November 2015

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

Foreword

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

Based on the suggestions received from our members, FICCI has submitted its Pre-Budget Memorandum 2016-17 to the Government on 25th October, 2015. FICCI has also been attending meetings convened by various ministries to discuss issues for the forthcoming Union Budget. Pre-Budget consultations with the Revenue Secretary are expected to take place later this month.

A meeting of the Standing Committee on Tax Deducted at Source (TDS) was convened by the Government on October 29, 2015. FICCI represented the issues and concerns relating to TDS faced by the industry in the meeting.

A meeting of the FICCI's Task Force on GST was held on 6th November, 2015, to specifically discuss the four reports on Business Processes for GST released by the Government namely (a) Registration (b) Payments (c) Refunds and (d) Returns. The meeting discussed FICCI's response on these reports. FICCI has since then submitted its recommendations on the abovementioned reports to the Government.

In the taxation regime, the Delhi Income Tax Appellate Tribunal in the case of Cincom System Inc. held that the consideration received by a foreign company for providing access to its internet, email and networking facilities by which it provides a gateway that will facilitate call centers for incoming and outgoing calls from India to the USA and vice-versa is taxable as royalty under the Income Tax Act, 1961 and under the India-USA tax treaty.

The Kerala High Court delivered an important judgment regarding sale of goods through online e-commerce portals. The taxpayer, a service provider engaged in facilitating transactions of sale or purchase of goods through its online portal was issued notices for payment of VAT on such sales. The taxpayer challenged the revenue authorities on the ground that it acted as a mere facilitator in the transactions through its online portal and was by itself not involved in carrying

out such sales and purchase. The invoices for the sale executed by the seller were raised after charging appropriate VAT or CST depending upon the local / inter-state movement of the goods. Observing that the situs of a sale was wholly irrelevant to determine the nature of a sale transaction, the High Court quashed the orders imposing penalty on the taxpayers (Flipkart Internet Private Ltd. v/s State of Kerala and others).

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

Ponds specially designed for breeding of prawns are treated as a plant which is eligible for depreciation under the Act

The taxpayer, a company engaged in the business of aqua culture, grows prawns in specially designed ponds. In the return of income, the taxpayer had claimed depreciation in respect of these ponds by raising a plea that these prawn ponds are tools for the business of the taxpayer and, therefore, they constitute as a 'plant' within the meaning of Section 32 of the Act. However, the AO disallowed the claim of the taxpayer. Earlier, the Division Bench of the Kerala High Court in the taxpayer's own case held that it is not a 'plant'. However, another Division Bench did not agree with the earlier decision and rendered a contrary decision. In the present case, the Supreme Court observed that the Division Bench of the High Court of Kerala which had given the latter decision should have referred the matter to a larger Bench, as otherwise it was bound by the earlier decision of the Coordinate Bench.

Appeals were filed against both the decisions and the validity of the decision rendered in the first case was also questioned by the taxpayer. The question before the Supreme Court was whether a 'natural pond', which as per the taxpayer is specially designed for rearing of prawns, would be treated as a 'plant' within Section 32 of the Act for the purposes of allowing depreciation thereon.

If ponds are 'plants', then they are eligible for depreciation at the rates applicable to plant and machinery and the case would be covered under the provisions of Section 32 of the Act. The decision of the Supreme Court in the case of CIT vs Karnataka Power Corporation [2002(9) SCC 571] decided this issue wherein the Court had taken into consideration the earlier judgments and suitably dealt with them. The tax department had contended that the pond in question was natural and not constructed/specially designed by the taxpayer. The Supreme Court did not agree with the same. The Kerala High Court's decision which was in favour of the taxpayer had specifically mentioned that the prawns are grown in specially designed ponds, which are not natural ponds. The court's decision rightly rests this case on a 'functional test' and since the ponds were specially designed for rearing/breeding of the prawns, they have to be treated as tools of the business of the taxpayer and depreciation was admissible on these ponds.

ACIT vs Victory Aqua Farm Ltd. [2015] 61 taxmann.com 166 (SC)

High Court Decisions

Payments of ISO certification and audit services are not FTS under the Act or under the India-Germany tax treaty

The taxpayer is a German company having a branch in India. The Indian branch is engaged in the business of audit and procedure of norms for ISO 9000 certification wherein a quality system

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auditor of the taxpayer visits the company which wants an ISO 9000 certification. These auditors shall carry out a preassessment audit after which a certification audit is conducted. Consequently, a report is prepared which is checked and verified by the taxpayer in Germany.

During the year under consideration, the taxpayer received a payment towards ISO certification and audit services. The taxpayer was of the view that the ISO certification and audit services do not fall under Article 12 of the tax treaty. It was taxable as business income under Article 7(1) of the tax treaty since business was carried out through a Permanent Establishment (PE) in India. The Assessing Officer (AO) held that the services rendered by the taxpayer were FTS under the tax treaty and therefore taxable as per Article 12 of the tax treaty. The CIT(A) upheld the order of the AO. The Mumbai Tribunal held that in an audit work there may be some incidence of advice given at the time of evaluation but it cannot be termed as a pure consultancy service since in the audit work, the auditor has to only evaluate the quality as well as environmental system. Accordingly, such services were not in the nature of in the nature of FTS.

The High Court upheld the order of the Tribunal and held that there is a finding which is rendered after examination of the taxpayer's records. Having analysed all this, the Tribunal concluded that the taxpayer's services are not of the nature that fall within the statutory provision. Therefore, the Tribunal's order cannot be termed as perverse or vitiated by any error of law apparent on the face of the record. Accordingly, such fees were not FTS falling within the provisions of Section 9(1)(vii) of the Act and Article 12 of the tax treaty.

DIT vs TUV Bayren (India) Ltd. (ITA No. 1304 of 2013) – Taxsutra.Com

Service tax collected shall not be included in the gross receipt while computing presumptive income under Section 44BB of the Act

The taxpayer is a company engaged in the business of providing equipment on hire and manpower, etc. for exploration and production of mineral oil and natural gas. The taxpayer filed its income tax return for the relevant year, declaring its income as per the provisions of Section 44BB(3) of the Act. In computing the gross receipts, the taxpayer did not include service tax received from its customers. However, the AO included service tax in the gross receipts for computing the taxable income under Section 44BB of the Act.

The High Court observed that Section 44BB of the Act begins with a non obstante clause that excludes the application of Sections 28 to 41 and Sections 43 and 43A to assessments under it. It states that 10 per cent credit of the amounts paid or payable or deemed to be received by the taxpayer on account of 'the provision of services and facilities in connection with, or supply of plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils in India' shall be deemed to be the profits and gains that are chargeable to tax. The purpose of this provision is to tax what can be legitimately considered as income of the taxpayer earned from its business and profession. The expression 'amount paid or payable' in Section 44BB(2)(a) of the Act and the expression 'amount received or deemed to be received' in Section 44BB(2)(b) is qualified by the words 'on account of the provision of

services and facilities in connection with, or supply of plant and machinery.' Therefore, only such amounts which are paid or payable for the services provided by the taxpayer can form part of the gross receipts for the purposes of computation of gross income under Section 44BB(1) read with Section 44BB(2) of the Act. Based on the decision of the Supreme Court in the case of CIT vs Lakshmi Machine Works [2007] 290 ITR 667 (SC), the present appeal is decided in favour of the taxpayer. The service tax collected by the taxpayer does not have any element of income and therefore cannot form a part of the gross receipts for the purposes of computing 'presumptive income' of the taxpayer under Section 44BB of the Act.

