December 2015

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

Foreword

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

In an unprecedented move, FICCI in collaboration with ASSOCHAM, CII, PHD Chamber and Confederation of All India Traders arranged a joint interactive session on 16th December, 2915, with Shri Arun Jaitley, Hon'ble Finance Minister on "GST in India". The session was attended by more than 700 delegates belonging to the above mentioned trade and industry bodies. Presidents of all the Chambers expressed their concern at the delay in passage of the Constitution Amendment Bill to give effect to the Goods and Services Tax. A Resolution was adopted in the session calling for forward movement on the long awaited reform of the indirect taxes regime in the country. Mr. Arun Jaitley, Hon'ble Finance Minister while relating the developments leading to the introduction of the Constitution Amendment Bill on GST hoped that the GST legislation would be adopted soon.

A Committee headed by Justice (Retired) R.V. Easwar, has been set up by the Government with a view to simplify the provisions of the Income Tax Act, 1961. FICCI has submitted the first batch of its suggestions to the Committee for its consideration.

In the taxation regime, the Rajkot Tribunal in the case of MUR Shipping DMC Co, UAE held that the benefit of the India-UAE tax treaty cannot be denied to the foreign shipping company by applying Limitation of Benefit (LOB) provisions, since such a company has bonafide business activities in the UAE. The Tribunal held that LOB provisions under the tax treaty would be applicable only when the main purpose or one of the main purposes of the creation of an entity was to obtain benefits of the tax treaty which would otherwise not be available.

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

IPR is treated as 'plant' under erstwhile Section 32 of the Income-tax Act and therefore it is eligible for depreciation

In 1939, Mr. S. Raghuram Prabhu started the business of manufacturing beedis (an Indian version of cigarettes). He was later joined in the business by Sri Madhav Shenoy as a partner and thus a partnership firm, came into existence with effect from 28 February 1940. Subsequently, due to differences between the partners, they applied to the High Court and, the firm was dissolved on 6 December 1987. The petition, the High Court appointed an official liquidator and a winding up order was passed on 14 June 1991. The High Court held that the firm is dissolved with effect from 6 December 1987 and directed the sale of its assets as a going concern to the highest bidder amongst the partners. Pursuant to the order passed by the High Court, an auction was conducted in which three of the erstwhile partners, formed an association of persons (AOP) and emerged as the highest bidders. With effect from 18 November 1994, the business of the firm passed on into the hands of the AOP but the tangible assets were actually handed over by the official liquidator to AOP on or about 7 January 1995.

The taxpayer filed its return for the period 18 November 1994 to 31 March 1995 and subsequently filed a revised return. The taxpayer claimed depreciation under Section 35A and 35AB of the Act towards acquisition of Intellectual Property Rights (IPR) such as the rights over the trademark, copyright and technical know-how. In the alternative, the taxpayer claimed depreciation on capitalizing the value of the IPR by treating them as plant. The AO and CIT(A) rejected the claim of the taxpayer. However, the Income-tax Appellate Tribunal (the Tribunal) held the in favour of the taxpayer. Subsequently, the High Court held the decision in favour of the tax department.

Supreme Court's ruling

In the case of Bharat Beedi Works (P) Ltd. v. CIT (1993) 3 SCC 252, it has been observed that there is a value attached to a brand name. It was observed that intellectual property rights have a value. As far as the copyright valuation is concerned, beedis are known not only by the trademark, but also by the depiction on the labels and wrappers and the colour combination on the package. The taxpayer had the copyright on the content of the labels, wrappers and the colour combination on them. Similarly, the know-how had a value since the aroma of beedis differs from one manufacturer to another, depending on the secret formula for mixing and blending tobacco. The valuation report mentioned that it did not consider any value for goodwill since the trademarks, copyrights and know-how had tremendous business value as the firm had been enjoying the status of being India's largest beedi manufacturer over the last five decades. After taking into consideration the net assets and liabilities of taxpayer, the Chartered Accountant arrived at the net value of the going concern at INR 9 million. On this basis, AOP gave its bid of INR 9.2 million which was eventually accepted.

The definition of 'plant' in Section 43(3) of the Act is inclusive. A similar definition oc-

curring in Section 10(5) of the Income-tax Act, 1922 was considered in Commissioner of CIT v. Taj Mahal Hotel (1971) 3 SCC 550 wherein it was held that the word 'plant' must be given a wide meaning. The term intellectual property such as trademarks, copyrights and know-how come within the definition of 'plant' since there can be no doubt that for the purposes of a large business, control over IPRs such as brand name, trademark, etc. are absolutely necessary. Moreover, the acquisition of such rights and know-how is acquisition of a capital nature, more particularly in the case of the taxpayer. Therefore, it cannot be doubted that so as far as the taxpayer is concerned, the trademarks, copyrights and know-how acquired by it would fall within the definition of 'plant' being commercially necessary and essential as understood by those dealing with direct taxes. Section 32 of the Act as it stood at the relevant time did not make any distinction between tangible and intangible assets for the purposes of depreciation. The distinction came in by way of an amendment after the assessment year that we are concerned with. That being the position, the taxpayer is entitled to the benefit of depreciation on plant (that is on trademarks, copyrights and know-how) in terms of Section 32 of the Act as it was at the relevant time. Therefore, Supreme Court held that the taxpayer would be entitled to the benefit of Section 32 of the Act read with Section 43(3) thereof.

Mangalore Ganesh Beedi Works v. CIT (Civil Appeal Nos. 10547-10548 of 2011) – Taxsutra.com

High Court Decisions

Unabsorbed losses of an amalgamating company can be set off if such a company is in the business for three or more years even if its unit is engaged in the business for less than three years

The taxpayer, KBD Sugars & Distilleries Ltd., is engaged in the business of manufacture of beer, IML and speed zone. Under the scheme of amalgamation, approved by the Karnataka and Andhra Pradesh High Courts respectively, Vani Sugars and Industries Ltd. (the amalgamating company) amalgamated with KBD Sugars & Distilleries Ltd. (the amalgamated company). The amalgamating company was engaged in the business of manufacturing and trading of sugar and generation of power. It was in the business of manufacturing sugar since 1984 and had commenced the business of power generation with effect from August 2003, which was by way of expansion of its business. During the Assessment Year (AY) 2005-06, the taxpayer amalgamated company had declared its business income of INR246.50 million and the brought forward losses of the amalgamating company of INR213.35 million was set off against the above income. The AO disallowed the business loss and unabsorbed depreciation amounting to INR34.89 million as it was a business loss arisen from power generation which was brought forward and claimed for set off. The CIT(A) and the Tribunal allowed the set off of such a loss and ruled in favour of the taxpayer. The High Court observed that the amalgamating company was amalgamated with the taxpayer with effect from March 2005, which falls in the AY 2005-06. The amalgamating company was in the sugar manufacturing business since 1984. In the year 2000, the amalgamating company had started work for the establishment of its power generation business and after establishing the unit, power generation had commenced from August 2003. The term

'commencement of business' would be different from the term 'engaged in business'. It is the latter term which has been used in Section 72A(2)(a) of the Act. 'Commencement of business' may be from the date when production starts but to say that the taxpayer is 'engaged in business' only from the date it commences production, is incorrect. The taxpayer engages itself in a particular business from the day it gets involved in the setting up of the business.

