnormally high margins.

### *High Court ruling*

- The High Court expressed reservations on the methodology for selection of comparables on a broad ITeS level as advocated in the Special Bench ruling in case of Maersk Global Centres (India) Private Limited vs ACIT (43 Taxmann 100) [2014].
- Entities performing voice call centre services and Knowledge Process Outsourcing (KPO) services may be employing different IT systems, services, functions, quality of manpower and undertaking different risks. Thus, comparing high-end KPO service providers with voice call centres would be unreliable and possibly flawed.
- The Tribunal view that there can be no subclassification of services falling under ITeS, was not accepted and such a view is contrary to the fundamental rationale of Arm's Length Price (ALP) determination.
- A comparability analysis under TNMM may be less sensitive to dissimilarities between the tested party and comparables. However, it cannot be the basis for diluting the standards of selecting comparable transactions/ entities and the provisions of Rule 10B(2) must be adhered to for selection of comparable companies showing a high degree of product and functional similarity.
- The Organisation for Economic Co-operation and Development (OECD) Guidelines and the provisions of the Act do not provide any guidance on removal of comparables only on the basis of high profit margins. Supernormal profits may in certain cases indicate functional dissimilarities having a material impact on the profitability and therefore, further analysis must be conducted to eliminate situations of any material dissimilarity between the taxpayer and the chosen comparable.

*Rampgreen Solutions Private Limited vs Commissioner of Income Tax (ITA No. 102/2015)*

# Tribunal Decisions

## Payment for capturing and delivering of live audio and visual coverage of cricket matches is neither treated as FTS nor royalty under the India-U.K. tax treaty

The taxpayer, a tax resident of the U.K., is a world leader in the field of multimedia coverage of sports events, including cricket. The taxpayer and the Board of Control for Cricket in India (BCCI) had entered into an agreement for capturing and delivering of live audio and visual coverage of cricket matches conducted under the brand name Indian Premier League (IPL). The taxpayer had contended that there existed a service PE and income attributable to the Indian operations was computed under the Transactional Net Margin Method (TNMM).

However, the Assessing Officer (AO) held that the amount received by the taxpayer was in the nature of FTS and also in the nature of royalty, and accordingly taxed the entire amount of gross receipts. The Dispute Resolution Panel (DRP) held that the concept of a 'service PE' does not have an application, once it is held that the gross receipts are taxable as FTS or royalty. The DRP held that the amount received by the taxpayer was in the nature of FTS under the Income-tax Act, 1961 (the Act) and the India-U.K. tax treaty.

## Tribunal's ruling

### *Fees for technical services*

It has been observed that the taxpayer produces the feed (programme content) of live audio-video coverage of cricket matches by using its technical expertise. After that, it delivers the feed (programme content) in the form of digitalised signals to the licencees (broadcasters). There was no dispute that the licencees (broadcasters) receive the feed on behalf of the BCCI. What is delivered by the taxpayer is a 'final product in the form of programme content' produced by using its technical expertise. The taxpayer does not deliver or make available any technology/know-how to the BCCI.

It was not disputed that the production of 'programme content' by using technical expertise is altogether different from the provision of technology itself. In the former case, the recipient would receive only the product and he could use it according to his convenience; whereas in the later case, the recipient would get the technology/know-how and hence he would be able to use the same on his own in order to produce any other programme content of a similar nature.

In the present case, the tax department has not established that the broadcasters (who are acting on behalf of the BCCI) or the BCCI itself has acquired the technical expertise from the taxpayer which would enable them to produce the live coverage feeds on their own after the conclusion of IPL cricket matches. In that case, the essential condition of the 'make available' clause fails and hence the amount received by the taxpayer cannot be considered as FTS under Article 13(4)(c) of the India-U.K. tax treaty.

## Royalty

The Tribunal observed that the tax department had not brought any material on record to show that the taxpayer had kept the ownership rights over the programme content. The tax department had noticed that the BCCI was required to supply certain equipments and therefore held that it would be taxable as equipment royalty under the Act as well as the tax treaty. However, the rationale behind this observation was not clear. If the taxpayer was using the equipments belonging to BCCI and if that activity is examined in isolation, then the taxpayer should be paying money to the BCCI for using the equipments. In the present case, the taxpayer has received the money for producing live coverage of cricket matches.