In this case, the High Court concurs with the decision of the Uttarakhand High Court in the case of DIT vs Schlumberger Asia Services Ltd. [2009] 317 ITR 156 (Utt). Service tax is not an amount paid or payable, or received or deemed to be received by the taxpayer for the services rendered by it. The taxpayer is only collecting the service tax for passing it on to the government. This position has been made explicit by the CBDT through two of its circulars. In Circular No. 4/20086, it was clarified that service tax paid by the tenant does not partake the nature of 'income' of the landlord. The landlord only acts as a collecting agent of the government for the collection of service tax. Therefore, Tax Deduction at Source (TDS) under Section 194-I of the Act would be required to be made on the amount of rent paid/payable, without including the service tax. In Circular No. 1/20147, it has been clarified that service tax is not to be included in the fees for professional or technical services and no TDS is required to be made on the service tax component under Section 194J of the Act. Accordingly, the amount of service tax collected by the taxpayer from its various clients shall not be included in the gross receipts while computing its income under the provisions of Section 44BB of the Act.

DIT vs Mitchell Drilling International Pvt Ltd [ITA 403/2013] (Del) – Taxsutra.com

Section 14A of the Act does not come into operation automatically. The AO must record that he/she is not satisfied with the correctness of the claim of the taxpayer

The taxpayer is engaged in the business of providing legal and other support services to law firms. These services are specifically related to search of trademark, patent and design out of the unique database created and owned by the taxpayer. During the year under consideration, the taxpayer had earned dividend income. The taxpayer claimed that since no expenses have been incurred for earning of such dividend income, Section 14A disallowance was not applicable.

The AO observed that the invocation of Section 14A is automatic and comes into operation, without any exception, as soon as the dividend income is claimed as exempt. The AO disallowed the payment under Section 14A read with Rule 8D of Income-tax Rules, 1962 (the Rules) and added the said amount to the total income of the taxpayer. The CIT(A) held that the taxpayer had sufficient funds and no interest expenditure was incurred which generated exempt income. Therefore, payment could not be disallowed under Section 14A of the Act.

High Court's ruling

The Delhi High Court observed that the AO has proceeded with the erroneous premise that the invocation of Section 14A of the Act is automatic and comes into operation as soon as the dividend income is claimed exempt. In Maxopp Investment (P) Ltd. vs CIT [2012] 347 ITR 272 (Del) the High Court held that:

- The requirement of the AO embarking upon a determination of the amount of expenditure incurred in relation to exempt income would be triggered only if the AO is not satisfied with the correctness of the claim of the taxpayer in respect of such expenditure. Therefore, the AO must accordingly record that he/she is not satisfied with the correctness of the claim of the taxpayer.

- It is only if the AO is not satisfied with the correctness of the claim of the taxpayer, that the AO gets jurisdiction to determine the amount of expenditure incurred in relation to such income, which does not form part of the total income under the said Act in accordance with the prescribed method.

- While rejecting the claim of the taxpayer with regard to the expenditure or no expenditure, as the case may be, in relation to exempt income, the AO would have to indicate cogent reasons for the same.

In the case of CIT vs Taikisha Engineering India Ltd. [2015] 370 ITR 338 (Del), the High Court disapproved of an AO's finding invoking Section 14A read with Rule 8D(2) of the Rules without recording his satisfaction and noted that the recording of satisfaction as to why 'the voluntary disallowance made by the taxpayer was unreasonable and unsatisfactory' is a mandatory requirement of the law. Accordingly, the disallowance under Section 14A of the Act cannot be made.

CIT vs I. P. Support Services India Ltd. (ITA No. 283/2014) – Taxsutra.com

Tribunal Decisions

Consideration for providing access to internet, email and networking facilities which provides a gateway to call centers for incoming and outgoing calls is taxable as royalty under the Act and under the India-USA tax treaty

The taxpayer is a foreign company engaged in the business of providing software solutions including creating personalized documents, management of solutions, etc. The taxpayer entered into a Communication Agreement' with Cincom Systems (India) Pvt. Ltd. wherein it was agreed that the taxpayer shall provide access to Cincom Systems (India) Pvt. Ltd. to the internet and other email and networking facilities along with other group concern. As a consideration for providing these services, the taxpayer was paid a certain sum. For the Assessment Year (AY) 2002-03, the taxpayer company offered such an amount as Fees for Included Services (FIS). However, before the Commissioner of Income-tax (Appeal) [CIT(A)], the taxpayer contended that the amount was not taxable in India. The CIT(A) held that the payment was not in the nature of FIS, however, held that it was in the nature of royalty.

The Tribunal observed that the AAR in the case of Abc [1999] 238 ITR 296 (AAR) held

that the definition of the expression 'royalty' under Section 9(1)(vi) of the Act read with clause (vi) of the Explanation includes rendering of any services in connection with any activities for the use of any patent, invention, secret formula or process, etc. In the instant case, the concept of 'source' against 'residence' becomes more significant as the issue relates to cyberspace activities. The transmission of information was through encryption as the data relates to clients and strict confidentiality was observed. It was for downloading of the software that the royalty is paid. In this context, the source rule becomes relevant which requires that royalty is sourced in the state of the payer. According to the agreement between the American and Indian company, the facilities were to be accessed only by the Indian company. The consideration payable was for the specific programme through which the Indian company was able to cater to the needs of the group companies located in Japan and other places. The transaction would be related to 'scientific work' and would partake the character of intellectual property and therefore, in the character of royalty. The software was customised and a secret. From the facilities provided by the American company to the Indian company, which were of the nature of online, analytical data processing, it would be clear that the payment was received as 'consideration for the use of, or the right to use design or model, plan, secret formula or process'. The use of the CPU and the consolidated data network of the taxpayer by the Indian company was not merely 'use of or the right to use any industrial, commercial or scientific equipment' as envisaged in Article 12(3)(b) of the tax treaty but more than that.

It was the use of an embedded secret software (an encryption product) developed by the American company for the purpose of processing raw data transmitted by the Indian company, which would fall within the ambit of Article 12(3)(a) of the tax treaty. The reliance placed by the taxpayer on the decision of the Delhi High Court in the case of Asia Satellite Telecommunication Co. Ltd. vs DIT [2011] 332 ITR 340 (Del) is totally misplaced. Accordingly, the ratio of the ruling of the AAR in the case of Abc was applicable in the present case and the consideration paid was in the nature of royalty within the meaning of Article 12(3) of the tax treaty.

Cincom System Inc. vs DDIT [ITA No. 952/Del/2006, AY: 2002-03] (Del) – Taxsutra.com

Lease rentals capitalised in the books of account is as an allowable expenditure under Section 37 of the Act

The taxpayer is a public limited company engaged in the business of manufacturing automobile lock sets. During the year under consideration the taxpayer acquired vehicles on finance lease. In terms of Accounting Standard 19 (AS 19) issued by the Institute of Chartered Accountants of India (ICAI), the assets acquired under financial lease were capitalised in the books of accounts and a consequent liability thereon was also created. However, under the Act lease rentals paid by the taxpayer was claimed as deduction under Section 37 of the Act. The AO disallowed the aforesaid claim of deduction on the ground that since the payments made by the taxpayer was in the nature of a 'finance lease', the same was required to be capitalised and not allowable as deduction under Section 37 of

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the Act. Further, depreciation was also not allowed on the purported cost of the fixed asset. The CIT(A) confirmed the disallowance under Section 37 of the Act.

The Tribunal held that AS19 i.e. accounting for leases issued by the ICAI is only applicable for accounting lease transaction in the books. The treatment in the books of accounts is not the determining factor of the liability towards income-tax for the purpose of the Act. For this proposition, the Tribunal relied on the decision of the Supreme Court in the case of Sutlej Cotton Mills Ltd. vs CIT [1979] 116 ITR 1 (SC), Kedarnath Jute Mfg. Co. Ltd. vs CIT [1971] 82 ITR 363 (SC). The Tribunal observed that, AS19 classifies lease transactions for accounting purposes as finance lease and operating lease. Finance lease, in AS19, is described as a lease that transfers substantially all the risks and rewards in respect of ownership of an asset; title may or may not be transferred under such lease. However, an operating lease is described as a lease other than a finance lease. AS19 provides that under the finance lease, the lessee should recognize the asset in its books and should charge depreciation on the same. In the case of operating lease, AS19 provides that the lessee should recognise lease payments as an expense in the profit and loss account and the lessor should recognize the asset given on lease and charge depreciation in respect of the same. The aforesaid distinction between finance lease and operating lease is not recognised under the Act.