In the present case, the licence for setting up the business of power generation, loans for the same, construction of the building and purchase of machinery, etc. had started from the year 2000 itself, which was duly reflected in the books of account of the amalgamating company. It cannot be disputed that the engagement of the amalgamating company in the business of power generation had begun from the year 2000, even though the production or generation of power i.e. the commencement of business may have been with effect from August 2003.

Section 72A(2) of the Act indicates that it is a loss for the amalgamating company as a whole, which is to be set off or carried forward, and not of a particular unit or division of that amalgamating company. It is the amalgamating company, which should be in business for three years or more, prior to the date of amalgamation, and not a particular unit or division of that amalgamating company. As the amalgamating company was in the business for more than three years prior to the date of amalgamation, the benefit of Section 72A of the Act should be granted to the taxpayer.

CIT v. KBD Sugars & Distilleries Ltd. (ITA NO.773/2009) – Taxsutra.com

Tribunal Decisions

Payment to a Hong Kong-based company for the services of seconded employees is taxable as fees for technical services under the Income-tax Act

The taxpayer is an Indian company engaged in the business of ownership and operation of a supermarket chain in India. The taxpayer entered into an agreement with Diary Farm Company Ltd. (DFCL), a company involved in the same business in Hong Kong. In terms of the said agreement, DFCL agreed to assign its employees to the taxpayer and consequently five employees/expatriates were deputed. The taxpayer agreed to engage these employees to assist it in its business operations. It was also agreed between the parties that the salary of these deployed employees would be paid by DFCL, subject to Tax Deduction at Source (TDS) under Section 192 of the Act. The taxpayer reimbursed DFCL for these salaries without deducting tax at source. The Assessing Officer (AO) held that a remittance made by the taxpayer constitutes as Fees for Technical Services (FTS) under Section 9(1)(vii) of the Act. The same is chargeable to tax on a gross basis. Therefore, the taxpayer was liable to deduct tax under Section 195 at 10 per cent. Accordingly, the AO treated the taxpayer as 'an assessee in default' under Section 201(1) of the Act for not withholding tax at source. The AO also determined the interest under Section 201(1A) of the Act. The Commissioner of Income-tax (Appeals) [CIT(A)] upheld the order of the AO.

Tribunal ruling

Taxability as FTS under the Act

Upon reviewing details of the seconded employees in the agreement, it indicates that all five secondees were not ordinary employees or workers but they were deputed on high level managerial/ executive positions, which indicates that they were deputed because of their expertise and managerial skills in the field. The secondment agreement was between the taxpayer and DFCL, and the secondees assigned to the taxpayer were not a party to the agreement. Further, the secondees were assigned by DFCL and there was no separate contract of employment between the taxpayer and the secondees. The secondees were under the legal obligation as well as employment of DFCL and assigned to the taxpayer only for a short period of time. In the absence of any contract between the taxpayer and the secondees, the parties cannot enforce any rights or obligations on each other. The secondees can claim their salary only from the parent company and not from the taxpayer. Thus, the expatriates were performing their duties for and on behalf of DFCL.

Once it was found that the secondees were rendering managerial and highly expertise services to the taxpayer, the payment for such services would fall under the ambit of FTS as defined in Explanation 2 to Section 9(1)(vii) of the Act. An identical issue has been considered and decided by the Delhi High Court in the case of Centrica India Pvt. Ltd. v. CIT [2014] 364 ITR 336 (Del). Subsequently, the Special Leave Petition (SLP) filed against the decision of the Delhi High Court has been dismissed by the Supreme Court in Centrica India Pvt. Ltd. v. CIT [2014] 227 Taxman 368 (SC). Therefore, the view taken by the High Court has attained finality.

The concept of income includes positive as well as negative income or nil income. In the case of payment being Fees for Technical Services (FTS) or royalty as per Section 9(1) of the Act, whether or not any profit element is included in the income is irrelevant. If the payment, whether FTS or royalty is made to a non-resident, then the concept of total income becomes irrelevant and the provisions of Section 44DA of the Act recognise the gross payment chargeable to tax. Thus, all the payments made by the taxpayer to a non-resident on account of FTS or royalty, is chargeable to tax, irrespective of any profit element. However, there is an exception to this rule : when the non resident has a fixed place of business/ permanent establishment (PE) in India, and the amount is earned through the PE, then the expenditure incurred in relation to the PE for earning the said amount is allowable under Section 44DA of the Act. Therefore, in view of the decision of the Delhi High Court in the case of Centrica India Pvt. Ltd., the payment made to the foreign company becomes FTS as per the definition under Explanation 2 to Section 9(1) (vii) of the Act.

Service PE under the Act

The Tribunal observed that there is no tax treaty between India and Hong Kong and under the provisions of the Act, there is no concept of a service PE. Since there is no tax treaty between India and Hong Kong, the concept of a service PE requires a proper examination of all the relevant facts as well as provisions dealing with whether or not it constituted a service PE in India or not. Accordingly, the issue was remitted to the file of the AO for adjudication of the issue of whether the secondment of employees constitute service PE.

Food World Supermarkets Ltd v. DDIT (ITA Nos. 1356 and 1357/Bang/2013) – Taxsutra.com

Since the taxpayer has bonafide business activities in the UAE, the benefit of the India-UAE tax treaty cannot be denied by applying the LOB clause

During the year under consideration, the taxpayer claimed the tax treaty benefit for freight income it received on account of its shipping business. The taxpayer had registered its shipping vessel with the UAE government to conduct its business for three years. The vessel is owned by a company located in the Marshall Islands with which India does not have a tax treaty. The taxpayer's total five shares are held by two Switzerland-based companies. The taxpayer also submitted a letter of commercial licence and tax residence certificate received from the UAE tax authorities. The AO denied the tax treaty benefit on account of the fact that the taxpayer had registered in UAE to get the benefit of the tax treaty and it is neither paying freight in India nor in the UAE. The AO invoked the provisions of Article 29 of the tax treaty and denied tax treaty benefits to the taxpayer. The CIT(A) held that the taxpayer was eligible to claim the tax treaty benefit.

The Tribunal observed that Article 29 of the tax treaty was introduced by the virtue of a protocol. Under the original tax treaty provisions there was considerable controversy on whether the actual taxability of income in the UAE was a condition for availing the treaty benefits in India. This issue was particularly relevant as not all the residents, whether individual or corporate, were necessarily taxable entities under the UAE law. The UAE, as a tax jurisdiction, had the right to tax these residents but the rights were not exercised by introducing a law to tax them. While dealing with the issue as to whether or not the UAE tax residents will be eligible for tax treaty protection with respect to their income sourced in India, the Mumbai Tribunal in the case of ADIT v. Green Emirate Travels [2006] 100 ITD 203 (Mum) observed that being 'liable to tax' in the contracting state does not necessarily imply that the person should actually be liable to tax in that contracting state. Vide protocol dated 26 March 2007, the definition of the expression 'resident' was revised and the requirement of an actual liability to tax for the residents of UAE was consciously removed from the definition of the 'resident of a contracting state'. The Delhi High Court, in the case of Emirates Shipping Line FZE v. ADIT [2012] 349 ITR 493 (Del) held that under the amended article, the requirement of liability to tax has been done away with. Therefore, it is not open to the AO to decline the tax treaty protection to a UAE tax resident with respect to India-sourced income, on the grounds that the UAE tax resident has not actually been taxed in respect of his income in the UAE.