A careful perusal of the definition of 'royalties' under the tax treaty indicates that a payment, in order to constitute royalty, should have been made 'for the use of, or the right to use any copyright, etc'. However, here the payment was made by BCCI to the taxpayer for producing the programme content consisting of live coverage of cricket matches. There was nothing on record which indicates that the taxpayer had retained the ownership of the programme content.

The Tribunal relied on the decision of the Delhi High Court in the case of CIT vs Delhi Race Club [2015] 273 CTR 503 (Del). The Tribunal observed that though the said decision was rendered in the context of provisions of Section 194J of the Act, yet said section imports the definition of the term ‘royalty’ from Explanation 2 to Section 9(1)(vi) of the Act. In the present case, the BCCI becomes the owner of the programme content produced by the taxpayer. The job of the taxpayer ends upon the production of the programme content and the broadcasting is carried out by some other entity to which licence was given by the BCCI. Hence, the question of transfer of all or any right does not arise in the facts and circumstances of the instant case. Accordingly, the payment received by the taxpayer cannot be considered as ‘royalty’ under the tax treaty.

*IMG Media Limited vs DDIT (ITA No.1513/Mumbai/2014) – Taxsutra.com*

## Exempt capital gains are to be excluded while computing book profits under the provisions of MAT

The taxpayer is engaged in the business of development and leasing of commercial complexes and rehabilitation of buildings under the slum rehabilitation scheme. The taxpayer held a parcel of land as a capital asset and the said land was attached with development rights/Floor Space Index (FSI). During the Assessment Year (AY) 2009-10, the taxpayer transferred the development rights/FSI to its wholly owned subsidiary. The said transfer generated a Long-Term Capital Gain (LTCG) and the taxpayer disclosed the same as ‘extraordinary income’ in the profit and loss account. The taxpayer claimed that the LTCG is exempt under Section 47(iv) of the Act and hence was not regarded as ‘capital gains’ under Section 45 of the Act while computing total income under normal provisions of the Act. Further, the taxpayer did not offer the LTCG while computing book profit under Section 115JB of the Act by mentioning in the notes to accounts that it is a capital receipt and that the transaction is not regarded as a transfer under the Act. The AO did not agree with the contentions of the taxpayer and accordingly, included the capital gain while computing book profits under the provisions of Section 115JB of the Act. The Commissioner of Income-tax (Appeals) [CIT(A)] upheld the order of the AO.

### Tribunal’s ruling

#### *Computation of book profit under Section 115JB of the Act by mentioning in the notes to accounts*

The Tribunal relied on the decision of CIT vs Sain Processing Mills (P) Ltd. [2010] 325 ITR 565 (Del) and Hindustan Shipyard Ltd vs DCIT [2010] 6 ITR (T) 407 (Visakhapatnam) and observed that for the purpose of making adjustments under Section 115JB of the Act, it is not necessary that those items should have been specified in Explanation 1 to Section 115JB of the Act, since the net profit itself is arrived at by adjusting the effects of notes given in the notes to accounts. Accordingly, the profit and loss account should be read along with the notes to account. Hence, the net profit shown should be adjusted with the items given in the notes to accounts. The profits arising on the sale of a capital asset to its wholly owned subsidiary company should be excluded while computing book profits under Section 115JB of the Act.

***Transfer of a capital asset is not treated as income under Section 2(24) of the Act***

The provisions of Section 45 of the Act dealing with capital gains postulate three conditions. If all the three conditions are satisfied, then the profits or gains arising from the transfer of a capital asset shall be chargeable to tax under the head 'capital gains' and the same is included in the definition of 'income' under Section 2(24) of the Act. Even if a transaction falls under the definition of transfer as per the provisions of Section 2(47) of the Act, it shall not be chargeable to tax under Section 45 of the Act, in view of the provisions of Section 47 of the Act.