Under the provisions of the Act, depreciation is admissible under Section 32 of the Act only to the 'owner' of the asset. Lease charges paid for the use of the asset, without acquiring any ownership rights in the same, are allowable as revenue expenditure under Section 37 of the Act. The Circular No.2 of 2001 dated 9 February 2001 issued by the CBDT provides that AS19 issued by the ICAI , which creates a distinction between finance lease and operating lease will have no implications under the provisions of the Act. Thus, the CBDT's view on the treatment of finance lease is not aligned to an accountant's perspective. For accounting purposes, although the lessee shows the asset in his balance sheet, charges depreciation in books of accounts and even makes an impairment provision, yet the taxpayer is not eligible to claim depreciation under the Act, which is allowed to the legal owner of the asset. Not only is the interest/finance/other charges component in the lease payments, but the entire lease payments are treated as a deductible expense and no deduction is allowed for the impairment provision. In the hands of the lessor, the entire 'lease rentals' and not merely the finance charges component thereof is taxed as income. The lessor, who is the legal owner of the asset, is entitled to claim depreciation under the provisions of the Act. The aforesaid legal position finds support from the decision of the Supreme Court in the case of ICDS Ltd. [2013] CIT 350 ITR 527 (SC).

The Rajasthan High Court in the case of Rajshree Roadways vs UOI [2003] 129 Taxman 663 (Raj) upheld the taxpayer's claim of allowability of lease rentals paid as a lessee of the trucks as a revenue expenditure under Section 37(1) of the Act, even though the lease was categorised as finance lease. Relying on the decision of CIT vs Banswara Synthetic Ltd. [2013] 216 Taxman 113 (Raj), Banashankari Medical & Oncology Research Centre Ltd [2009] 316 ITR 407 (Kar), CIT vs Tata Robins Fraser Ltd [2012] 253 CTR 227 (Jhar), it has been held

that a disallowance on account of lease rentals is not justified.

Minda Corporation Limited vs DCIT (ITA No.1962/Del./2012) – Taxsutra.com

The AO erred in adding back a transfer pricing adjustment to book profits under Section 115JB of the Act

The taxpayer rendered software development and business support services to its Associated Enterprise (AE) on a cost plus basis. The Arm's Length Price (ALP) of the said transaction was determined by considering the Transactional Net Margin Method (TNMM). The Transfer Pricing Officer (TPO), rejecting the Transfer Pricing (TP) study, carried out a fresh benchmarking analysis and made an adjustment. The Dispute Resolution Panel (DRP) upheld the adjustment made by the TPO, subject to: a) exclusion of the two comparables, b) granting a working capital adjustment as per the OECD Methodology c) furnishing the annual report of Wipro Technology Services Ltd. to the taxpayer and d) recomputing the operating margin of the taxpayer as well as comparable companies as per the guidelines provided by the Safe Harbor Notification dated 18 September 2013. The AO determined the total income under Minimum Alternate Tax (MAT) provisions after including the TP addition.

Tribunal ruling

Dispute on comparables: The Tribunal directed to exclude Persistent Systems Limited and Wipro Technology Services from the comparables set. For Zylog Systems Limited (Zylog), the Tribunal set-aside the issue back to the file of the TPO for reconsideration, subject to the availability of the audited segment data of Zylog's software development services segment and it qualifying all the filters applied by the TPO.

Nature of foreign exchange gain/loss (operating or not) : Relying on the decisions in the case of Westfalia Separator India Pvt. Ltd. vs ACIT (ITA No. 4446/D/02) and Fiserv India Pvt. Ltd. vs DCIT (ITA No. 6737/Del/2014), the Tribunal directed the AO/TPO to treat foreign exchange gain/ loss as an operating item.

Addition of TP adjustment by the AO, to the income assessed under Section 115JB (MAT): The Tribunal, stated that except for adjustments provided in Explanation 1 to Section 115JB(2) of the Act, no other adjustment can be made to book profits under Section 115JB and held that the TP adjustment could not have been added back to the book profits under Section 115JB of the Act. The case law relied upon by the Revenue was that of Rain Commodities vs DCIT (2010) 40 SOT 265 (Hyd) is not applicable in the present case as the Special Bench, following the decision the Apex Court in Apollo Tyres vs DCIT [2010] 40 SOT 265 (Hyd) and HCL Comnet (2008) 305 ITR 409 (SC), held that the AO cannot travel beyond the net profits declared by the taxpayer unless (a) it is discovered that the profit and loss account is not drawn in accordance with Part II and Part III of Schedule VI of the Companies Act or (b) incorrect accounting policies and accounting standards have been adopted for preparing such accounts and the method/rate of depreciation has been adopted incorrectly. In the present case, there is no such allegation or any such finding by the AO in the assessment order. The Tribunal directed the AO to exclude the

TP adjustment from the book profits computed under Section 115JB of the Act.

Cash Edge India Private Limited vs ITO (ITA No. 102/2015)

The TPO is not an expert on valuation and is bound to refer to the valuation report of the Departmental Valuation Officer as per the procedure laid down in the statute

During the assessment proceedings for AY 2006-07, the TPO observed that the taxpayer has incurred certain expenditure towards the purchase of fixed assets (including two second hand machineries). The taxpayer submitted a report from the approved valuer in the U.S. to justify the ALP of these two machineries. The TPO was of the view that the valuer has not provided the basis for arriving at the valuation and proceeded to make an adjustment to the extent of 50 per cent of the value of the second hand machinery. Further, the taxpayer paid certain amounts on account of a cost sharing arrangement wherein the AE was reimbursed the actual cost incurred. The TPO determined the ALP of the transaction at nil, stating that the information submitted by the taxpayer is incomplete. The DRP upheld the aforesaid disallowances.

Tribunal ruling

Purchase of second hand machineries

- The TPO was duty bound to refer the valuation of the machineries to the Departmental Valuation Officer (DVO) as per the procedure laid down under the statutory provisions, before rejecting the valuation report from the approved valuer indicating the fair market value of machineries purchased. The TPO not being an expert in determining the value of machineries, could not have quantified the value of the machineries at 50 per cent of the value shown by the taxpayer in the absence of any enquiry made by him to ascertain the fair market value of such machineries.

- The TPO is bound to determine the ALP by applying any of the methods prescribed under Section 92C of the Act. However, the TPO has determined the ALP on an adhoc basis.

- The TPO failed to refer the valuation to the DVO and proceeded to quantify the value of the machineries at 50 per cent, in violation of the statutory provisions of the Act. Therefore, the matter could not be restored back to the TPO. The Tribunal deleted the adjustment on account of disallowance of 50 per cent of the purchase value of second hand machineries.

Cost sharing arrangement

- The TPO failed to demonstrate what information was required from the taxpayer to establish that the payments made were for availing of services from the AE. The determination of ALP at nil without applying the method prescribed under the statutory provisions is legally unsustainable.

- The Tribunal observed that the TPO in the AY 2007-08, disallowed 20 per cent of the total cost incurred by the taxpayer towards such services which demonstrated that the TPO had accepted that the AE has provided certain services to the taxpayer and

that the taxpayer has availed such services in the subsequent year. Thus, the Tribunal deleted the adjustment.

