January 2016

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

KPMG cutting through complexity

BMR & Associates

Foreword

I am pleased to enclose the January 2016 issue of FICCI's Tax Updates. This contains recent case laws, circulars and notifications pertaining to direct and indirect taxes.

FICCI organized Interactive Sessions on "GST and its Implications" in collaboration with the Ministry of Finance, Government of India on 17th and 18th December, 2015 at Hyderabad and Bengaluru respectively. At Hyderabad, the programme was organized in association with the Federation of Telangana and Andhra Pradesh Chambers of Commerce and Industry. The objective of the sessions was to provide an insight into the GST framework as currently envisaged and the manner in which businesses need to prepare themselves for a smooth transition to the GST.

FICCI President, Mr. Harshavardhan Neotia was invited for Pre Budget consultations for Union Budget 2016-2017 with the Hon'ble Finance Minister on January 6, 2016. Some of the recommendations made by FICCI included introduction of a rebated income-tax for start-ups, overhaul of the tax administration and dispute resolution machinery by giving up the policy of setting revenue targets for tax officers, automating the process flow of various activities such as refunds, adjudications etc.

In a significant ruling on Central Excise, the Supreme Court has observed that interest liability should not arise on differential excise duty payable due to price escalation agreed post clearance. The manufacturer sold goods at an agreed price which was subsequently revised, as a result of which the taxpayer discharged excise duty on the additional sum received as consideration from its customers. The Revenue alleged that since differential duty paid at the time of price escalation was not paid at the time of removal of goods from the factory, interest under section 11AB of Central Excise Act, 1944 was chargeable on such differential duty amount.

This issue has already been decided by the Supreme Court in case of SKF India Limited and International Auto Limited wherein it was held that interest was payable under section 11AB of the Excise Act on differential duty from the date of

removal of goods. However in this case, the SC observed that the liability to pay differential duty only materialized when the parties to the transaction agreed for the price escalation. The SC also observed that since the differential duty was payable only at the time of fixation of revised prices, the taxpayer could not have known the amount due for payment of additional duty at the time of removal of goods. Thus the SC held that the taxpayer would not be liable to pay interest under section 11AB of the Excise Act and made an observation that the judgements passed in the case of SKF India Limited and International Auto Limited (supra) require a re-look and directed the Registry accordingly.

We do hope that this newsletter keeps you updated on the latest tax developments.

We would welcome any suggestions to improve the content and the presentation of this publication.

A Didar Singh

Recent Case laws

I. Direct Tax

High Court Decision

Presumptive taxation cannot be applied to a taxpayer's income where the taxpayer had incurred losses or its assessable income is less than its presumptive income

The taxpayer is a body corporate having financial and administrative independence. It was a part of the Ministry of Transport of the Government of Jordan and it was to undertake all the scheduled air transport activities from and to Jordan. It was stated by the Transport Ministry of Jordan that the taxpayer is directly controlled by the Council of Ministers and that it has the status of a Department of the Government in the Kingdom of Jordan. The taxpayer has its principal office in Jordan. It appointed Jet Air Pvt. Ltd. as its general sales agent in India. The taxpayer commenced its operations in India, carrying passengers and cargo on international flights from and to India from 1989 onwards. Since commencement of its operations in India, the taxpayer has been incurring losses. It did not file any return of income in India.

During the year under consideration, the taxpayer has not declared its income in terms of Section 44BBA of the Act. In response to the notice issued under Section 142(1) of the Act, the taxpayer disclosed its gross receipts as well as its expenses, apart from the commission paid to its agents. The taxpayer had been paying income tax to the government since September 1993 in order to obtain a 'No Objection Certificate' for remittance of sales proceeds calculated on the basis of gross receipts less commission under Section 44BBA of the Act. The AO held that in terms of Section 44BBA of the Act, 5 per cent of the gross receipts were to be deemed to be taxable income on a presumptive basis. The Commissioner of Income-tax (Appeals) [CIT(A)] held that the taxpayer was not liable to pay tax as its entire income was in fact the income of the Government of Jordan. A reference was also made to the audited accounts of the taxpayer which stated that the Kingdom of Jordan was committed to cover the losses incurred by the taxpayer. The CIT(A) held that the entire income of the taxpayer was exempt from taxation. The Tribunal following its earlier ruling in the case of Iraqi Airways vs Inspecting Assistant Commissioner [1987] 23 ITD 115 (Del) upheld the order of the CIT(A) and held that the income of the taxpayer was not liable to be assessed to income tax.