Section 10 of the Act provides various types of income, which do not form a part of total income. All those items of receipts shall otherwise fall under the definition of the term 'income' as defined in Section 2(24) of the Act, but they are not included in total income in view of the provisions of Section 10 of the Act. Since items mentioned under Section 10 of the Act are considered as 'incomes not included in total income' for some policy reasons, the legislature, in its wisdom, had decided not to tax such income under Section 115JB of the Act also, except otherwise specifically provided for. The logic of these provisions, is that an item of receipt which falls under the definition of 'income', are excluded for the purpose of computing book profit, since the said receipts are exempt under Section 10 of the Act while computing total income. Thus, it is seen that the legislature seeks to maintain parity between the computation of total income and book profit, in respect of an exempted category of income. If the said logic is extended further, an item of receipt which does not fall under the definition of 'income' at all and hence falls outside the purview of the computation provisions of the Act, cannot also be included while computing book profits under Section 115JB of the Act.

Accordingly, exempt LTCG are to be excluded while computing book profits under the provisions of MAT.

*Shivalik Venture Pvt. Ltd. vs DCIT (ITA No.2008/Mum/2012) – Taxsutra.com*

## Profit Split Method considered as the most appropriate method if activities performed by the taxpayer and its associated enterprises are inextricably linked and both the entities contribute to the value chain

The taxpayer was engaged in providing back-end software services to its Associated Enterprises (AEs), since, the initial year of establishment. During AY 2008-09, there was a restructuring, consequent to which there was a significant change in the business profile of the taxpayer as a result of which, it undertook the critical delivery function to the end-customers. The taxpayer selected the Profit Split Method (PSM) to benchmark its transactions with its AEs. A profit split ratio of 60:40 in favour of the parent company i.e. Infogain U.S. was arrived at, based on the functions/responsibilities of the taxpayer and interviews/discussions with key management personnel of the taxpayer and Infogain U.S. The TPO considered TNMM for ALP determination and proposed an adjustment. The DRP upheld the order of the TPO.

### Tribunal ruling

- The activities performed by the taxpayer and its AE are inextricably linked and both the entities contributed significantly to the value chain of provision of software services to the end-customers.

- The Tribunal placed reliance on the case of Aztech Software and Technology Ltd vs ACIT (ITA No 584/Bangalore/2006), Global One India Pvt Ltd. ACIT (ITA/5571/Del/2011) and OECD Transfer Pricing Guidelines 2010 to determine the Most Appropriate Method (MAM) for the arm's length analysis.
- The TPO failed to consider the role of the Global Delivery Organization (GDO) in India, which is responsible for delivery of services to customers globally and brought overall synergies for the group across geographies.
- In view of the approach adopted by the taxpayer in assigning weights to each activity in the entire value chain based on the interviews of the key management personnel and considering the fact that both the taxpayer and its AE are making a contribution, the Tribunal held that PSM is the MAM to be adopted.
- In the absence of an external uncontrolled transaction for comparison, the residual profit should be allocated on the basis of relative contribution that could have been made by the independent party based on key value drivers.
- A harmonious interpretation of provisions is required to make the rule workable and achieve the desired result of the determination of the ALP. Allocation of residual profits under PSM, based on contributions by each entity, was in concurrence with both the OECD TP Guidelines and the UN TP Manual for developing countries.

*DCIT vs Infogain India Pvt. Ltd. (ITA No. 6134/Del/2012)*

## Despite substantial single party purchases, there is no AE relationship, as requirement of influence over pricing and other conditions relating thereto are not satisfied

The taxpayer had entered into a distribution agreement with Terex GB Ltd. registered at Northern Ireland, for distributing its products in India. The taxpayer imported substantial amount of trading equipments from a group company of Terex GB Ltd. i.e. Finlay Hydrascreens Omagh Ltd. (FHOL), which is a wholly owned subsidiary of Terex Corporation. The TPO contended that since a substantial portion of the purchases of the taxpayer was from FHOL, the foreign company was exercising complete influence on the activities of the taxpayer. Accordingly, TP provisions are applicable in case of the taxpayer. The taxpayer contended that it is only a distributor and not an AE of FHOL. However, the TPO argued that substantial purchases (95.43 per cent) were made from a single party and thus held that the taxpayer was an AE of Terex Corporation. It was further held that the taxpayer should receive 5 per cent commission of the net sales value for the orders which were directly executed by the foreign company.