Koch Chemical Technology Group (India) Limited vs ACIT (ITA No. 7236/Mum/2010 - AY 2006-07) & ACIT vs Koch Chemical Technology Group (India) Limited (ITA No. 8091/Mum/2011 – AY 2007-08)

AAR Decisions

Services in connection with the procurement of goods are taxable as FTS under the India-China tax treaty

The applicant is a company registered under the Chinese laws. The share capital of the applicant is held by Usha International Limited (UIL), having its registered office in India. The applicant has been set-up to carry out the business of import and export and also to provide services relating to the business of household electrical appliances and equipments, household goods and accessories, etc. to the Indian company. The applicant had entered into a Memorandum of Understanding (MOU) with UIL for providing services in connection with the procurement of goods by UIL from vendors in China. Subsequently, the MOU was converted into a service agreement. As per the agreement, the applicant has to render services to UIL in the form of new supplier's development, new products development, market research, price, payment terms, safety/performance/endurance test, review of the quality system, inspection through SGS, interaction with vendors and information sharing with UIL. While making the payment of service fees to the applicant company, UIL had deducted tax at source at the rate of 10 per cent, considering the payment was in the nature of FTS under the tax treaty. The applicant filed an application before the AAR on the issue of whether service fees received for providing services in connection with procurement of goods are taxable in India.

The AAR referred to the India-China tax treaty and the China-Pakistan tax treaty and observed that it is necessary to point out the distinction between the two. In the India-China tax treaty, the expression used is 'provision of services of managerial, technical or consultancy nature' while in the China-Pakistan tax treaty the expression used is 'provision of rendering of any managerial, technical or consultancy services'. The AAR observed that the expression 'provision of services' is not defined anywhere in the tax treaty. It is concerned only with the India-China tax treaty. Any other tax treaty either between India and another country or between China and an other country cannot influence the scope of the India-China tax treaty. This distinction clearly points out that the scope of 'provision of services' as in the India-China tax treaty is much wider than that of 'provision of rendering of services' as in the Pakistan-China tax treaty. Based on this distinction, the AAR in the case of Inspectorate (Shanghai) Limited [AAR No.1005 of 2010] held that 'provision of services' will cover the services even when these are not rendered in the other contracting state (i.e. India in this case) as long as these services are used in the other contracting state (i.e. India in this case).

On perusal of the list of services provided in the service agreement, it indicates that the applicant is not only identifying the products but also generating new ideas for UIL after conducting market research. It is also evaluating the credit, organisation,

finance, production facility, etc. and based on advice in the form of a report to UIL. Such an evaluation can only be given by an expert in the specific area. The applicant is also providing information on new developments in China with regard to technology/product/process upgrade. These are specialised services requiring special skill, acumen and knowledge. These services are definitely in the nature of consultancy services. Accordingly, it has been held that the amount of service fees received by the applicant from UIL for providing consultancy services is taxable in India.

Guangzhou Usha International Ltd. (AAR No 1508 of 2013) – Taxsutra.com

Notification & Circulars

The CBDT has introduced a new procedure for filing for self-declaration in the case of nil withholding of tax

The CBDT issued a Notification No. 76/2015, wherein it substituted the Rules with respect to a declaration to be furnished by specified persons in Form 15G or 15H while claiming the receipt of certain incomes without deduction of tax at source. In order to overcome the discrepancies faced by the earlier procedure for filing of a declaration, the CBDT introduced a new procedure for filing a nil withholding tax declaration with effect from 1 October 2015 which is follows:

- The declaration may be furnished in a paper form or electronically after duly verifying through an electronic process in accordance with the prescribed procedures, formats and standards.
- The payer shall be allotted a unique identification number to each declaration received by him in 15G and Form No.15H respectively during every quarter of the financial year in accordance with the procedures, formats and standards specified by the Principal Director-General of Income Tax (Systems).
- The payer shall furnish the particulars of the declaration received by him during any quarter of the financial year along with the unique identification number allotted to him in the statement of deduction of tax of the said quarter in the case of the amount paid/credited on which tax was not deducted.
- The payer shall furnish the statement of deduction of tax containing the particulars of the declaration received to him/her during each quarter of the financial year along with the unique identification number allotted to him/her, irrespective of the fact that no tax has been deducted in the said quarter.
- The Income Tax authority may, before the end of seven years from the end of the financial year in which the declaration has been received, require the payer to furnish or make available the declaration for the purposes of verification or any other proceeding under the Act.
- The Principal Director General of Income-tax (Systems) shall specify the procedures, formats and standards for the purpose of furnishing and verifying the declaration, allotment of a unique identification number and furnishing or

making available the declaration to the Income Tax authority and shall be responsible for the day-to-day administration in relation to the furnishing of the particulars of the declaration.

- The new Rule has also amended Form No.15G and 15H with respect to furnishing of a nil declaration.

CBDT Notification No. 76/2015, dated 29 September 2015

CBDT ordered to use email based communication for paperless assessment proceedings

The Central Board of Direct Taxes (CBDT) issued an order wherein it introduced email based communication for paperless assessment proceedings which can enhance the efficiency and usher in a paperless environment. The tax officer may use email as a mode of communication for sending the questionnaires, notice, etc. at the time of scrutiny proceedings and getting responses using the same medium on a pilot basis. This could eliminate the necessity of taxpayers visiting the income tax offices, particularly in smaller cases, involving limited issues and where the taxpayer is able to provide details required by the AO without necessitating his/her physical presence.

The CBDT has taken steps to set-up a standardized platform for making such email based communications between the taxpayer and the income tax department seamless and user friendly. It has decided to launch a pilot project in this regard in five non-corporate charges at Delhi, Mumbai, Bengaluru, Ahmedabad and Chennai stations. Initially, 100 cases for e-hearing could be identified in each of these charges and major part of the assessment processing could be conducted in an electronic mode. Also, the cases covered under the aforesaid pilot project should be those which have been selected for scrutiny on the basis of Annual Information Return/Central Information Branch information or non-matching with 26AS-data. A consent from the taxpayers should also be obtained in the beginning and cases of only willing taxpayers should be considered under the pilot project. The department officers, through their official emails, can interact with the taxpayers through emails as mentioned in the respective returns of income.

CBDT Order [F. No. 225/267/2015-ITA-II], dated 19 October 2015

II. SERVICE TAX

Tribunal Decisions

No service tax on service recipient, if the service provider has already discharged liability; penalty levied for non-compliance of law

The taxpayer was engaged in the provision of port services at Kakinada Port, which involved construction of berths for facilitating port operation, as well as carrying out other management and maintenance facilities. The tax payer had entered into a contractual agreement with the Government of Andhra Pradesh ('GOAP') whereby the GOAP had agreed to provide infrastructural support services to the taxpayer. The GOAP had discharged appropriate service tax on such services rendered by them to the taxpayer. A show cause notice was issued to the taxpayer demanding service tax on various issues which inter alia involved demand of service tax on such infrastructural services received from the GOAP under reverse charge mechanism as laid down under Notification No 30/2012 - ST dated June 20, 2012.

The Tribunal, observed that service tax could not be levied twice in a situation where taxable event was one and the same. Thus, service tax could not be demanded from the service recipient once the service tax liability was discharged by the service provider. It was further observed that the taxpayer had committed a mistake by not paying the service tax which they were liable to pay and such a mistake could not be corrected by recovering service tax twice on a single transaction, but by levying penalty on it. In view of the above, penalty was levied on the taxpayer for contravening provisions laid down under the service tax laws.