High Court ruling

In the case of Union of India vs A. Sanyasi Rao [1996] 219 ITR 330 (SC), the Supreme Court was interpreting Section 44AC of the Act which provides for taxation of presumptive income based on gross receipts. The Supreme Court in the said case held that even where Section 44AC of the Act is sought to be applied to a trader, it was only a machinery provision and could not deny the normal relief afforded to all taxpayers. Accordingly, it was held that in such an instance an option would be available to the taxpayer to produce the books of accounts to show that the assessable income is in fact less than the presumptive income.

Section 44BBA of the Act is not a charging provision, but only a machinery provision and it cannot preclude the taxpayer from producing books of accounts to show that in any particular assessment year there is

no taxable income. The High Court concurs with the view expressed by the Tribunal, which has not been challenged by the tax department and has attained finality. The High Court concurs with a view that where there is no income, Section 44BBA of the Act cannot be applied to bring to tax the presumptive income constituting 5 per cent of the gross receipts in terms of Section 44BBA(2) of the Act. For that purpose, the taxpayer has to produce books of accounts to substantiate that it has incurred losses or that its assessable income is less than its presumptive income, as the case may be. The Tribunal has noted the factual position regarding the losses incurred by the taxpayer. This has not been disputed by the tax department in its appeal against the aforesaid order.

DIT vs Royal Jordanian Airlines (ITA No. 159/2002)(Del)–Taxsutra.com

The Delhi High Court held that AMP expenses incurred by Maruti Suzuki India do not constitute an international transaction. It also held the use of a bright line approach inappropriate for determining the existence of an international transaction and for making an adjustment

The taxpayer is engaged in manufacturing of passenger cars in India and is a subsidiary of Suzuki Motor Corporation, Japan (SMC). During the AY 2005-06, the TPO made an adjustment to the total income on account of the AMP expenditure incurred by the company by application of the Bright Line Test (BLT). The Revenue contended that as the taxpayer undertakes sale of products under the brand name 'Maruti-Suzuki', any excess AMP expense incurred by the company vis-à-vis the comparable, is promoting the brand Suzuki which is legally owned by SMC.

High Court's ruling

The High Court has pronounced a landmark ruling on the issue of marketing intangibles for licensed manufacturers through this case. Earlier this year, the Delhi High Court in the case of Sony Ericsson Mobile Communications Pvt. Ltd. CIT [2015] 374 ITR 118 (Del) had adjudicated on the issue of marketing intangibles for taxpayers engaged in marketing and distribution functions. It had held that AMP expenses constituted an international transaction. Taking a contrary stand based on the specific facts of the taxpayer, and distinguishing the Sony Ericsson High Court ruling as the one which looked at the AMP issue for taxpayers that were only distributors and not manufacturers themselves, the High Court rejected the Revenue's contention that after the aforesaid Sony Ericsson ruling, the existence of an international transaction in the case of the taxpayer cannot be questioned.

The findings of the High Court have briefly been given below:

BLT is not permitted under the law - BLT applied by the Revenue authorities is not permissible under the Indian transfer pricing regulations. AMP expense cannot constitute an international transaction merely by application of BLT, especially when its application has been struck down by the High Court in the Sony Ericsson ruling.

Onus is on the Revenue to demonstrate the existence of an international transaction - The onus to demonstrate that an AMP expense incurred by a taxpayer constitutes an international transaction would rest upon the Revenue authorities without application of BLT. Neither the substantive,

nor the machinery provisions of the Indian transfer pricing regulations permit undertaking an adjustment by the application of BLT, in the manner applied by the Revenue authorities.

Lack of statutory guidance on the approach - Even in a case where an AMP expense incurred by the taxpayer is held to be an international transaction, there is no machinery provision under the transfer pricing regulations to enable the Revenue authorities to determine the compensation entitled to an Indian entity and clear statutory guidance is required on the approach to be adopted for such determination.

Benefit to the related party is only incidental - In the subject case, based on an intercompany agreement, SMC had granted permission to the taxpayer to use the co-brand 'Maruti-Suzuki'. Neither did the co-brand belong to SMC nor did it have the right to use the co-brand in India or outside. The High Court noted that as SMC is not entitled to use the co-brand, the benefit does not arise. The High Court held that the benefit of additional AMP spend flowing to SMC is merely based on presumption of the Revenue authorities.