The amendment of the tax treaty definition for a 'resident in a contracting state', however, did come with a built-in check to ensure that this provision is not abused by incorporating Special Purpose Vehicles (SPVs) in the UAE only to seek undue benefits in India. Article 29 of the tax treaty, indicates that the tax treaty benefits can be declined in cases where the main purpose or one of the main purposes of the creation of an entity is to obtain the benefits of the tax treaty, which would otherwise not be available. As long as such entities have bonafide business activities, the provisions of Article 29

of the tax treaty cannot be pressed into service at all by a tax jurisdiction.

The present case is post amendment vide protocol which gives residuary taxation rights to the residence jurisdiction. Article 8 of the India-Switzerland tax treaty does not cover income from the operation of ships in international traffic and restricts itself to income generated from the operation of aircrafts in international traffic. Therefore, whether a Swiss tax resident earns India sourced income from operations of ships in international traffic in India or whether a UAE tax resident earns Indian sourced income from operations of ships in international traffic, the income is not taxable in India in the former case, because of the provisions of Article 22(1) of the India-Switzerland tax treaty, and in the latter case, because of the provisions of Article 8 of the India-UAE tax treaty.

In this case, the condition precedent for invoking Article 29 of the India-UAE tax treaty was not fulfilled. When tax treaty protection with respect to income of such a nature was available anyway, though, under a different kind of provision of the India-Switzerland tax treaty, the taxpayer cannot be said to have been created for the purposes of availing the India-UAE tax treaty benefits. Accordingly, the AO was in error in invoking the provisions of Article 29 of the tax treaty. With regards to the stand of the AO that the directors of the taxpayer are not UAE nationals is wholly irrelevant as the directors are residents of UAE and the nationality of the directors, de hors their place of residence. Further, the shareholder meetings have taken place in the UAE. It has been observed that the taxpayer is not merely a paper company and has actually carried out material business operations from the UAE. As regards the issue raised by the AO on the shortcomings in the tax residency certificate, it is wholly devoid of any legally sustainable merits so far as eligibility for treaty benefits are concerned. Since there was reasonable evidence to suggest that the affairs of the company are conducted from UAE, and there was no material to controvert the same or to establish that the company is controlled or managed from outside the UAE, the CIT(A) was indeed justified in reversing the action of the AO and consequently granting the taxpayer the benefits of the India-UAE tax treaty.

ITO v. MUR Shipping DMC Co, UAE (I.T.A. No. 405/RJT/2013) – Taxsutra.com

The limitation of the relief clause under the India-Singapore tax treaty is not applicable to income which is offered to tax on an accrual basis in Singapore

The taxpayer filed a return of income in India with respect to MT Alabra, which is owned by Alabra Shipping Pte Ltd of Singapore, a freight beneficiary, as an agent of this company under Section 172(3) of the Act. The taxpayer claimed the benefits of the India-Singapore tax treaty and treated such freight income as exempt from tax in India. The taxpayer remitted the funds to the freight beneficiary's account with 'The Bank of Nova Scotia in the U.K.'. The AO observed that the taxpayer remitted freight to a country other than Singapore and the remittance to Singapore is a sine qua non for availing the benefits of the India-Singapore tax treaty. On the basis of the LOB clause in Article 24 of the tax treaty , the AO declined the tax treaty benefit. The CIT(A) relied on the decision of the Mumbai Tribunal in the case of Abacus International Pvt. Ltd. v. DDIT [2013] 34 taxmann.com 21 (Mum)

FICCI

where it was observed that a requirement of Article 24 of the tax treaty is that the taxpayer must have received the interest income in Singapore. Accordingly, the CIT(A) upheld the order of the AO.

Tribunal's ruling

In this case, since the taxpayer seeks a benefit of tax treaty protection, in respect of its shipping income covered by Article 8 of the tax treaty, the only LOB provision which comes into play is the provision set out in Article 24 of the tax treaty.

While the tax treaty does contain certain other significant LOB clauses, they are relevant only for the purposes of the tax treaty protection related to Article 1 of protocol to the the tax treaty. On perusal of Article 24(1) of the tax treaty, it indicates that LOB clauses come into play only when:

- Income sourced in a contracting state is exempt from tax in that source state or is subject to tax at a reduced rate in that source state
- The said income is subject to tax by reference to the amount remitted to, or received in, the other contracting state, rather than with reference to the full amount of such income.

In such a situation, the tax treaty protection will be restricted to the amount which is taxed in the other contracting state. The benefit of the tax treaty protection is restricted to the amount of income which is subject matter of taxation in the source country. This is more relevant in a situation in which a territorial method of taxation is followed by the tax jurisdiction, and the taxation of income from activities carried out outside the home jurisdiction is restricted to the income repatriated to such a tax jurisdiction. In the case of Singapore, the tax treaty protection must remain confined to the amount which is actually subject to tax.

Any other approach could result in a situation in which income, which is not a subject matter of taxation in the residence jurisdiction, will be available for tax treaty protection in the source country. Therefore, the scope of the LOB provision in Article 24 of the tax treaty needs to be appreciated. There was no dispute about the fact that the business was carried on by the taxpayer in Singapore and that the taxpayer was a tax resident of Singapore. In a letter dated 31 December 2013, the Inland Revenue Authority of Singapore confirmed that, in the case of Albara Shipping Pte Ltd, 'freight income has been regarded as a Singapore sourced income and brought to tax on an accrual basis (and not a remittance basis) in the year of assessment'. The taxpayer had also filed a confirmation from its public accountant that the freight earned from the port in India had been included in the global income offered to tax by the company in Singapore. On these facts, the provisions of Article 24 of the tax treaty cannot be put into service as these can only be triggered when the twin conditions of treaty protection, by low or no taxability, in the source jurisdiction and taxability on receipt basis, in the residence jurisdiction, are fulfilled.

In order to come out of the mischief of Article 24 of the tax treaty, the onus is on the taxpayer to show that the amount is remitted to, or received in Singapore; but then such an onus is confined to the cases in which income is taxable in Singapore on a limited receipt basis rather than on a comprehensive accrual basis. However, in a case where it can be demonstrated that the related income is taxable in Singapore on an accrual basis and not on a remittance basis,

such an onus does not get triggered. It has been observed that the only reason for declining the India-Singapore tax treaty benefits was the applicability of Article 24 of the tax treaty and that there is no other dispute on the claim of the tax treaty protection of shipping income under Article 8(1) of the tax treaty which provides that: 'Profits derived by an enterprise of a contracting state from the operation of ships or aircrafts in international traffic shall be taxable only in that state'. Accordingly, the entire freight income of the taxpayer from the operation of ships in international traffic, was taxable only in Singapore.