The DRP observed that the taxpayer had not influenced the sale price and other conditions relating thereto of Terex GB Ltd. Thus, the second condition required under Section 92A(2) (i) of the Act that states as 'the goods or articles manufactured or processed by one enterprise, are sold to the other enterprise or to persons specified by the other enterprise, and the prices and other conditions relating thereto are influenced by such other enterprise' is not satisfied. The DRP further observed that the relevant clauses of the agreement as referred to by the taxpayer suggest that both are independent parties. Thus, the DRP held that Terex GB Ltd. was not an AE of the taxpayer and the TP provisions were not applicable to the taxpayer. The DRP also observed that the agreement of the taxpayer is one of the routine, non-exclusive manufacturer-distributor agreement. On the basis of the said agreement, if both the persons are treated as AEs, then all manufacturers and their distributors will be considered as AEs and such a conclusion would be far-fetched.

### Tribunal ruling

- The findings given by the DRP stating there was nothing on record to suggest that the taxpayer or Terex GB Ltd. had influenced prices and other conditions relating to the said agreement/transaction, could not be countered by the Revenue. Revenue could not point out any distinguishable features so as to take a different view than that taken by the DRP.
- A bare perusal of the various clauses of the distributor agreement shows that both the parties in the said transaction are independent of each other.
- The Tribunal upheld the decision of the DRP and confirmed that Terex GB Ltd. is not an AE of the taxpayer as the conditions under Section 92A(2)(i) are not satisfied.

*DCIT vs W. B. Engineers International Private Limited (ITA No. 523/ PN/ 2014)*

## Revenue earned from distribution of news and financial information products is not taxable in India in the absence of a dependent agent PE or service PE under the India-U.K. tax treaty

The taxpayer is a resident of the U.K. engaged in the business of providing worldwide news and financial information products. The taxpayer produces, compiles and distributes the news and financial information products through 'Reuters Global Network' with a vast global communication network. The taxpayer uses the network to receive and transmit information and provide access of the compiled news and edited financial information to distributors in various countries. In India, the taxpayer provides 'Reuters products' to its Indian subsidiary named as Reuters India Private Limited (RIPL) under certain specified agreements. In turn, RIPL distributes 'Reuters products' to Indian subscribers independently in its own name. The taxpayer entered into a distributor agreement with RIPL as per which RIPL has been appointed as a distributor to sell designated 'Reuters Products' to subscribers in India using Reuters Global Network. During the relevant year, the taxpayer had deputed its employee, Mr. Simon Cameron Moore, as its News Bureau Chief (NBC) of Mumbai for gathering, writing and distributing news and its overall coverage of news.

In terms of the distributor agreement, the taxpayer had received distribution fees which was claimed to be non taxable in India in the absence of a PE. The AO held that revenue earned by the taxpayer was taxable as FTS under Article 13 of the tax

treaty. It was further held that RIPL constituted a dependent agent PE in India under Article 5(5) of the tax treaty and therefore, income was taxable under Section 44D of the Act on gross basis. The DRP held that the taxpayer had a PE in India in the form of RIPL, as it was dedicated for the business of the taxpayer. Further, Mr. Simon Cameron Moore was deployed in India as NBC during the relevant period, for rendering service to RIPL on the taxpayer's behalf and such services will constitute
as a service PE in India.

## Tribunal's ruling

### *Agency PE*

On referring to the relevant terms of the distribution agreement, it indicates that nowhere has it been specified or that there is any mandate stating that RIPL was habitually exercising its authority to negotiate and conclude contracts on behalf of the taxpayer in the territory of India, which is binding or can bind the taxpayer. It envisages simply delivering of Reuter services for a price which can be further distributed by RIPL for earning its own revenue. There was no clause in the agreement that RIPL will act as an agent on behalf of the taxpayer qua the distribution to subscribers. In fact, RIPL has an independent contract with the subscribers, which is evident from the contract agreement between RIPL and third party subscribers in India. Similarly, when RIPL is supplying news and material to the taxpayer, the same is again on a principal-to- principal basis. The second condition as mentioned in Article 5(4) of the tax treaty is also not fulfilled, because RIPL does not habitually maintain stock of any goods and merchandise, for which it can be held that it is regularly delivering goods on behalf of the taxpayer. Lastly, it is not habitually securing orders wholly and almost wholly for the taxpayer.