No adjustment warranted if transactions are held to be at ALP - The High Court relied upon the Sony Ericsson ruling that if on application of the Transactional Net Margin Method (TNMM), an Indian entity has operating margins higher than that of the comparable companies, no separate adjustment on account of AMP expense is warranted. Based on the same, the High Court observed that since the net operating margin of the taxpayer is higher vis-à-vis comparable companies, there is no question of a transfer pricing adjustment on AMP expense.

Erstwhile ruling in the case of Maruti Suzuki is not binding - The erstwhile ruling in the case of Maruti Suzuki is no longer binding in light of the observations of the Supreme Court in the same case.

Maruti Suzuki India Limited vs CIT (ITA 110/2014)(Del)

Tribunal Decisions

A taxpayer is entitled to foreign tax credit against MAT liability

The tax department filed an appeal against allowing of relief of foreign tax credit to the taxpayer under Section 90 of the Act, while computing tax liability under the MAT provisions. The tax department contended that taxes under MAT provisions, stood on a different footing than the regular tax computed under other provisions of the Act. Therefore, a rebate for taxes paid in a foreign country could not be granted to the taxpayer. The taxpayer relied on the decision of the co-ordinate Bench in the case of ACIT vs L&T Ltd. [ITA No. 4499/Mum/2008, dated 22 April 2009].

The Bangalore Tribunal while deciding the case, found that a similar issue had come up before the Mumbai Tribunal in the case of L&T Ltd. In that case, the Mumbai Tribunal observed that the income on which tax has been paid abroad was included in 'book profit' for the purpose of computing MAT.

It was held that once taxable income was determined either under the normal provisions of the Act or MAT provisions, a subsequent portion relating to computation of the tax has to be governed by the normal provisions of the Act. In that case, it was

also held that there was no provision in the Act, debarring granting of credit for tax paid abroad in case income is computed under MAT provisions. It was further held that the taxpayer could not be denied the set-off of tax relief against the tax liability determined under the MAT provisions. Therefore, the Bangalore Tribunal by relying on the aforementioned case held that the credit for tax paid in a foreign country would be available under Section 90 of the Act against tax liability under MAT provisions.

DCIT vs Subex Technology Ltd. [ITA No. 913(B)/2013 (Assessment year: 2009-10)] (Bang) – Taxsutra.com

Issue of a corporate guarantee is in nature of 'shareholder activities'/ 'quasi capital' and thus, could not be included within the ambit of 'provision for services' under the definition of 'international transactions' under Section 92B of the Act

The taxpayer issued various corporate guarantees on behalf of its subsidiaries, without charging them any consideration on the ground that these guarantees did not cost anything to the taxpayer, nor were any charges recovered for the same, and the 'said guarantees were in the form of corporate guarantees/quasi capital and not in the nature of any services'.

The TPO made an adjustment by computing the ALP of the corporate guarantee at two per cent at the prevalent market rate for guarantee fees. The Dispute Resolution Panel (DRP) rejected the objections raised by the taxpayer and the AO thus proceeded to make the ALP adjustment.

Tribunal's ruling

The Tribunal:

- Relying on the decision of Micro Inks Ltd vs ACIT [2013] 144 ITD 610 (Ahd), observed that the question of excess credit period arises only when there is a standard credit period for the product sold at the same price and where the credit period allowed to the Associated Enterprises (AEs) is more than the credit period allowed to independent enterprises. That is not the case here. The credit period for finished goods cannot be compared with that of unfinished goods and raw materials, and therefore, when the products are not the same, prices cannot be the same.

- Held that issuance of corporate guarantee was in the nature of 'shareholder activities'/'quasi capital' and thus could not be included within the ambit of 'provision of services' under the definition of 'international transaction' under Section 92B of the Act.

- In the case of Vodafone India Services Limited vs Union of India [2013] 37 Taxmann.com 250 (Bombay), the applicability of a retrospective amendment to Section 92B of the Act had been considered in the context of 'transfer' and not 'international transactions'. The issue considered by the High Court was prior to the amendment, whereas in the present case, it is the amended definition which is to be considered. Therefore, the Tribunal did not find it necessary or proper to apply Section 2(47) of the Act as amended to the present proceedings and hence, the

decision is equally misplaced and devoid of legally sustainable merits.