Kakinada Seaports Ltd vs Commissioner of Central Excise, Service Tax & Customs Visakhapatnam – II (ST/22657/2014 – DB) (CESTAT, Bangalore)

III. VAT/ CST/Entry Tax

High Court Decisions

Buyer not required to reverse input tax credit on account of post-sale discounts, where no adjustment in output tax liability has been claimed by the seller

The taxpayer, registered as a dealer under the Delhi Value Added Tax Act, 2004 ("DVAT Act") was engaged in trading of taxable goods. Notices demanding differential tax were issued to the taxpayer for failure to reverse Input Tax Credit ("ITC") previously availed by them, on account of post-sale discounts / incentives received by them from the corresponding selling dealers.

The taxpayer pleaded that since the selling dealer had neither adjusted the output tax as a result of offering discounts / incentives nor claimed refund, therefore, they were not required to adjust the ITC availed by them. They also produced certificates issued by the selling dealers before the Revenue Authorities ("RA"), evidencing the above. The Tribunal, however, held that the taxpayers were required to avail only proportionate ITC as the discounts /

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incentives subsequent to the sale reduce the sale price, leading to a corresponding increase in the ITC claimed by the buyer.

The High Court ("HC"), after examining the relevant provisions of the DVAT Act, observed that it was not mandatory on the part of the purchasing dealer to reduce his ITC in the absence of issuance of credit notes by the selling dealer. Further, Section 51(a) of the DVAT Act does not mandate the selling dealer to issue a credit note in cases where no adjustment in output tax liability has been sought by the selling dealer. In light of the above, HC held the demand to be inadmissible.

Challenger Computers Ltd & Others v Commissioner of Trade & Taxes, Delhi & Others (ST Appl 76/2014) (HC, Delhi)

Benefit of subsequent in-transit sale not allowable in case of inter-state supplies effected under indivisible works contract

The taxpayers were contractors engaged in execution of Engineering, Procurement and Construction ("EPC") contracts for different customers. The contractual arrangement between the taxpayer and the contractee ('"owner") was such that the taxpayers were required to sell the goods to the owner, during transit, by endorsement of the lorry receipts. These goods, which were to be used in the execution of EPC Contract, were procured from identified suppliers outside the state on which tax was paid by the taxpayer under Section 3(a) of the Central Sales Tax Act, 1956 ("CST Act"). The taxpayer claimed exemption from payment of tax on the above transaction of sale as a subsequent sale under Section 6(2) of the CST Act.

The RA denied the benefit of Central Sales Tax ("CST") exemption and sought to levy Value Added Tax ("VAT") on the ground that:

- The concept of subsequent sale under Section 3(b) and Section 6(2) loses its relevance in case of works contract as the goods in the case of Works Contract are transferred through accretion

- The contract was essentially for execution of 'works' and therefore any transfer of property pursuant to such contract would be eligible to VAT as a deemed sale

- Contracts are artificially split by the parties between supply of service and goods to claim the benefit of exemptions under CST Act

The matter came up for consideration before the HC. The HC, after analysing the agreements between the parties in detail and the jurisprudence on similar issues observed that –

- While the form of the contracts indicate that they are two separate contracts, in substance they are one single indivisible works contract

- A contract of sale entered into either before commencement of movement in the first State, or after completion of movement of the goods in the second State, can neither be a Section 3(b) sale nor a subsequent in-transit sale exempt under Section 6(2) of the CST Act

- Notwithstanding the bailment/free issues and liquidated damages clauses in the contract entered into between the taxpayer and the owner, the parties to the contract intended that the title to the goods would be transferred only at the time of execution of EPC Contract and not prior thereto

- For a sale to be exempt under Section 6(2), sale contract should come into existence and title to goods should be transferred during movement alone. However in the instant case, it was evident that sale contract came in existence much prior to movement of goods and the transfer of title to the customer took place only after erection and commissioning of the plant

Consequently, although the benefit of subsequent sale was denied to the taxpayer, however the HC held that such supplies were nonetheless inter-state sales falling under Section 3(a) of CST Act. Mere fact that goods delivered were incorporated in the works within the state would not make it an intra-state sale within the State.

The HC, however granted the benefit of sales in the course of import under Section 5(2) of the CST Act, where the bill of lading was endorsed in favour of the owner and not the contractors. HC in this regard noted that the property in the goods was transferred to the owner prior to import of goods and not at the time of execution of works contract.

Larsen & Toubro Ltd. & Others vs. State of Andhra Pradesh (WP No 22960 of 2007) (HC, Telangana and Andhra Pradesh)

Sale of goods to customers by sellers through an online e-commerce portal would not invite 'VAT' in the hands of the owner of the online portal

The taxpayer, a service provider engaged in facilitating transactions of sale or purchase of goods through its online portal, was issued notices for payment of VAT on sales effected through such online portal. The sellers of the products, on the occurrence of a sale, were raising invoices charging appropriate amount of tax VAT/CST on the sale, depending on the local / inter-state movement of goods. A show cause notice was issued to the taxpayer imposing penalty for contravention of the provisions of the Kerala Value Added Tax Act ("KVAT Act"), premised on the following contentions:

- Local sales were effected by the taxpayer in Kerala, since the product was delivered in the state of Kerala from an online portal, whose situs could be traced to Kerala

- Even if the taxpayer was not the seller of the product, the taxpayer could be held liable to tax under KVAT Act as the online portal could be seen as an intangible shop and the situs of the sale would be in Kerala where the agreement to sell was made

The taxpayer challenged the contentions of the RA on the following grounds:

- The taxpayer acted as a mere facilitator in the transactions of sale and purchase effected through its online portal and was by itself not involved in carrying out such sale and purchase. The invoices for

sale executed by the seller were raised after charging appropriate VAT or CST depending upon the local / inter-state movement of the respective goods

- No sales were made in Kerala as the said sales occasioned the movement of the respective goods from outside the State to various locations within the State of Kerala, and were thereby liable to CST

- The online portal could not been seen as premises within Kerala as the taxpayer did not own any premise within the jurisdiction of KVAT Act where the sellers could stock / store the goods for the purpose of sale

The HC observed that the situs of a sale was wholly irrelevant to determine the nature of a sale transaction. Further, no specific fact finding was carried out by the RA to treat the sales effected by the taxpayer as local sales as such finding was necessary to have the jurisdiction to proceed against the taxpayer under the penal provisions of the KVAT Act. The HC observed that notices cannot confront an assessee regarding an offence with definitive conclusions, it would lead to mockery of the quasi-judicial adjudication. In light of the above, the HC quashed the orders imposing penalty on the taxpayers and rebuked the RA for mindless issuance of notices and orders on taxpayers.

Flipkart Internet Private Limited vs State of Kerala & Others (WP(C) No 5348 of 2015(P)) (HC, Kerala)

Implementation of customized software would amount to a pure service activity, not liable to VAT

The taxpayer was engaged in the implementation of Enterprises Resource Planning ("ERP") solutions and was discharging its service tax liability on the same, under the belief that such activities constituted pure services. The RA sought to levy VAT on such activities contending that the said activities involved a transfer of property in goods, in the form of software. The matter came up for consideration before the Tribunal, wherein the Tribunal observed that the activity of implementation of ERP did not result in the development of new software as it involved codification of software, which was already in existence in the system of the customers.

Consequently the RA filed a revision petition before the Karnataka HC, wherein the HC gave its observations by placing reliance in case of *Infosys Limited (Kar HC).* The Infosys decision laid down that implementation of ERP of a customized software was a pure service rendition and does not involve any transfer of property. If any source coding or scripting is done during the process of implementation, the ownership of the same did not vest with the software developer and the same rested with the customer. The same would be considered as a pure service contract, with no sale of goods. Accordingly, the HC observed that implementation of ERP solution did not result in transfer of any goods and therefore was to be considered as a pure service activity.