Even under Article 5(5) of the tax treaty, the activities of RIPL cannot be said to be devoted wholly or almost wholly on behalf of the taxpayer as it had entered into contracts with subscribers in India on an independent and on principal-to-principal basis for earning and generating its revenues. In fact revenue from third party subscribers was far excess than the transaction with the taxpayer. In the present case, it was not that the RIPL was completely or wholly doing any activity for the taxpayer and earning income wholly from the taxpayer only. Thus, the conditions laid down in Article 5(5) of the tax treaty are also not fulfilled.

### *Service PE*

There was no furnishing of services by the NBC to RIPL which had led to earning of a distribution fee to the taxpayer. As per the terms of the agreement, the taxpayer was merely delivering Reuters services to the distributors. The NBC has nothing to do with respect to providing of Reuters services to the distributor. The NBC was only acting as a chief reporter and text correspondent in India in the field of collection and dissemination of news. Thus, it cannot be held that the NBC constitutes a service PE in India for the taxpayer under Article 5(2)(k) of the tax treaty, as it has not furnished any services in India on which the taxpayer has earned a distribution fee.

*Reuters Limited vs DCIT (ITA No. 7895/Mum/2011) – Taxsutra.com*

# II. CENTRAL EXCISE

## Supreme Court Decisions

### Non-applicability of MRP based assessment to Accessories

In the present case, an appeal was filed before the Supreme Court and was limited to the question as to whether MRP based assessment applies to accessories.

The taxpayer had explained to the concerned Adjudicating Authority that 'woofers' are not an integral part of TV. Woofers are capable of functioning independently and even a TV can be operated without woofers. This contention was accepted by the Adjudicating Authority and accordingly, the demand was dropped. However, the Revenue aggrieved by the said order had appealed to the Customs, Excise and Service Tax Appellate Tribunal (CESTAT).

The CESTAT held that MRP based valuation is applicable only for notified goods. Woofers being an accessory and not notified, therefore, assessment under Section 4A of the Excise Act is not permissible and goods correctly merit valuation under Section 4 of the Excise Act. Subsequently, the Revenue filed a civil appeal before the Supreme Court against the said CESTAT decision. The Hon'ble Supreme Court dismissed the appeal and upheld the order of the CESTAT.

*CCE vs Viacom Electronics Pvt Ltd and others (2015-TIOL-202-SC)*

### Valuation of imports – lump-sum royalty and lump-sum trademark fee

In the present case, the issue was whether a lumpsum trademark fee and lump-sum royalty for technical know-how should be added to the value of imports made from related overseas suppliers. With respect to recurring royalty, the department admits that the same is not connected with the purchase of raw materials, whereas the lump sum payment is sought to be added to the assessable value of the raw materials. In the contract, it is clearly stipulated that the appellant had the freedom to procure the raw materials from any person, so long as the quality/standard is maintained. In these circumstances, it cannot be said that the relationship has influenced the supply price of the raw materials. Accordingly, the Supreme Court dismissed the appeal and mentioned that there was no good ground to interfere with the order passed by the Tribunal.

*CC vs Can Pack India Pvt. Ltd (2015-TIOL-201-SC)*

# III. FOREIGN TRADE POLICY

## High Court Decision

### Only Indian brands are eligible under the SFIS Scheme

In a batch of writ petitions filed before the Bombay High Court, the petitioners challenged the order passed by the Secretary, Department of Commerce and Industry, holding that the petitioners are not entitled to the duty credit scrip under the Served from India Scheme (SFIS) as they were not promoting Indian brands. The Mumbai High Court observed that the intention of the SFIS scheme is to accelerate growth in the export of services and to create a powerful and unique 'Served From India brand' instantly recognised and respected world over. Further the object, would be only by encouraging those entities and conferring benefits & giving incentives to such companies, who create an Indian brand. The role that Indian suppliers are expected to play in creating such a brand is underlined by making a reference to the persona and nationality of the shareholders and directors. The brand created should be served from India and must get recognition and respect world over. It is not the soil or piece of land which is important but the involvement of Indian suppliers, which is predominant.