- Distinguished the G E Capital Canada vs Her Majesty the Queen [2009] TCC 563 decision relied upon by the Revenue.

- Held that the Revenue cannot seek to widen the net of transfer pricing legislation by taking refuge of the best practices recognised by the OECD work.

- Held that bank guarantees are not comparable with corporate guarantees.

- Relying on the decision of CIT vs EKL Appliances Ltd [2012] 345 ITR 241 (Del), the Tribunal stated that even if the issuance of a corporate guarantee is accepted as 'provision for service', such a service is needed to be recharacterised to bring it to tune with commercial reality, as 'no independent enterprise would issue a guarantee without an underlying security as has been done by the taxpayer'.

- Issuance of corporate guarantees is covered by the residuary clause of Section 92B of the Act. However, in the decision in Bharti Airtel Limited vs ACIT [2014] 63 SOT 113 (Del), the Delhi Tribunal has explained the legal position of Section 92B of the Act and has specifically brought that the onus is on the Revenue to demonstrate that the transaction shall have a bearing on its profits, income, losses or assets. These conditions are not satisfied in the present case. It was held that, 'when a taxpayer extends its assistance to the AE, which does not cost anything to the taxpayer and particularly for which the taxpayer could not have realised money by giving it to someone else during the course of its normal business, such assistance or accommodation does not have any bearing on its profits, income, losses or assets, and, therefore, it is outside the ambit of international transactions under Section 92B(1) of the Act' and thus, deleted the transfer pricing adjustment.

Micro Ink Limited vs ACIT (ITA No. 2873/Ahd/10)

Allowability of a deduction under Section 80E in respect of higher education pursued outside India

Section 80E of the Act allows a deduction in the hands of individual taxpayers in respect of interest paid on a loan taken from any approved financial/charitable institution for the purpose of pursuing his/her higher education or for the purpose of higher education of his/her relative.

The Pune Tribunal held that interest on an education loan availed for pursuing higher education outside India is eligible for a deduction under Section 80E of the Act.

Nitin Shantilal Muthiyan vs DCIT [2015] 59 taxmann.com 41 6 (Pune)

Notifications/Circulars/ Press Releases

CBDT Circular on allowability of employer's contribution to funds for the welfare of employees in terms of Section 43B(b) of the Act

The Supreme Court in the case of CIT vs Alom Extrusions Ltd, [2009] 185 Taxman

416 (SC), held that the amendments made in Section 43B of the Act, by way of deletion of the second proviso and amendment in the first proviso are curative in nature and should retrospectively be applicable from 1 April 1988. By these amendments, the contribution to welfare funds have been brought at par with the other duty, cess, fee, etc. Thus, the proviso is equally applicable to the welfare funds. Therefore, the deduction is allowable to the employer if he deposits the contribution to the welfare funds on or before the 'due date' of filing of the return of income.

The CBDT has stated that it is now a settled position that if the taxpayer deposits any sum payable by it by way of tax, duty, cess or fee by whatever name called under any law for the time being in force, or any sum payable by the taxpayer as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees, on or before the 'due date' applicable in his case for furnishing the return of income under Section 139(1) or the Act, no disallowance can be made under Section 43B of the Act.

The CBDT has directed that no appeals should be filed on this ground by the officers of the tax department and appeals already filed, if any, on this ground before Courts/Tribunals should be withdrawn/not pressed upon.

Circular No. 22/2015, dated 17 December 2015

CBDT amends rules relating to furnishing of information in respect of payments made to a non-resident

The CBDT has issued a Press Release and a Notification No. G.S.R. 978(E), dated 16 December 2015 to amend Rule 37BB of the Income-tax Rules, 1962 (the Rules) for furnishing of information in respect of payments made to a non-resident. The amendments to the Rules are summarised as follows:

- The person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum Chargeable under the provisions of the Act, shall furnish the following, namely:

  – The information in Part A of Form No. 15CA shall be furnished, if the amount of payment or the aggregate of such payment made during the financial year does not exceed INR5,00,000.

  – For payments other than the payments referred above, the information shall be furnished:

  * In Part B of Form No.15CA after obtaining:

    i. A certificate from the Assessing Officer (AO) under Section 197; or

    ii. An order from the AO under subsection (2) or subsection (3) of Section 195;

  * In Part C of Form No.15CA after obtaining a CA certificate in Form No. 15CB.