Alabra Shipping Pte Ltd./Singapore GAC Shipping India Pvt.Ltd.(As agents) v. ITO (ITA No. 392/RJT/2014) – Taxsutra.com

Mark-to-market loss arising on account of un-expired derivative transactions in foreign currency cannot be considered as notional or contingent loss and are therefore allowable as non-speculative loss

The taxpayer is a domestic company registered with the Development Commissioner, Vishakhapatnam Special Economic Zone. The taxpayer is a Knowledge Process Outsourcing (KPO) Unit involved in the business of Revenue Cycle Management (RCM) for their clients across the U.S. During the Assessment Year 2009-10, it had entered into foreign exchange derivative contracts on the National Stock Exchange of India Limited (NSE) to hedge itself against foreign exchange fluctuations on account of underlying account receivables which are denominated in US Dollars. The taxpayer debited mark to market loss of INR 10.9 million to the Profit and Loss Account. The taxpayer claimed that the loss on account of derivative transaction is neither a speculative nor contingent loss. The AO held that a such loss arising on account of derivative transaction is in the nature of speculative loss. Therefore, it cannot be allowed to be set-off against the income from business other than speculation business. The CIT(A) upheld the order of the AO.

The Tribunal held that taxpayer has entered into derivative transactions in foreign currency through a SEBI registered broker who is a member of the NSE and these derivative transactions are carried out on the NSE which is a recognised stock exchange and these transactions are backed by time stamped contract notes carrying a unique client identity number and PAN allotted under the Act. It was held that these derivative transactions in foreign currency as entered into by the taxpayer duly fulfilled all the conditions as specified under Section 43(5) of the Act. Further, these transactions are covered by the exception provided in Section 43(5) of the Act and hence are not speculative transactions. Accordingly, it was held that loss on derivative transactions in foreign currency is not a speculative loss within the definition as contained in Section 43(5) of the Act. The Tribunal relied on the decision of DCIT v. Bank of Bahrain and Kuwait [2010] 132 TTJ 0505 (Mum) (SB).

The Accounting Standard-11 prescribed by Institute of Chartered Accountants of India (ICAI) also stipulates that in situations like this when the derivative transaction in foreign currency has not been settled/ squared during the accounting period, the effect of the exchange rate difference on the unexpired foreign currency contracts as at the end of the accounting period is to be accounted for in the books of accounts prepared for the afore-stated accounting period. Accordingly, it has been held that the loss of INR 10.9 million incurred by the tax-

payer on account of mark to market loss arising on the date of the balance sheet as on 31 March 2009 cannot be considered as a notional or contingent loss rather it is an ascertained loss which has already occurred during the assessment year which can be computed with reasonable certainty and accuracy and is a fait accompli as held in ONGC v. DCIT [2003] 261 ITR 1(Del).

Inventurus knowledge Services Pvt. Ltd. v. ITO (ITA No. 5922/Mum/2013) – Taxsutra.com

In the absence of an order for transfer of jurisdiction, Additional Commissioner of Income-tax cannot exercise the functions of the AO

During the Assessment Year 2006-07, the taxpayer had furnished a return of income declaring an income of INR42.78 million. The said return was assessed by the Additional CIT at an income of INR91.06 million under Section 143(3) of the Act. The taxpayer claimed that the aforesaid assessment framed by the Additional CIT is without jurisdiction since the Additional CIT who framed the impugned assessment was not an AO under Section 120(4) (b) of the Act read with Section 2(7A) of the Act. Further, there was no order under the Act for transfer of jurisdiction from the Deputy Commissioner of Income Tax (DCIT) to the Additional CIT. The CIT(A) rejected the claim of the taxpayer and held that the taxpayer had not challenged the jurisdiction or authority of the AO to make the assessment itself at the stage of assessment and once the taxpayer had subscribed to the jurisdiction and participated in the assessment proceedings, the said contention is not tenable.

The Tribunal on a perusal of Section 2(7A) of the Act observed that an AO means the 'Assistant Commissioner' or 'Deputy Commissioner' or 'Assistant Director' or 'Deputy Director' or 'Income Tax Officer' who is vested with the relevant jurisdiction by virtue of the directions or orders issued under Section 120(1) or 120(2) or any other provision of this Act. Further, the second part of the above Section provides that the AO, inter alia, means an Additional CIT who is directed under Section 120(4)(b) of the Act to exercise or perform all or any of the powers and functions conferred on or assigned to an AO under the Act. In other words, an Additional CIT can only be directed under Section 120(4) (b) of the Act to act as an 'Assistant Commissioner' or 'Deputy Commissioner' or 'Assistant Director' or 'Deputy Director' or 'Income Tax Officer' under the Act. The said provision provides that CBDT may by a general or special order empower the powers and functions conferred on or as the case may be, assigned to, an AO to an Additional CIT or an Additional Director or a Joint Commissioner or a Joint Director. The position which emerges is that an Additional CIT ipso facto cannot exercise the powers or perform the functions of an AO under the Act. He/she can perform the functions and, exercise the powers of an AO, only if he/she is specifically directed under Section 120(4)(b) of the Act. The Tribunal relied on the decision of Prachi Leathers Pvt. Ltd. v. ACIT (ITA No. 744/Lucknow/04, dated 29 March 2010) and City Garden v. ITO [2012] 21 taxmann.com 373 (Jodhpur).

The present case has not been challenged by the tax department either by placing any order or any notification on record, supporting the position that an order was made under Section 120(4)(b) of the Act so as to confer jurisdiction of the Additional CIT to exercise the powers or perform the functions of an AO under Section 2(7A) of

the Act read with Section 120(4)(b) of the Act. The assessment order so framed is without jurisdiction in as much as the Additional CIT did not have the requisite mandate power under the law to frame the assessment under Section 143(3) of the Act. Section 120(1) of the Act stipulates that the powers and functions of an income tax authority shall be confined and restricted to the powers and functions conferred or assigned by the CBDT under the Act. Further, Section 120(2) of the Act enables the CBDT to even authorize an income tax authority to issue an order in writing for exercise of powers and function by subordinate income tax authorities. Section 120(2) of the Act does not mention that the CIT can authorise an Additional CIT to perform the functions and exercise the powers of an AO.

The order passed by an Additional CIT is neither an order under Section 120(4)(b) of the Act nor it otherwise directs the Additional CIT to exercise or perform all or any of the powers and functions conferred on or assigned to an AO under the Act. The decision in the case of CIT v. British India Corporation Ltd. [2011] 337 ITR 64 (All) does not apply to the facts of the present case. Relying on the decision of the Delhi High Court in the case of Valvoline Cummins Ltd. [2008] 307 ITR 103 (Del) it has been held that an assessment has to be completed by the authority who has initiated the assessment proceedings. Any other authority can take over the proceedings only after a proper order of transfer under Section 127(1) or 127(2) of the proceedings. Consequently, the assessment made by the Additional CIT was illegal and bad in law for want of jurisdiction.

Mega Corporation Ltd. v. ACIT (ITA No. 102/Del/2014) – Taxsutra.com

Payment to a credit company under a risk-sharing arrangement is not commission and hence TDS under Section 194H is not applicable

The taxpayer is engaged in the business of selling tractors and has set-up a unit at Pune. During the year under consideration, the taxpayer entered into an agreement with Sundaram Finance Ltd. (Credit Company) to provide credit facilities to its customers. The taxpayer’s customers mainly comprise of farmers who do not have the resources and liquidity to purchase tractors and other agricultural equipment. In terms of the agreement, part of loss if any, incurred on account of non-payment of the loans by the borrowing farmers would be borne by the taxpayer. Hence, any losses made by the finance company arising out of non-performing credit agreements for which the financed goods of the taxpayer cannot be repossessed from the customers within the stipulated time shall be borne up to the stipulated percentage by the company. In terms of the said agreement, the taxpayer has incurred an expenditure allocated under the head ‘authority to guarantee’.