The High Court further, observed, that anybody who earns foreign exchange is not entitled for the benefit as this will be contrary to the objective and purpose of the SFIS. The entity establishing a foreign brand of service and prior to the entry in India, therefore, will not qualify and cannot be held eligible for the SFIS benefit as the brand of such an entity is already created, existing and established. Such a foreign brand does not get recognised and respected world over as an Indian brand. Therefore, disagreeing with the Delhi High Court decision in the case of Yum Restaurant, the Mumbai High Court observed that the learned judge has construed the expression 'Indian Service Providers' narrowly and has not construed it in the backdrop of the policy measures and has read the paragraphs in the policy in isolation. Therefore, the views of the Delhi High Court are not agreeable. It has been held that SFIS scheme is only applicable to Indian brands.

*Shri Naman Hotels P Ltd with others [2015-TIOL-2090-HC (Mum)]*

# IV. VAT/CST

## High Court Decisions

### The High Court rejects distinction between statutory vs contractual right of sale; a sale of hypothecated goods by bank's are liable to VAT

In the present case, the issue before the Madras High Court was whether a bank, which holds hypothecation of vehicles in its favour would be a dealer within the definition under the Tamil Nadu Value Added Tax Act, 2006 (TN VAT Act), merely because the bank seizes and repossesses the hypothecated vehicle and conducts sale through public auction.

The AO resorted to revision of the assessment on subsequently finding that the taxpayer had sold thousands of repossessed vehicles from defaulting customers and that these sales were not reported in the returns and tax was not paid. Aggrieved, the taxpayer preferred to appeal before the Appellate Authorities, which were dismissed. Consequently, the taxpayer filed a revision petition before the Madras High Court against the order of the Tribunal. The taxpayer contended that a bank merely facilitates the sale of hypothecated vehicles and the sale of such hypothecated vehicles was only in its capacity of being an agent of the owner of the vehicle. The bank in itself is not competent to transfer the title in the vehicle to the purchaser and hence, would not get covered within the definition of the expression 'dealer' under the TN VAT Act.

The High Court noted that even though the ownership of hypothecated goods remains only with the person creating the hypothecation, the hypothecation agreement invariably contains clauses empowering the bank to repossess the vehicle in the event of a default and also to sell the vehicle without even involving the owner of the vehicle. Therefore, banks sell hypothecated goods only as agents of the owners, may not be completely true. Further, explanation to the definition of dealer also includes disposal of unclaimed goods and hence, the contention of the taxpayer that a seller of goods must be in a position to pass on the title, may not stand.

Given the above, the High Court held that since the explanation to the definition of dealer also includes sale of unclaimed goods, the distinction between a statutory right of sale and contractual right of sale cannot stand and hence, the auction of sale of sale of repossessed hypothecated vehicles by a bank is taxable under the TN VAT Act.

*HDFC Bank Limited, Chennai vs the State of Tamil Nadu [TS-479-HC-2015(MAD)-VAT-HDFC]*

## CST exemption available in respect of sale to a buyer's branch in the course of export by the head office

The issue before the Madras High Court was whether the taxpayer was entitled to benefit of Section 5(3) of the Central Sales Tax Act, 1956 (CST Act) when factum of export was proved but goods were actually sold to a branch office and Form H was given by the head office.

The taxpayer, had received an order from a branch office of its customer located at Madras, for supply of gloves which were to be exported to a foreign buyer. However, Form H required for claiming exemption under Section 5(3) of the CST Act against such sale was issued by the head office of the customer situated at Bombay, mentioning the port of loading as Bombay. The AO denied the exemption claimed by the taxpayer stating that the real exporter is the head office at Bombay and not the branch office at Madras. Accordingly, the AO held that the sale is to be treated as an outright sale liable to tax. Aggrieved by the same, the taxpayer preferred an appeal but did not get relief. Subsequently, the taxpayer preferred an appeal before the Tribunal which subsequently got transferred to the High Court.