CA certificate in Form No. 15CB will be required to be furnished only in respect of such payments made to non-residents which are chargeable to tax and where the

amount of payment during the year exceeds INR5,00,000.

- The person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum which is not chargeable under the Act, shall furnish information in Part D of Form 15CA.

- No information is required to be furnished in Form 15CA and 15CB for any sum which is not chargeable under the provisions of the Act, if:

  - the remittance is made by an individual and it does not require prior approval of the Reserve Bank of India (RBI) as per the provisions of Section 5 of the Foreign Exchange Management Act, 1999 or

  - the remittance is of the nature prescribed in the specified list.

  - The list of payments of specified nature mentioned in Rule 37BB of the Rules, which do not require submission of Forms 15CA and 15CB, has been expanded from 28 to 33 to include advance payment against imports, payment towards imports settlement of invoice, intermediary trade, imports below INR 5,00,000 (for use by ECD offices) and imports by diplomatic missions.

- The amended Rule 37BB of the Rules prescribes to continue submission of Form 15CA electronically and introduces the optional usage of the digital signature in accordance with the procedure, formats and standards to be provided by the Principal Director General of Income-tax (Systems) [PDGI (Systems)].

- A new sub-rule 6 has been inserted which states that Form 15CB shall be required to be furnished and verified electronically in accordance with the procedures, formats and standards to be provided by the PDGI (Systems). There was no such requirement in the earlier Rule.

- The authorised dealer shall furnish a quarterly statement for each quarter of the financial year in Form 15CC to the PDGI (Systems) or the person authorised by the PDGI (Systems) electronically under digital signature within 15 days from the end of the quarter of the financial year to which such a statement relates in accordance with the procedures, formats and standards to be prescribed by the PDGI(Systems).

- The amended Rules will come into effect from 1 April 2016.

CBDT Notification No. G.S.R. 978(E), dated 16 December2015

CBDT notifies new forms for reporting by investment funds under Section 115UB(7) of the Income-tax Act in order to avail a 'pass through' Status

The CBDT has inserted a new Rule i.e. Rule 12CB along with Forms 64C and 64D for reporting by investment funds [i.e. Category I and II Alternative Investment Funds (AIF)] under Section 115UB(7) of the Act. As per Rule 12CB of the Rules, the person responsible for crediting or making a payment of

income on behalf of the Investment Fund shall furnish the following forms:

- Form 64C to the unit-holders by 30 June of the financial year following the previous year during which the income is paid or credited; and

- Form 64D to the prescribed income tax authority by 30 November of the financial year following the previous year during which the income is paid or credited, electronically under the digital signature, duly verified by an accountant.

In light of the above notification, all investment funds (including Venture Capital Funds (VCF) registered as a Category I AIF) will have to file Forms 64C and 64D (instead of Form 64 which was filed earlier).

CBDT Notification No. 92/2015, dated 11 December 2015

CBDT prescribes new monetary limits for filing of appeals by the tax department before the Tribunal, High Court and Special Leave Petition before the Supreme Court

The CBDT issued a Circular where it stated that the tax department may file an appeal on merits before the Tribunal, High Courts and Special Leave Petition (SLP) before the Supreme Court keeping in view the specified monetary limits and conditions.

The CBDT Circular prescribes new monetary limits and conditions. The appeals/SLPs shall not be filed where the tax effect does not exceed INR10 lakh where an appeal is before the Tribunal, INR20 lakh where an appeal is before the High Court and INR25 lakh in case of appeals before the Supreme Court. It is clarified that the appeal should not be filed merely because the tax effect in a case exceeds the monetary limits prescribed. Filing of an appeal is to be decided on the merits of the case. The CBDT Circular prescribes that in case chargeability of interest is the issue under dispute, the amount of interest shall be the tax effect.

- In cases where returned loss is reduced or assessed as income, the tax effect would include a notional tax on disputed additions.

- In the case of penalty orders, the tax effect will mean a quantum of penalty deleted or reduced in the order to be appealed against.

If the disputed issues arise in more than one assessment year, an appeal can be filed in respect of such assessment year(s) in which the tax effect in respect of the disputed issues exceeds the monetary limit prescribed.