The taxpayer claimed that the finance company is not providing any service to the taxpayer for selling its goods. It is providing finance to the farmers. It is only out of commercial expediency that the taxpayer has agreed to share some of the losses. When the taxpayer has agreed to share the losses, no service is being rendered by the finance company to the taxpayer per se. It is merely sharing of losses without any element of service provided. The AO rejected the contentions of the taxpayer and observed that the said expenditure has been incurred as a part of its sale promotion activity. The services rendered by the financial institutions have helped increase the sales

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of the taxpayer and it is nothing but payment similar to commission/brokerage. Therefore, TDS under Section 194H of the Act is applicable even when the expenditure has been recorded in the books irrespective of actual payment. The Commissioner of Income tax (Appeals) [CIT(A)] upheld the order of the AO.

The Tribunal on a perusal of the definition of expression 'commission or brokerage' as appearing in Section 194H of the Act observed that: (a) a payment should be received by a person for services rendered only and (b) such a person should be acting on behalf of the other person to whom the services have been rendered in respect of buying and selling of goods, etc. On reference to facts of the case it is clear that there is no component of service rendered by the finance company to the taxpayer against the recovery of a portion of the losses, if any. It is a simple business proposition whereby an arrangement has been entered into by the taxpayer to assist its customers to enable them ready finance of their products and simultaneously assure the finance company for recovery of losses, if any due to a default in repayment by the customers. The ratio of decision in the case of CIT v. JDS Apparels Pvt. Ltd. [2014-TIOL-2046-HC-DEL-IT] as well as CIT v. Intervet India P. Ltd. [2014] 364 ITR 238 (Bom) are applicable to the facts of the present case. Accordingly, Section 194H of the Act is not applicable to the facts of the case.

John Deere India Pvt. Ltd. v. DCIT (ITA Nos. 390 to 392/PN/2014) – Taxsutra.com

The AO to apply his/her mind and form a belief on the TP report filed by the taxpayer, failing which a TP addition cannot be sustained. No TP addition can be made when tax avoidance is not possible

The AO following the CBDT Instruction No. 3/2003 dated 20 May 2003 (requiring a mandatory reference to the Transfer Pricing Officer (TPO) to determine the arm's length price (ALP), where the aggregate value of international transaction(s) exceeded INR 5 crores) and after taking the approval of Commissioner of Income-tax (CIT) as per Section 92CA(1) of the Act, referred the ALP determination of the taxpayer's international transactions to the TPO. The TPO made a Transfer Pricing (TP) adjustment on the international transaction(s) which was mechanically incorporated by the AO in his order. The Commissioner of Income-tax (Appeals) [CIT (A)] deleted the TP adjustments.

Before the Tribunal, the taxpayer invoked Rule 27 of the ITAT Rules and sought to support the order of the CIT(A) by raising a plea that under Section 92C or 92CA of the Act, it was the statutory duty of the AO to decide independently, whether the determination of the ALP by the taxpayer should be accepted, or whether there was a need for the Revenue to determine the ALP by applying provisions of Section 92CA(1) read with Section 92C(3). In other words, in cases where the AO does not discharge this judicial function of forming an opinion on the conditions (a) to (d) prescribed under Section 92C(3) of the Act, no TP adjustment could be made. The tax department, relying on various case laws, argued that the AO was not required to form a prior considered opinion before making a reference to the TPO under Section 92CA(1) and that CBDT Instruction No. 3/2003 dated 20 May 2003 was held to be constitutionally valid and was binding on the AO.

Tribunal's ruling

The Tribunal held that the taxpayer was correct in supporting the order of the CIT(A) on both of its arguments.

- Where the AO does not discharge this judicial function of forming an opinion on the conditions (a) to (d) prescribed by Section 92C(3) of the Act, no TP adjustment could be made.
- Where the taxpayer enjoys the benefit of a tax holiday under the Act, or in a case where the tax rate in the country of the associated enterprise (AE) is higher than that in India, whether a TP adjustment could be made.

The Tribunal appreciated the taxpayer's contention that the Bombay High Court in the case of Vodafone India Services P. Ltd. vs Union of India [361 ITR 531 (Bom.)] had overrule the decisions in the case of Sony India P. Ltd. vs CBDT & Ors. [288 ITR 52 (Delhi)] and Aztec Software and Technology Services Ltd. vs ACIT [294 ITR (T) 32 (Bangalore) (SB)].

The Tribunal agreed with the contention of the taxpayer that it was a condition precedent for the AO to have a prima facie belief upon the application of his mind to the material or information or document in his possession that it was necessary or expedient to make a reference to the TPO. Such a prima facie belief was a condition precedent and mandatory. The AO as well as the CIT(A) failed to apply their mind to the TP Report filed by the taxpayer, or to any other material or information or document furnished. The AO as well as the ld. CIT(A) did not discharge the necessary respective judicial functions conferred on them under sections 92C and 92CA of the Act. Such a failure would vitiate the entire TP proceedings. Accepting the pleas raised by the taxpayer to support the CIT(A)'s order, the Tribunal confirmed the order of the CIT(A).

It was also held that no TP adjustment could be made in a case where the taxpayer enjoyed the benefit of a tax holiday, or where the tax rate in the country of the AE was higher than the rate of tax in India and where the establishment of tax avoidance or manipulation of prices or shifting of profits out of India was not possible.

The aforementioned observation of the Tribunal that the AO should examine the issue of TP and apply his mind before making a reference to the TPO would squarely apply to the proposition that the satisfaction of conditions of 92C(3) of the Act and the requirement to demonstrate the tax evasion are mandatory before making a reference by an AO to the TPO.

It is important to understand the implications of the above decision going forward in light of the new Instruction No. 15 issued by the CBDT recently on 16 October 2015 (elaborated below) on the implementation of TP provisions (the New Instruction). As per the New Instruction, except in certain specific situations, the AO is allowed to arrive at a prima facie belief based on basic factual details of international transactions, nature of documents maintained and methods followed that would normally be available in the Accountant's Report filed by the taxpayer and not go into a detailed enquiry of scrutinizing the correctness or otherwise of the price of the international transaction(s).

DCIT vs Tata Consultancy Services Limited (ITA no.7513/M/2010)

Notification & Circulars

CBDT revises and updates guidance for selection and referral of TP cases for assessments

The CBDT issued a new instruction No. 15/2015 on 16 October 2015, replacing Instruction No. 3 dated 20 May 2003, providing guidance to the AO and TPO regarding the administration of TP assessments. The guidelines issued are applicable predominantly for international transactions and specify that cases for TP assessments should not be selected for scrutiny based on the value of international transactions reported by the taxpayers in the Accountants Report i.e. Form No. 3CEB, but should be based on risk parameters. The key highlights of the guidance are as under:

- In cases involving TP issue, as a jurisdictional requirement, the AO in the following three situations, must record his/her satisfaction that there is an income or potentiality of an income arising and/or being affected on determination of the ALP, before proceeding to determine the ALP or making a reference to the TPO:

  - The AO notices that international transaction(s) have been entered into by the taxpayer but the Accountant's Report has not been filed.