The State of Karnataka vs IBM India Pvt Ltd (STRP No 215/2011) (HC, Karnataka)

IV. CENTRAL EXCISE

Supreme Court Decisions

Rebate of excise duty admissible on both inputs as well as finished goods meant for export under Rule 18 of Central Excise Rules

The issue before the Supreme Court ('SC') was whether a manufacturer exporter is entitled to refund of excise duty paid on inputs as well as on finished goods that are exported outside India. The said dispute arose in context of the interpretation of the word 'or' occurring in Rule 18 of the Central Excise Rules, 2002 which provides for grant of rebate of excise duty paid on excisable goods 'or' duty paid on materials used in the manufacturing of such exported goods.

The SC observed that the interpretation of the word 'or' occurring in Rule 18 has to be in consonance with the statutory scheme and the intention of the legislature, which was to rid exports of taxes. It was further observed that the Notifications issued under the said rule provided detailed procedures for enabling an exporter to claim rebate of duty both on inputs and final goods. In view of the same and keeping in mind that both the Rule as well as the Notification had been framed/ issued by the Central Government, the SC held that the word 'or' occurring in Rule 18 could not be assigned a literal meaning and had to be read as 'and' to keep it in accord with the understanding of the rule maker. It was observed in this ruling that wherever the use of the word 'and'/'or' produces irrational results, the court has the power to read 'or' as 'and' and vice versa to give effect to the intention of the legislature, which is clear.

In light of the above, the SC allowed the benefit of rebate to the taxpayer not only on materials used in the manufacture of goods but also on goods that are produced and ultimately exported on payment of excise duty.

M/s Spentex Industries Ltd vs Commissioner of Central Excise & Ors (Civil Appeal No 10534 of 2013) (SC)

Cash discount to be taken into consideration for arriving at "transaction value" in terms of Section 4 of Central Excise Act, 1944

The issue before the SC was whether the taxpayer is entitled to claim deduction on account of volume discount and cash discount for the purpose of payment of excise duty, being discounts which are passed onto customers after removal of goods from the factory. The dispute pertains to the period after July 1, 2000 i.e., under the scheme of assessment based on 'transaction value', as prior to July 1, 2000 the position with respect to cash discount was well settled in favour of the taxpayer.

The SC, while delving into the legislative history of Section 4 of the Excise Act, noted that the common thread running through Section 4, whether it is prior to or after the amendment of June 2000, is that excisable goods have to have a determination of 'price' 'at the time of their removal'. This basic feature of Section 4 did not change even after the said amendment.

The SC noted that since cash discounts are known to the parties even prior to removal

of the goods; it must be deducted from assessable value. Further, it was clarified that the term 'when sold' in the definition of 'transaction value' merely indicates that the goods are the subject matter of the agreement of sale, and not the time when such goods are sold. Accordingly, the limited question of deductibility of cash discount was answered in favour of the taxpayer.

Purolator India Limited vs CCE, Delhi-III (Civil Appeal No 1959 of 2006) (SC)

Buyer's premise cannot be treated as 'place of removal', on the ground that the transit insurance policy has been obtained by the manufacturer-supplier

The taxpayer was engaged in the manufacture and sale of excisable goods to buyers and the price of the goods was 'ex-works'. The taxpayer arranged for the transportation of the goods till the buyer's premises and also obtained an insurance policy to cover the risk of loss or damage to the goods while in transit, the expenses of which were subsequently recovered from the buyers. The taxpayer was discharging excise duty on the sale value of goods treating the factory gate as the place of removal, exclusive of freight and insurance charges recovered by them from the buyers. The RA sought to levy excise duty on the freight charges incurred on the transportation of goods till the buyer's premises contending that the property in the goods remained with the taxpayer while the goods were in transit as the taxpayer had taken out an insurance policy covering the risk of loss or damage to the goods in transit.

The SC noted that the conceptual understanding around the definition of 'place of removal' under Section 4 of the Excise Act, whether prior to or after the amendment of July 1, 2000, demonstrates that the 'place of removal' shall be the place from where the manufacturer is to sell the goods manufactured by him and not the buyer's premises. The reference of place of removal could be drawn to the buyer's premises only if the provision would have used the expression 'have been sold' instead of 'excisable goods are to be sold'.

The SC further relied on the principle laid down by the Tribunal in the case of Escorts JCB Ltd vs CCE, cited supra and the Circular dated March 03, 2003 and observed that the question of ownership of goods in transit cannot be determined solely with reference to the insurance policy taken out by the manufacturer. It was observed that in this case all the prices were ex-works and the goods were cleared on payment of appropriate sales tax by the taxpayer, thereby indicating that it had sold the goods at the factory gate. Further the excise invoices were prepared in the name of the customer, at the time of the goods leaving the factory and the taxpayer did not reserve any right of disposal of goods in any manner on handing over the goods to the transporter. In view of the same, the SC held that freight and transit insurance charges are not includible in the assessable value for the purpose of payment of excise duty.

Commissioner of Customs and Central Excise, Nagpur vs Ispat Industries Ltd (Civil Appeal No 637 of 2007) (SC)

High Court Decisions

Interest is payable on differential excise duty charged on supplementary invoice consequent to a price escalation / variation clause

The taxpayer was engaged in manufacturing conductors, cables and transformers. The taxpayer entered into a contractual arrangement with a customer which contained a price variation clause. As a result of such clause, supplementary invoices were raised by the taxpayer for payment of the differential excise duty, however no interest was paid by the taxpayer on such differential duty. The RA raised a demand for interest on the ground that such differential duty arose on account of upward revision in price which had become payable as on the date of clearance of goods.

The HC in this case followed the ratio laid down by the SC in the case of *Commissioner of Central Excise, Pune vs SKF India Limited (2009 (239) ELT 385)* and held that the payment of differential duty after the date of clearance indicated short payment / short levy on the date of removal and hence interest was payable on such differential duty amount.

Commissioner of Central Excise vs M/s Jayashree Cables & Conductors Pvt Ltd & Anr (CMA No 266 of 2010) (HC, Madras)

Tribunal Decisions

Advance payment of deferred sales tax amount under the sales tax incentive scheme as an alternative option, does not disallow deduction of 'deferred sales tax payable' from the assessable value for payment of excise duty

The taxpayer was engaged in the manufacture of excisable goods and availed the benefit of deferred sales tax scheme under Package of Incentives 1993 declared by the Maharashtra Government.

While the scheme allowed taxpayers to pay the amount of sales tax collected from customers after a prolonged period i.e. in the 11th or 15th year, an alternative option was provided subsequently which enabled the taxpayer to make an advance payment of the sales tax on the Net Present Value ("NPV") of the deferred sales tax. The amount paid under the advance payment method on the NPV would differ from the originally deferred sales tax amount.

Thereafter the taxpayer discharged its excise duty liability at the time of clearance of goods after claiming a deduction of the amount of sales tax 'actually payable' on such goods, as per the definition of 'transaction value'. The dispute raised by the authorities was that the taxpayer was eligible to deduct only the NPV amount from the selling price and not the sales tax actually payable under the scheme, considering the NPV amount was far less than the amount actually payable under the deferral scheme.

The Tribunal, in this regard, relied on CBEC's view over the years and observed the following:

- Relevance of the term 'actually paid' and 'actually payable' is to be

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determined at the time of removal. Also the term 'actually paid' is not relevant in the present case, as what is relevant is 'actually payable', which is the deferral sales tax payable at the time of clearance

- Where an amount equal to NPV of deferred tax is paid, the same is deemed to be the deferred sales tax paid. Thus as far as the sales tax authorities are concerned, the whole of the deferred sales tax amount payable by the taxpayer has actually been paid. The fact that the same has been paid after the clearance of the goods and before the deferred date of payment will not make any difference

- As under the sales tax law, payment equal to NPV of deferred tax is considered to be the deemed payment of sales tax, it cannot be said that there is any difference between the two

Thus even though the amount paid as per the NPV was far less than the amount actually payable under the deferral scheme, the Tribunal held that the deduction of the amount of 'deferred sales tax payable' shall be allowed from the assessable value for the purpose payment of excise duty.