In case of a composite order of any High Court or appellate authority, which involves more than one assessment year and common issues in more than one assessment year, an appeal shall be filed in respect of all such assessment years even if the tax effect is less than the prescribed monetary limits in any of the year(s), if it is decided to file an appeal in respect of the year in which the tax effect exceeds the monetary limit prescribed. In a case where a composite order/ judgement involves more than one taxpayer, each taxpayer shall be dealt with separately.

The Commissioner of Income-tax shall keep a record of the cases wherein an appeal before the Tribunal or a Court is not filed on account of a tax effect being less than the monetary limit. In such cases, no

inference shall be drawn as the decisions rendered were acceptable to the department. Further, the tax department shall not be precluded from filing an appeal against disputed issues in the case of the same taxpayer for any other Assessment Year (AY) or in the case of any other taxpayer for the same or any other AY, if the tax effect exceeds the monetary limit.

Adverse judgements on following issues should be contested on merits, notwithstanding that the tax effect entailed is less than the monetary limit or that there is no tax effect:

- Where the constitutional validity of the Act or the Rules is under challenge, or
- Where a CBDT order, notification, instruction or circular has been held to be illegal or ultra vires, or
- Where the revenue audit objection in the case has been accepted by the tax department, or
- Where the addition relates to undisclosed foreign assets/bank accounts.

The Circular prescribes that the monetary limits shall not apply to writ matters and direct tax matters other than income tax. Filing of appeals in other direct tax matters shall continue to be governed by relevant provisions of the statute and rules. Further, the filing of an appeal in cases of income tax, where the tax effect is not quantifiable or not involved i.e. registration of trusts or institutions under Section 12A of the Act, shall not be governed by monetary limits and the decision to file an appeal in such cases may be taken on the merits of a particular case.

The CBDT circular will apply retrospectively to pending appeals and appeals to be filed henceforth in High Courts/the Tribunal. Pending appeals below the specified tax limits may be withdrawn/not pressed. Appeals before the Supreme Court will be governed by the instructions on this subject, operative at the time when such an appeal was filed.

Circular No. 21/2015, dated 10 December 2015

The CBDT extends the collegium system to considser withdrawal of appeals from High Courts

The CBDT has issued an Office Memorandum to extend the collegium system to consider withdrawal of appeals from the High Courts where the same are no longer considered prosecutable. The collegium system existing in multi-CCsIT stations would be responsible for reviewing all appeals pending before the High Courts relating to jurisdictional CCIT.

CBDT Office Memorandum No. F. No. 279/Misc./52/2014 - (TTJ)

II. SERVICE TAX

Advance Ruling

Service tax is not applicable on salary and allowances payable by an Indian company to employees under a dual employment with the parent company

The applicant, a subsidiary of a US based company ("Parent Company"), employed a person who was also on the permanent employment roll of the Parent Company. A tripartite agreement was executed between the applicant, the Parent Company and the employee, whereby the employee was required to provide services under a contract of employment with the applicant for a specific time period for which the salaries and allowances were paid by the applicant to the employee. The Parent Company was required to bear the social security requirements of the employee. As per the agreement, the applicant was not required to reimburse any amount to the Parent Company for meeting social security requirements of the employee.

The Authority for Advance Rulings ("AAR") observed that the language of the agreement clearly suggested that the employee was under the employment of the applicant since he provided services solely to the applicant. The AAR also observed that under the Negative List regime, a fresh definition of 'service' was provided under Section 65 (44) of the Finance Act, 1994 (as amended, 'the Act'), which excluded from its ambit services provided by an employee to the employer in the course employment. The AAR also held that merely because the social security amount was paid by the Parent Company, it could not lead to an interpretation that the arrangement was that of a pure 'service' between the applicant and the Parent Company. Thus the AAR held that there was no liability to pay service tax on the salary and the allowances by the applicant to the employee.

M/s North American Coal Corporation India Pvt Ltd (Advance Ruling No AAR/ST/13/2015) (AAR)

Tribunal Decisions

Refund of service tax filed by SEZ units would be allowable, even if the input services carried an unconditional upfront exemption

The taxpayer, an SEZ unit, filed a refund claim of service tax paid on services used in the authorized operations of the SEZ unit under Notification No 9/2009 dated March 3, 2009. The Revenue Authorities ("RA") rejected the refund application on the ground that the services did not have any nexus with the authorized operations in SEZ, even though the same were approved by the Approval Committee in the list of approved services. A portion of the refund claim was also rejected on the ground that an unconditional exemption was provided to such services, when wholly consumed within the SEZ under Notification no 15/2009-ST dated May 20, 2009. Thus as per the RA, the taxpayer instead of claiming refund, should have availed the unconditional exemption.