  - One or more international transaction(s) are not disclosed in the Accountant's Report filed by the taxpayer.

  - Qualifying remarks are declared by the taxpayer in the Accountant's Report stating that such transaction(s) are not international transaction(s) or that it does not impact the taxpayer income.

- In other scrutiny cases, there is no requirement to make a reference to the TPO based on the value of the international transaction(s), except in the aforesaid situations a. and b.

- In both the above cases, the AO must provide an opportunity of being heard to the taxpayer before recording his/her satisfaction or otherwise.

- In cases where no objection is raised by the taxpayer to the applicability of Chapter X (Section 92-92F) of the Act, the prima facie view of the AO would be sufficient before making a reference to the TPO. In other cases, the taxpayer's objection to the applicability of Chapter X of the Act should be specifically dealt with by the AO in the interest of natural justice.

- Approval from the Principal Commissioner or Commissioner is to be necessarily sought before making a reference to the TPO to determine the ALP of international transaction(s).

- TP cases would be selected for scrutiny on the basis of risk parameters and not on the basis of the value of international transaction(s).

- Taking into consideration all the relevant facts and data available with him/her, the TPO shall determine the ALP and pass a speaking order after seeking the necessary approvals.

- The TPO, being the Additional/Joint CIT shall be assigned not more than 50 cases depending on the importance and complexity involved. It has been emphasized that the TPO shall document adequate reasons and supporting analysis to support the determination of ALP, in light of the fact that the same shall be subject to judicial scrutiny.

CBDT instruction No. 15/2015 dated 16 October 2015

CBDT rolls out final rules for 'Range' concept and multiple year data prescribed under TP regulations

On 19 October 2015, the CBDT released the final rules for the use of range and multiple year data (the Rules). The key highlights/amendments of the Rules are as under:

Use of multiple year data

The data to be used for comparability analysis was required to be data related to the 'financial year' in which the international transaction or the specified domestic transaction (SDT) was entered into or data relating to a period not more than two years prior to such a financial year. The term 'financial year' (FY) has been replaced by the term 'current year' in order to avoid disputes arising from the use of the term 'financial year'. The amendment will be applicable for only those international transactions or SDTs, entered into on or after 1 April 2014.

The following are the important factors that need consideration while using multiple year data:

- To be used only in case the most appropriate method (MAM) used for determination of ALP is Transactional Net Margin Method (TNMM), Resale Price Method (RPM) or Cost Plus Method (CPLM)

- Comparability to be conducted based on:

  - Data relating to the current year

  - Data relating to the financial year immediately preceding the current year, if the data relating to the current year is not available at the time of furnishing the return of income

- If the current year data becomes available, during assessment proceedings, the same to be considered irrespective of the fact that such current year data was not available at the time of furnishing of return of income. Determination of the ALP where application of the MAM results in more than one price.

In cases where the application of any of the methods result in more than one price, the ALP shall be computed as follows:

- A dataset shall be constructed by placing the prices/data in an ascending order.
- If a comparable has been identified on the basis of data relating to:

  - **Current year**, then the data for the immediately preceding two FYs can be considered, provided the comparable has undertaken the same or similar comparable uncontrolled transaction in those preceding two years.

  - **Financial year immediately**

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- **preceding the current year**, then the data for the immediately preceding two years can be considered provided the comparable has undertaken the same or similar comparable uncontrolled transaction in that preceding year.

- Enterprises may not be considered as comparables, if they have not undertaken a comparable uncontrolled transaction in the Current Year.
  - Even if, such an enterprise had undertaken a comparable uncontrolled transaction in either or both of the financial years immediately preceding the Current Year.
- The price in respect of comparable uncontrolled transactions shall be determined using the weighted average of the prices/data points for:
  - The Current Year and the preceding two financial years; or
  - Two financial years immediately preceding the Current Year (but not including the Current Year as the same may not have been available); with weights being assigned to specific parameters (sales, costs, assets etc.) depending on the MAM selected

Range concept

The concept of Range for determination of ALP shall apply, subject to certain conditions as under:

- Applicable only in case the MAM used for determination of ALP is Comparable Uncontrolled Price (CUP), RPM, CPLM and TNMM.
- A minimum of six comparables/ data points would be required. In case the number of comparables / data points is less than six, the arithmetic mean (AM) will continue to apply along with the benefit of a 3 per cent tolerance band (1 per cent for wholesale traders).
- A dataset shall be constructed by placing the prices/data points in an ascending order. The data points lying within the thirty-fifth percentile to sixty-fifth percentile of the data set of series, arranged as above, would constitute the arm's length range.
- Arm's length test:
  - If the price at which the international transaction or SDT is undertaken is within the thirty-fifth percentile to sixty-fifth percentile of the dataset, the transaction shall be deemed to be at the ALP.
  - If the price at which the international transaction or the SDT is undertaken is outside the arm's length range (thirty-fifth percentile to sixty-fifth percentile of the dataset), the ALP of the transaction shall be taken to be the median of the dataset.

CBDT Notification No. 83/2015 dated 19 October 2015

II. CENTRAL EXCISE DUTY

Supreme Court Decisions

Interest on receivables, embedded in the sale price, is liable to be deducted from the assessable value for the purposes of payment of excise duty

The taxpayer was engaged in the manufacture of lubricating oils and its allied preparations, which were being sold to customers on cash sales basis, as well as on credit. The taxpayer offered a cash discount to such buyers that made cash payment against the delivery of goods. However to customers that purchased goods on credit, a higher price was charged and the interest element was embedded in the price of goods itself. As the interest on receivables from such buyers was only known at the end of the year, the taxpayer carried out a provisional assessment and paid excise duty accordingly. Thereafter at the time of final assessment, the taxpayer submitted a certificate from a chartered accountant to prove the computation of interest according to the credit period offered to the buyers, and claimed the excess excise duty paid earlier.

The Revenue authorities ("RA") disallowed the deduction as the same was not expressly mentioned on the invoice. The RA contended that the price charged on the invoice for such credit sales was the normal price, and the price charged for cash sales was the discounted price. The RA further contended that the taxpayer failed to establish that the price charged on credit sale includes the interest element, as there was no evidence that the interest was recovered separately from the customers. The Supreme Court ("SC") observed that the lower price charged for cash sales indicated the cash discount offered, as against credit sales. The same implied that the interest component was embedded in the price charged to buyers purchasing goods on credit, which should not form part of the transaction value. Thus the taxpayer was not required to pay excise duty on the interest component.

M/s Castrol India Ltd vs CCE, Chennai (Civil Appeal No 532 of 2008, Civil Appeal No 2463 of 2008) (SC)

Exemption available in respect of inputs captively consumed in the manufacture of final product which was specifically exempt from excise duty subject to fulfillment of conditions

The taxpayer was engaged in manufacture of final product 'cement' which was exempt from the levy of excise duty under exemption Notification No 50/2003 – CE dated June 06, 2003. The taxpayer also manufactured the intermediate good 'clinker' in the same factory where the final product was manufactured, which was not specifically exempted under Notification no 50/2003. Subsequently, the taxpayer claimed exemption on manufacture of 'clinker' by virtue of exemption Notification No 67/1995 dated March 16, 1995 which lays down that intermediate goods used in captive consumption would be exempt from excise duty subject to certain conditions. The RA contended that the exemption under Notification No 67/1995 was not applicable to the taxpayer as the proviso to the notification states that if the intermediate goods were used in manufacture of final product that were exempted from excise duty, the intermediate goods would not be eligible for the benefit of the exemption.