Commissioner of Central Excise, Raigad vs Uttam Galva Steels Ltd (Civil Appeal No E/85253/14-Mum) (CESTAT, Mumbai)

V. CUSTOMS

Supreme Court Decisions

SAD exemption under Notification 34/98-Cus not available for goods on which no sales tax is chargeable

The taxpayer had imported pig hair bristles and claimed an exemption under Notification No 34/98-Cus dated June 13, 1998 ("Exemption Notification") which provided for 'Nil' rate of Special Additional Duty ("SAD") on goods falling under First Schedule of Customs Tariff Act,1975, imported for sale 'as such'. Proviso to Notification 34/98 provides that exemption shall not apply if the importer sells the said imported goods from a place located in an area where no tax is chargeable on the sale or purchase of goods.

The RA sought to deny SAD exemption on the ground that the goods are 'tax free' goods and no tax is paid on the subsequent sale of the goods after import, leading to non-fulfilment of condition prescribed in the Notification.

The SC, agreeing with the views of the RA held that it was apparent on perusal of the relevant provisions of the state sales legislation that the goods were ab-initio exempt from sales tax. Accordingly, the aforementioned proviso would get attracted and therefore, the Exemption Notification would not apply.

Commissioner of Customs v Seiko Brushware India (Civil Appeal No 216 of 2007) (SC)

High Court Decisions

Service provider promoting a foreign brand is not entitled to duty credit scrip under Served from India Scheme ("SFIS") of Foreign Trade Policy 2009 -14

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The taxpayer, a company incorporated under the Indian Companies Act 1956 and having its registered office in India, was engaged in the provision of a wide range of engineering, procurement, construction and management services as well as lump sum turn-key projects for various industrial plants both in India as well as overseas. The taxpayer had applied for duty credit entitlement under SFIS with respect to overseas service assignments provided from India, for which they had also received consideration in convertible foreign exchange. However, the RA contended that the taxpayer is not entitled to the Duty Credit scrip under SFIS, as the taxpayer was promoting 'Thyssenkrupp' brand which was not an Indian brand and that the taxpayer was therefore not an Indian service provider.

The taxpayer relied on Delhi HC's ruling in the case of *M/s Yum Restaurants (I) Pvt Ltd (DEL HC)* where on an identical issue the Delhi High Court held that the benefit of SFIS would be available to a service provide who accelerates the growth in export of services from India, ever if it is promoting a foreign brand. The HC, contrary to the Delhi HC Ruling held that SFIS is for encouraging the growth of 'Indian Service Providers' through home exports. The entity establishing a foreign brand of service and prior to entry in India cannot be held to be an Indian service provider eligible for the benefit of SFIS. It further held that the Delhi HC ruling construed the policy narrowly and the real intention of SFIS is to accelerate growth in export of services so as to create a powerful and unique 'Served from India brand'

Thyssenkrupp Industrial Solutions India Private Limited & Ors v UOI & Others (Writ Petition No 33 of 2015) (Bombay, HC)

Benefit of Served from India Scheme ("SFIS") not admissible to foreign brands like the 'Four Seasons' Hotel

The taxpayer, an Indian service provider, was engaged in the provision of hospitality services under the name of a foreign brand name in India. The taxpayer was granted the benefit of duty credit in respect of foreign exchange earned by them under the SFIS, prescribed under Foreign Trade Policy, 2009-2014 ("FTP"). Consequent to a Policy Interpretation Committee ("PIC") meeting on December 27, 2011, a show cause notice was issued to the taxpayer for recovery of duty credit entitlement granted in respect of the foreign exchange earnings in FY 2011-12. The contention of the PIC was that the brand under which the taxpayer operated its hospitality business was not Indian.

The matter came up for consideration before the HC wherein the Court placing reliance on the ratio laid down by Division Bench in case of *Shri Naman Hotels Private Ltd vs the Union of India and Others (Writ Petition No 33 of 2015)* observed that the main objective behind the SFIS scheme was the creation of a unique 'Served from India' brand recognized and respected world over and to highlight the role that Indian suppliers were supposed to play in encouraging India's brand. An entity establishing a foreign brand of service would not be eligible for the SFIS benefit, since the brand of such an entity was already created, existing and established, hence would not be unique much less served from India exclusively. In view of the

above, the HC dismissed the contentions of the taxpayer and refused to allow the benefit of duty credit under the said scheme. However, the HC refrained the Revenue from recovering incentives granted under prior policies and earlier to FTP 2009-14

Provenance Land Pvt Ltd vs the Union of India (Writ Petition No 359 OF 2015) (HC, Bombay)

Payments made under agreements for transfer of technical know-how and usage of trademark not includable in assessable value for calculating customs duty

The taxpayer apart from the agreement for import of raw material, entered into two agreements with their related principals situated abroad. One was for the use of trademark and other was for supply of technical know-how. The trade-mark was allowed to be used for goods manufactured by the taxpayer using technical know-how supplied by the Principal. For both the agreements, the taxpayer was required to pay one-time fee and ongoing fee at a specified rate (specified in respective agreement), on the sale of goods manufactured by them. The supply agreement also contained a clause that the taxpayer was free to procure raw materials / components from third parties subject to maintenance of quality standards.

The RA sought to include the value of one-time lump sum fee paid by the taxpayer under the trademark and technical know-how agreement into the value of raw material imported from related parties. On the ground that same are paid as a 'condition of sale' for the purchase of raw-materials from the related parties. However, no duty was proposed on the running royalties on the ground that in the case of lump sum payment, the law is not settled whereas in the case of running royalty the law is settled against the Revenue. The taxpayer contended that two separate yardsticks cannot be adopted for inclusion / exclusion of royalty merely because mode of payment of royalty is different.

The Tribunal in this case *inter alia* placed reliance on the ruling of the SC in Mahindra & Mahindra (SC) case and held that supply agreement between the taxpayer and related suppliers imposed no restriction on procurement of materials from any other person subject to fulfilment of quality requirements. Thus, Mumbai Tribunal rejected the Revenue's contention that lump-sum royalty payment is a condition of sale for purchase of raw materials from related foreign entities, and is hence includible in the assessable value of imported goods.

The appeal filed by the RA to SC was dismissed by the SC on merits in the present case.

Commissioner of Customs (Import), Mumbai v Can Pack (India) Pvt Ltd [2015-TIOL-201-SC-CUS-LB]

Drawings / designs imported in a CD format constitute Information Technology software 'IT software', subject to fulfilment of specified criteria

The issue was whether the designs and drawings imported in the form of a CD, would be covered by the expression IT

software, under Chapter Heading 8523 8020 of the Customs Tariff Act, 1975, attracting 'nil' rate of duty. The adjudicating authorities sought to contest the classification of these designs and drawings as an IT software on the ground that CD did not have any source code or an object that would have inherent capability / feature of being manipulated. The Tribunal while analyzing the definition of IT software, provided under Supplementary Note to Chapter 8523, held that drawings / designs imported in CD format would constitute as an IT software, as it satisfies the following conditions:

- The drawings on the CD when used with another software called AUTOCAD, would be capable of being zoomed in, viewing from a cross section area, *etc*, thus the drawings / designs imported on the CD are in a machine readable format
- It provides interactivity to the user and is also capable of being manipulated, as its length and breadth could be changed, it could be repositioned, the design could be changed entirely, *etc*

The Tribunal observed that the aforesaid principles were also laid down by the SC in the case of *Pentamedia Graphics Limited* and the Tribunal in case of *Gayatri Impex Limited.* The Tribunal accordingly held that even though there was absence of source code / object code in such imported CD's containing drawings / designs, the same would not debar it from qualifying as an IT software.