The taxpayer pleaded that the branch office at Madras only acted as an intermediary in the course of export by the head office at Bombay, which contracted the supply of goods for export. Further, there is no differentiation between a branch office and a head office, where the branch office merely acts as an intermediary for enabling the export of goods under a contract of sale. The taxpayer also placed reliance on various decisions of the Supreme Court to contend that the requirement of Section 5(3) of the CST Act i.e. 'sale in the course of export' has been satisfied since the sale by the assesse to the branch office, for being exported to a foreign buyer through its head office, is intrinsically connected with the export.

The High Court observed that the reasoning provided by the AO that since Form H was provided by the head office, the real exporter was the head office was incorrect. The High Court further observed that it does not matter whether Form H was issued by the head office or the branch office, so long as the sale has occasioned the export. Furthermore, the SC in an earlier decision has already held that the presence of an intermediary for movement of goods in the course of execution of a contract would not make the matter different.

Given the above, the High Court held that the benefit under Section 5(3) of the CST Act would be available to the taxpayer.

*PVC Leathers, Paper Mills Ltd vs State of Tamil Nadu [TS-476-HC-2015(MAD)-VAT-PVC LEATHERS]*

## Non-levy of VAT on implementation of software

In the instant case, the matter involved applicability of VAT on 'software implementation' provided by Infosys Limited (taxpayer) to a bank. The assesse was providing a banking software tilted 'Finacle' to banks. The agreements between the assesse and the banks provided for the following activities separately:

- Sale of licence of Finacle (the same could be customised or otherwise depending upon the requirements of the bank);

- Implementation of the software (the same involved linking of Finacle with other softwares of the banks so as to integrate the entire system);

- Annual maintenance of Finacle (the same included updates and maintenance of Finacle) The assesse was discharging the following taxes in respect of the aforesaid transactions:

- VAT on sale of licence of Finacle (by treating the same as a right to use goods);

- Service tax on implementation of the software; and

- VAT and service tax on annual maintenance of the software (by treating the same as works contract)

The Karnataka High Court held that the implementation of software activity constitutes 'mere service' through skill and human effort and that there is no right to use goods liable to VAT. The High Court further held that, even if some software gets created during implementation, as per the agreement, the ownership automatically vests with the bank and the taxpayer has no copyright/proprietary right over it.

The bank has its discretion or an option to engage any service provider for implementation of the software and it is not a condition for granting a licence transferring right to use the software. Further, since delivery of a customised copyrighted software takes place once consideration is paid for grant of licences and is not contingent upon completion of implementation, VAT is not leviable thereto as a 'pre-sale expense'. Hence, the entire consideration is liable to service tax, which has already been discharged by the taxpayer.

However, the High Court upholds VAT on customised banking software, whose proprietary right vests with the taxpayer and what is granted is only a licence transferring right to use such a copyrighted article. As regards maintenance and upgrades, the High Court holds the same as 'goods' and 'deemed sale' effected in the course of rendition of annual technical support service by the taxpayer, liable to VAT as works contract. The taxpayer has rightly discharged VAT declaring self as a 'works contractor'.

*TS-481-HC-2015(Kar)-VAT-Infosys Ltd*

# V. SERVICE TAX

## High Court Decision

### Refund of service tax paid under mistake of fact allowed even when the refund application was time barred

In the instant case, the issue was whether the service tax refund application filed by the taxpayer beyond the stipulated period of one year under Section 11B of the Central Excise Act, 1944 (the Excise Act) should be allowed. The High Court allowed the refund application of the taxpayer on the following grounds:

- The decision of Apex Court in Mafatlal Industries Ltd. And others vs Union of India and others [(1997) 5 SCC 536] does not apply to the facts of the present case, since in the said decision it was held that the remedies under Section 11B of the Excise Act (which prescribes the time limit of one year) are available in specified cases i.e. when tax paid by an assesse is an unconstitutional/illegal levy or is paid on account of a mistake of law. In the present case, the levy was purely on account of mistake of fact (and not by a mistake of law) and hence, the present situation is not covered under Section 11B of the Excise Act.

- The distinguishing feature for attracting provisions under Section 11B of the Excise Act is that the levy should have the colour of validity when it was paid and only consequent upon interpretation of law or adjudication, the levy is liable to be ordered as refund.