The SC observed that the aforesaid proviso would not be applicable where the goods are cleared under any of the six circumstances mentioned in the notification, which specifically includes a scenario where

a manufacturer of dutiable and exempted final products has discharged the obligation under Rule 6 of the CENVAT Credit Rules, 2001. As the taxpayer in the present case had followed the obligations prescribed under Rule 6 provided above, the SC set aside the CESTAT order and held that exemption on 'clinker' would be available to the taxpayer under Notification No 67/1995.

Ambuja Cement Ltd vs CCE, Chandigarh (Civil Appeal No 2793 of 2006, 2912 of 2006, 10934 of 2014 and 10394 of 2013) (SC)

Tribunal Decisions

Benefit of non-payment of excise duty on goods exported as provided under Notification No 44/2001-CE(NT) dated June 26, 2001 would be available in case of deemed exports as well

The taxpayer was engaged in manufacture of excisable goods and was a holder of an Advance License for deemed exports under Notification No 108/1995 – CE dated June 26, 1995. Thus the taxpayer could manufacture and clear goods without payment of duty to the Assam Integrated Flood and Riverbank Erosion Risk Management Programme under International Competitive Bidding (ICB), which qualified as a 'deemed' export as per the aforesaid notification. The taxpayer also procured intermediate goods from an Advance Authorization holder, which were used as inputs in the manufacture of goods.

The RA claimed that the benefit of exemption of excise duty would not be available to the taxpayer as the final product manufactured by the taxpayer was not physically exported out of India, and the opening paragraph of Notification No 44/2001 – CE (NT) clearly provided that the exemption was available only in case of export of goods out of India, excluding Nepal and Bhutan. The RA contended that the proviso contained in the said notification could not go beyond the scope of the opening paragraph of the notification and therefore benefit of excise exemption was not available under the notification.

The CESTAT observed that the language of the proviso under Notification No 44/2001 – CE (NT) was clear and non-ambiguous, and that the proviso must be considered in relation to the main matter of the notification. The CESTAT held that the proviso contained in the notification was of wide amplitude and therefore, if a manufacturer holding an Advance Authorization, supplied intermediate goods to another manufacturer (the taxpayer), who in turn removed the final products under ICB using such intermediate goods, then such taxpayer would be covered within the scope of the notification. Consequently, CESTAT set aside the order of demand of duty along with interest and penalty and allowed the appeal of taxpayer.

M/s Techfab India Industries Limited vs CCE, Daman (Appeal no E/11164/2014) (CESTAT, Ahmedabad)

III. VAT/ CST/Entry Tax

Supreme Court Decisions

Input tax credit ("ITC") on raw materials used in the manufacture of

the final products, which were exempted from VAT, would be available

The taxpayer, a manufacturer, availed ITC on raw materials used in manufacturing activities. The RA denied the benefit of ITC to the taxpayer on the ground that the taxpayer did not pay VAT on the sale of manufactured goods, due to an exemption available under the provisions of Rajasthan Value Added Tax Act. In response, the taxpayer had contended that it had received VAT exemption as a manufacturer of goods, under the Rajasthan Sales Tax Act, 1994. The taxpayer also contended that there was a difference between exempted 'goods' and 'special transactions' or 'persons' that are exempted. In the latter case, the goods themselves remained taxable though exemption was granted to a particular individual or a specified transaction. In such cases, all subsequent transactions in those goods, since not specifically exempt, would be subjected to taxation.

The SC agreed with the contention of the taxpayer. The SC also observed that if the contention of the RA was to be accepted, the taxpayer though covered by an exemption notification could be placed at a disadvantageous position. The same due to the reason that if a subsequent sale would be made by a non-exempted dealer or if tax stands paid on the non-exempted transfer, goods would suffer tax on the entire sale consideration. This would place an exempted manufacturer-dealer at a disadvantageous position and make his products uncompetitive, in spite of the exemption. Thus the SC held that ITC was correctly availed by the taxpayer and consequently dismissed the appeal filed by RA.

Commercial Tax Officer vs A Infrastructure Ltd (Civil Appeal No 2806 of 2015) (SC)

Directorate of Commercial Tax (WB) Decisions

Development, upgradation and maintenance of pre-existing software would amount to a works contract, therefore liable to VAT

The taxpayer, registered as a dealer under the West Bengal Value Added Tax Act, 2003 ("WBVAT Act") was engaged in import and sale of information technology software and also undertook development, upgradation and maintenance of pre-existing software. The taxpayer raised a question for determination of rate of VAT applicable on an annual maintenance contract ("AMC") involving development, upgradation and maintenance of such pre-existing software. The taxpayer contended that the deemed deduction available under the WBVAT with respect to various types of works contract, would also cover such AMC's involving software.

The Commissioner, Sales Tax, observed that software amounted to 'goods' as per the WBVAT Act and was taxable at the VAT rate of 5 percent. With respect to the question at hand, the Commissioner held that any comprehensive AMC involving transfer of property in goods would fall under the ambit of works contract, and therefore any development, upgradation and maintenance of pre-existing software would also amount to a works contract and would be taxed accordingly. Accordingly the Commissioner classified the software under "annual

maintenance contract of any equipment including computer, that was liable to a deemed deduction of 40 percent.

M/s Hewlett-Packard Sales Private Limited vs Directorate of Commercial Taxes (Case No. 24X/PRO/VAT/15/256) (Directorate of Commercial Tax, West Bengal)

IV. CUSTOMS DUTY

High Court Decisions

Blanket exemption from levy of additional duty (CVD) not available to importers, when exemption from excise duty is conditional as per the exemption notification

The issue before the HC was whether benefit of an exemption from CVD would be available, in case similar goods when manufactured were made exempt from excise duty. The exemption from CVD was provided under Notification no 30/2004-CE dated July 9, 2004, subject to the condition that no CENVAT Credit ought to have been availed in respect of duties paid on inputs used in such goods.

The SC had passed two judgements on the same question (Aidek Tourism Services Private Limited [2015 (3) TMI 690 - Supreme Court] and SRF Limited [2015 (4) TMI 561- Supreme Court]), and held that the aforesaid benefit of exemption from CVD shall be available to importers of goods, as in any case an importer would not be able to avail CENVAT Credit, hence the question of fulfilling the condition did not arise.

Subsequently, this Notification no 30/2004 was amended in 2015 by notifications issued in July 17, 2015 and July 21, 2015. Under the amended form, the benefit of exemption under the notification would be available only when specified conditions would be fulfilled by a manufacturer of goods who pays excise duty/ additional duties on the inputs used in manufacture of final products and does not avail credit of the duties so paid. The amended notification specifically excluded 'buyers' from the scope of its benefits.

The said amendment notifications were challenged on the ground that if domestic goods were exempt from excise duty, then importers cannot be placed at a disadvantageous position by being made to pay CVD. In this regard, the HC observed that where exemption notifications prescribed conditions which were merely procedural in nature and did not involve payment of duty on inputs, the taxpayer including the importer was provided the benefit of the exemption, on the premise that importer in any case cannot fulfill the condition. However where the notification prescribes a conditional exemption, only those taxpayers who fulfill the condition of exemption would be allowed the benefit of exemption and those who did not fulfill the conditions would be denied the benefit of exemption, whether importer or any other domestic taxpayer.