ABG Shipyard vs Commissioner of Customs, Mumbai (Appeal No C/87440/14) (CESTAT, Mumbai)

Notification & Circulars

Additional tax on goods falling under residuary Schedule in Uttar Pradesh increased from 1.5 to 2 percent

The rate of additionl tax as levied under the UP VAT Act, 2008 ("UP VAT Act") have been revised as under:

- Rate of additional tax applicable on residuary category of goods falling under Schedule V of the UPVAT Act has been increased from 1.5 percent to 2 percent
- Further, tyres and tubes of cycles, cycle rickshaws and animal driven vehicles will also now attract additional tax of 3 percent

Accordingly rate of additional tax on other goods prescribed in the Additional Tax Notification like natural gas, cement and those specified in Schedule II (other than declared goods) remains unchanged.

Notification No-KA NI-2-1309/XI-9(1)/2014-UP Act-5-2008-Order-(138)-2015 dated September 3, 2015

Prescribes restrictions on ITC availment under Haryana VAT Act, 2003 in case of inter-state sales and other scenarios

The said notification seeks to amend Schedule E of the Haryana VAT Act, 2003 ("HVAT Act") which provides for restrictions on availment of ITC in case of certain goods/ activities. Accordingly, the extent of credit admissibility has been prescribed as

follows –

- Goods sold 'as such' in the course of interstate sales: to the extent of VAT actually paid on purchase of goods or CST payable on sale of goods whichever is lower

- Inputs for manufacturing goods to be sold in the course of inter-state sales: to the extent of VAT actually paid on purchase of goods or CST payable on sale of goods whichever is lower

- Goods sold at a sale price lower than the purchase price: to the extent of output tax liability (if any) on the sale of such goods

Notification No 22/ST-1/ HA 6/ 2003/S 59/2015 dated September 7, 2015

Clarification on application of abatement for ancillary services provided by Goods Transport Agencies ("GTA") in the course of transportation of goods by road

The Circular clarifies that abatement of 70 percent applicable to GTA services shall also be available on ancillary services like loading / unloading, packing / unpacking, transshipment, temporary storage etc, that are rendered by the GTA in the course of transportation of goods by road. The pre-requisite is that the charges for such services should be included in the invoice raised by the GTA.

The benefit has been allowed on the ground that such ancillary services are not rendered independently, but in order to successfully provide the principal service of transportation. It has been further clarified that the aforesaid abatement shall also be available in cases where services of transportation are provided for delivery of goods within a stipulated time.

Circular No 186/5/2015 F No 354 / 98 /20015-TRU-Service Tax dated October 05, 2015

Clarification on availability of excise duty exemption in respect of parts and components of wind operated electricity generators ("WOEG")

In light of the ruling of the Supreme Court in case of *M/s Gemini Instratech vs Commissioner of Central Excise, Nashik in Civil Appeal No 1218 of 2006*, the Central Board of Excise & Customs has clarified that the following shall be treated as parts and components of a WOEG, thereby being eligible for the excise duty exemption under entry number 332 of Notification 12/2012 dated March 17, 2012:

- Tower: Supports the nacelle and rotor assembly of a WOEG
- Nacelle: Consists of gear-box, generator, yaw components, flexible couplings, brake hydraulics, brake calipers, sensors, nacelle plate, nacelle cover and other smaller components
- Rotor: consists of blades, hub, nosecone, main shaft, special bearings
- Wind turbine controller, nacelle controller and control cables

Circular No 1008/ 15/ 2015 – CX dated October 20, 2015

Mere transfer of title in immovable property, would be exempt from payment of service tax

The Circular clarifies that the sale of flats/ dwellings *etc* after issuance of occupancy certificate but before issue of completion certificate shall not qualify as a 'service' under Finance Act, 1994, thereby not being liable to service tax as such sale involves mere transfer of title in immovable property.

Ministry of Finance Press Release dated October 26, 2015

CBEC raises the monetary limit for 'prosecution' to INR one crore

The CBEC has issued consolidated guidelines with respect to 'prosecution' under the excise, service tax and customs laws. Key instructions have been summarized below:

- Monetary limit for triggering prosecution on account of evasion of central excise duty or service tax or misuse of CENVAT Credit in relation to offences under section 9(1) of Excise Act / 89(1) of Finance Act shall be equal to or more than one crore
- For offences punishable under Customs Act, it has been clarified that prosecution may be launched in situations, which inter alia includes:
    - Unauthorized importation of baggage, or outright smuggling of high value goods / prohibited items or offence involving foreign currency, of value equal to or more than INR 20 lakhs
    - Import of trade goods (appraising cases) involving wilful mis-declaration / concealment, where CIF value is equal to or more than INR 1 crore
    - fraudulent availment of duty drawback or exemption of value equal to or more than INR 1 Cr or in case of fraudulent exports of goods where FOB value is equal to more than INR 1 Cr
- Prosecution to be launched in case of company / assesse involved in 3 or more cases of confirmed demand (at first appellate level or above), raised on account of fraud, suppression of facts in past five years from date of decision, where the total duty / tax evaded or CENVAT credit misused is INR one crore or more or as per the threshold limits specified for the purpose of Customs

Circular No. 1009/ 16/ 2015-CX dated October 23, 2015; Circular No 1010/ 17/ 2015-CX dated October 23, 2015; Circular No 27/ 2015-Cus dated October 23, 2015 and Circular No 28/ 2015-Cus dated October 23, 2015

Instructions on filing digitally signed customs documents for using services of customs brokers

Pursuant to the circular, submission of digitally signed customs documents has been made mandatory for all importers, exporters using services of customs brokers for formalities under Customs Act with effect from January 01, 2016. There is no requirement to physically sign the said documents, where the documents are digitally signed.

It has been further clarified that importers / exporters desirous of filing bill of entry or shipping bill individually shall have the

option of filing declarations / documents without using digital signature.

Circular No 26/2015 - Customs dated October 23, 2015

Extension of the benefit of rewards under Services Exports from India Scheme ("SEIS")

Vide the Public Notice, the DGFT has extended the time limit for availing the rewards granted under Services Exports from India Scheme till March 31, 2016. It has been further clarified that the list of services / rates notified under the said scheme shall be reviewed with effect from April 2016.

Public Notice No 42/2015-20 dated October 26, 2015

DGCEI, Chennai targeting motor vehicle insurance providers for claiming incorrect CENVAT Credit

Chennai Zonal Unit of Directorate General of Central Excise Intelligence ("DGCEI"), vide this Press Release, seeks to bring to the attention of the public the issue / practice of fraudulent availment of CENVAT credit by Insurance Companies on the service invoices (advertisement, renting of computers/ printers, training, arranging customer awareness program etc) which were never provided by the car dealer. The car dealers issued the service invoices as a mechanism for receiving higher commission form the Insurance Companies.

Press Release by DGCEI, Chennai dated August 10, 2015

Guidelines prescribed for expeditious assessment of Bill of Entries

Central Board of Excise and Customs ("CBEC") vide this circular seeks to address the concerns raised over increasing number of queries and resultant delay in assessment of Bill of Entry by customs officers, which hinder Ease of Doing Business in India. The guidelines issued to customs officers' *inter-alia* includes the following:

- During assessment procedure, clarifications must be sought by customs officers from importers in one go and not in a piece meal manner
- Frequently raised queries in the course of assessment must be listed for ensitizing trade regarding the same. This would enable importers to take preventive action to avoid such queries or be better prepared to reply to such queries
- On receipt of satisfactory reply from importers, time taken for completion of assessment procedure and issuance of documents must be curtailed
- The importers may also be educated about the most common errors so that delays in completion of reassessment is avoided in future

CBEC Circular No 22/2015-Customs dated September 3, 2015

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