*M/s Geojit BNP Paribas Financial Services Ltd. vs Commissioner of Central Excise Customs (TS-503-HC-2015(KER)-ST)*

## Notification & Circulars

### Time limit of Authorised Economic Operator (AEO) certificate increased

In order to reduce transaction cost and to facilitate the ease of doing business, the Central Board of Excise and Customs has decided that the validity of an AEO certificate shall be increased from three years to five years or for further period as extended by the Directorate General of Inspection Customs and Central Excise (DGICCE), subject to the yearly review by the AEO Programm Manager.

*Circular No. 21/2015 dated 19 August 2015*

### For the purpose of 'ease of doing business', delay in furnishing reply to queries raised should be reduced

With regard to trade facilitation for the purpose of 'Ease of Doing Business in India', the Central Board of Excise and Customs (CBEC) has instructed the officers that for the purpose of seeking general clarification, the queries should be raised upon importers/exporters in one go, and not in a piece meal manner. Further, field formation should consider listing of queries frequently raised in the course of assessment, and disseminate them through public notice or sensitise trade about the same, so that importers can take preventive action to avoid such queries, or be better prepared to reply to such queries.

*Circular No. 22/2015 dated 03 September 2015*

## Amendment in the procedure for filing applications under MEIS and SEIS

A public notice has been issued to clarify the procedure for applications under MEIS and SEIS Scheme by units located in SEZs and Export Oriented Units (EOUs). It has been clarified inter alia that Importer Exporter Code (IEC) holders having units in SEZs/EOUs shall apply to the concerned Development Commissioner of SEZs given in Appendix 1A for availing the Merchandise Exports from India Scheme (MEIS) and Services Exports from India Scheme (SEIS) benefits. In case, an IEC holder has units in a SEZ /EOU and Domestic Tariff Area (DTA) both, the DTA unit shall apply to the concerned Directorate General of Foreign Trade (DGFT) and the SEZs /EOUs shall apply to the concerned Development Commissioner of the SEZ.

Further, regarding the Port of Registration under MEIS, it is provided that SEZs being non-EDI ports, the scrip 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 a Telegraphic Release Advice (TRA).

*Public Notice No. 30/2015-20 dated 26 August 2015*

### Bihar

With effect from 8 September 2015, the threshold limit for charging tax by dealers, other than dealers engaged in the business of transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract and dealers engaged in the business of transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration, has been increased from existing INR0.5 million to INR1 million.

*Notification S.O. 211 dated 8 September 2015*

### Maharashtra

The Sales Tax Department, Maharashtra has generated Computerised Desk Audit (CDA) for the period April 2012 to March 2013 after analysing electronic data pertaining to e-returns, audit reports in Form e-704 and annexures uploaded by dealers. The CDA has resulted into findings of likely tax liability in respect of some of the dealers. The list containing the names of the dealers selected for CDA is uploaded on the department's website www.mahavat.gov.in. The dealer is no longer required to visit the sales tax office for the audit period, if he/she agrees with the findings of the CDA and pays tax and applicable interest as per the CDA observations.

*Trade Circular No. 12T of 2015 dated 14 August 2015*

The Government of Maharashtra in its state annual budget for FY 2014-2015 inserted a new entry in Schedule A (i.e. Goods exempted from payment of tax) as drugs for treatment of cancer. In continuation thereof, the Government of Maharashtra has notified the list of drugs for treatment of cancer, whether sold under a generic name or brand name, for the purpose of the said entry.

*Notification no. VAT. 1515/ C.R. 74/Taxation-1 Dated 12 August 2015*

### Nagaland

Electronically generated payment challan form 'e-challan' has been introduced for making payments of all kinds of taxes with a view to automate the process of payment of taxes and facilitate easy payment of taxes. Each 'e-challan' will have a Unique Transaction Reference Number (UTRN) for facilitating easy tracking and references.

*Notification No FIN/REV-3/UTRN/2014-15, dated 12 August 2015*

### Telangana

The Government of Telangana has prescribed seven per cent as the rate of discount for calculating and paying the net present value of deferred taxes by an industrial unit under Rule 67 of the Telangana Value Added Tax Rules, 2005. The discount rate of seven per cent prescribed is valid for a period of one year from the date of publication of the notification.

*Notification G. O. Ms No. 136 dated 17 August 2015*