The HC also observed that in such cases, the importers were not placed in disadvantageous positions than domestic manufacturers, as the said amendments are made with an intent to separate only those taxpayers who fulfill the conditions, from others that

do not fulfill the condition of the exemption. The notifications also do not seek to differentiate between the importers and domestic manufacturers, but actually seek to differentiate between one set of domestic manufacturers (those who avail credit) from another set of domestic manufacturers (those who do not avail credit), and therefore was not violative of Article 14 of the Constitution specifically in reference to the importers. Also the exemption notification was issued in exercise of the power conferred to the Central Government, as it had the power to grant an exemption either on an absolute basis or subject to conditions. Thus it was held that the amendments were not in excess of the delegated powers, and are not ultra vires to the legislation.

M/s HLG Trading vs Union of India and Others (WP Nos 24507, 26010 and 26011 of 2015, and all connected pending MPs Cont. Petn. No.2069 of 2015 and Sub-A.No.776 of 2015) (HC, Madras)

V. SERVICE TAX

Tribunal Decisions

Reversal of CENVAT Credit amounts to non-availment of Credit, thus benefit of abatement claim cannot be denied

The taxpayer was engaged in the provision of tour operator services and availed the benefit of Notification No 2/2004-ST dated February 5, 2004 and Notification No 01/2006-ST dated March 01, 2006 by paying service tax after availing the benefit of an abatement at the rate of 60 percent or 90 percent as applicable. While availing the benefit of said abatement notification, the taxpayer also availed the benefit of CENVAT Credit, which was reversed subsequently. The RA contended that benefit of the said abatement notification shall not be available as CENVAT Credit has been availed by the taxpayer.

The CESTAT, observed that reversal of CENVAT Credit would amount to non-availment of credit and placed reliance on the decision given in the case of Khyati Tours & Travels Vs CCE Ahmedabad [2011 (24) STR 456 (Tri-Ahmd)]. On the basis of the same, the CESTAT held that the benefit of the abatement notification cannot be denied to the taxpayer.

M/s Windex Tours & Travels vs Commissioner, Central Excise & Service Tax, Vadodara (Appeal no ST/122/2008) (CESTAT, Ahmedabad)

No time limit prescribed for filing a refund claim of CENVAT Credit under Rule 5 of CENVAT Credit Rules, 2004

The taxpayer was engaged in export of taxable services under the category of “business auxiliary services” and “management consultancy service”. The taxpayer filed a refund claim for the accumulated CENVAT Credit under Rule 5 of CENVAT Credit Rules, 2004 (“Credit Rules”) read with Notification No 05/2006 – CE (NT) dated March 14, 2006. The RA rejected the refund claim partially, on grounds which included delay in filing refund claim within the period of one year from the date of invoice. The RA in support of such rejection,

contended that the refund notification specifically provides for limitation of 'one year' as provided under Section 11B of the Central Excise Act, 1944 to apply.

The CESTAT held that mere accumulation of CENVAT Credit did not make the taxpayer entitled to refund under Rule 5 of the Credit Rules, until the taxpayer made an attempt to utilize the CENVAT Credit for payment of taxes. It was also observed that only upon satisfaction of the condition that, CENVAT Credit is accumulated and utilization of that credit is not possible, entitles the taxpayer to claim refund. The CESTAT placed reliance upon the decisions passed in case of Deepak Spinners Ltd [2014 (302) ELT 132], Elcomponics Sales Pvt. Ltd [2012(279) ELT 280] and Global Energy Food Industries [2010 (261) ELT 627], and observed that it would be difficult to arrive at the relevant date to compute the period of limitation under Section 11B of the Central Excise Act, 1944, in case of refund claim is made under Rule 5 of the Credit Rules. Thus it was held that the limitation period prescribed under the Excise Act would not be applicable for refunds filed under Rule 5 of the Credit Rules.

M/s Affinity Express India Pvt Ltd vs CCE, Pune I (Appeal no ST/216/11) (CESTAT, Mumbai)

Supervision charges for erection and commissioning of a plant, if incidental to the supply of plant and machinery, and provided free of cost would not be chargeable to service tax

The taxpayer was engaged in supply of plant and machinery to customers under an arrangement, which included supervision of erection and commissioning of the plant and machinery. The consideration charged by the taxpayer was for the supply of plant and machinery only, and there was no additional charge for the supervision of erection and commissioning of plant and machinery. The RA contended that the arrangement was not merely for supply of plant and machinery and included provision of service for erection and commissioning of plant and machinery. Thus, the RA levied service tax on the entire amount agreed to be paid by the customer to the taxpayer for supply of plant and machinery.

The CESTAT observed that in providing supervision of erection and commissioning of plant and machinery, the taxpayer had not charged anything from the customer and the incidental costs related to such supervision activity were borne by the taxpayer. Referring to the judgement passed by Andhra Pradesh HC in case of CIT vs Sundwiger EMFG & Co, the CESTAT held that supervision has to be considered as incidental to the supply of plant and machinery. Additionally, even if it was held that was a service component in the form of supervision of erection and commissioning of the plant and machinery, the said service was rendered free of cost and thus no service tax liability can arise on the same. Thus the service tax demand was set aside by CESTAT and appeal of the taxpayer was allowed.

Larsen & Toubro Ltd vs CCE, Bhopal (F. Order No. 52531/2015) (CESTAT, Delhi)

Notification & Circulars

Revision of All Industry Rates ("AIR") of Duty Drawback

The Central Government has notified revised All Industry Rates for Duty Drawback with effect from November 23, 2015.

Notification No 110/2015 – Customs (N.T.) dated November 16, 2015

Allotment of Accounting codes for Swachh Bharat Cess ("SBC")

CBEC vide this circular communicated the New minor head "506 – Swachh Bharat Cess" and the following sub heads for payment of SBC:

Tax Collection	Other Receipts (Interest)	Penalties	Deduct Refunds
00441493	00441494	00441496	00441495

Circular No 188/7/2015 – ST dated November 16, 2015

Procedure for granting provisional grant of refund to service exporters for claims filed under Rule 5 of Credit Rules on or before March 31, 2015

The Circular has proposed a scheme for expeditious sanction of refund for service exporters claiming refund under Rule 5 of Credit Rules. The scheme shall apply to refund claims filed on or before March 31, 2015, whereby provisional refund of eighty percent shall be granted within five working days from the submission of requisite documents.

Circular No 187/6/2015 – ST dated November 10th, 2015

Credit of accumulated Education Cess (EC) and Secondary & Higher Education Cess (SHEC) not allowed

CBEC has issued instructions to the officers of Central Excise dated December 7, 2015 to follow clarifications as brought out in the minutes of the Tariff Conference held by the CBEC in October 2015. As per the clarification, the credit of accumulated balances of EC and SHEC balance shall not be allowed for utilization by the taxpayers. The instruction states that this was a policy decision, as the cesses have been phased out and no new liability arises to pay such cesses.

Instructions under File No 96/85/2015 – CX.I dated December 7, 2015 (relevant para B.21)

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