It was held that refund claim was allowable on all such services that were included in the list of approved services, as once the Approval Committee certified that services

received by the taxpayer were in relation to authorized operations, a contrary decision could not be taken by the RA.
Further the refund claim was held to be allowable even in cases where the service was wholly consumed within the SEZ. The CESTAT held that the taxpayer was eligible to claim refund where service tax was already paid on services, thereby implying that the upfront exemption was optional.

M/s Dell India Pvt Ltd vs Commissioner of Central Excise, Customs and Service Tax, Bangalore (ST/696/2012-SM, ST/697/2012-SM, ST/698/2012-SM, ST/700/2012-SM, ST/701/2012-SM,
ST/702/2012-SM, ST/703/2012-SM) (CESTAT, Bangalore)

III. CENTRAL EXCISE

Supreme Court Decisions

Pre-delivery inspection charges and after sales service charged by dealers not includible in the assessable value

The question before the SC was whether pre-delivery inspection charges and after sales service charges, charged by dealers, were includible in the assessable value of manufacturers for the purpose of levy of excise duty. This issue was decided by the larger bench of CESTAT Delhi in the case of Maruti Suzuki India Ltd. *[2010 (257) ELT 226 (Tri. LB)],* where it was held that such charges were includible in the assessable value.

The SC observed that pre-delivery inspection charges and after sales service charges were borne by the dealer, for services rendered as a routine activity, as per the dealership agreement entered into with the taxpayer. The SC rejected the contention of RA that such services were linked to the warranty given by the taxpayers for the goods. The SC also observed that the expense incurred by the dealer for the pre-delivery inspection and after sales services was not related to the term "servicing" mentioned in the definition of transaction value under the Excise Act. On the basis of above observations, the SC overruled the larger bench ruling of the CESTAT given in the case of Maruti Suzuki India Ltd. and held that pre-delivery inspection charges and after sales service charges would not be included in the assessable value for the purpose of paying excise duty.

M/s CCE, Mysore vs M/s TVS Motors Company Ltd (Civil Appeal No 5155-5156 of 2007) (SC)

Interest liability should not arise on differential excise duty payable due to price escalation agreed post clearance

The taxpayer was engaged in manufacture and trading of iron and steel products, which were sold at an agreed price to Indian Railways and cleared from the factory upon payment of excise duty on the invoice value. Subsequently, there was an upward revision in the price of the products, as a result of which the taxpayer discharged excise duty on the additional sum received as consideration from its customers. The RA alleged that since differential duty paid at the time of price escalation was not paid at the time of removal of goods from the factory, interest under section 11AB of Central Excise Act, 1944

("Excise Act") was chargeable on such differential duty amount.

This issue has already decided by the Supreme Court ("SC") in case of SKF India Limited [(2009) 13 SCC 461)] and International Auto Limited [(2010) 2 SCC 672], wherein it was held that interest was payable under section 11AB of the Excise Act on differential duty from the date of removal of goods. However in this case, the SC observed that the liability to pay differential duty only materialized when the parties to the transaction agreed for the price escalation. The SC also observed that since the differential duty was payable only at the time of fixation of revised prices, the taxpayer could not have known the amount due for payment of additional duty at the time of removal of goods. Thus the SC held that the taxpayer would not be liable to pay interest under section 11AB of the Excise Act and made an observation that the judgements passed in the case of SKF India Limited and International Auto Limited (supra) require a relook. The registry was directed to place this matter before the Hon'ble Chief Justice of India for constituting a larger bench to examine the issue.

M/s Steel Authority of India Ltd vs CCE, Raipur (Civil Appeal No 2150 of 2012 with 2562 of 2012, 599 of 2013, 600 of 2013 and 1522-1523 of 2013) (SC)

Maximum Retail Price ("MRP") based valuation of goods upheld on bulk sales made to institutional buyers

The taxpayer was engaged in the manufacture of footwear under the brand name of 'Liberty', and sold the same to retail buyers as well as to institutional buyers, in bulk, on contract price. The taxpayer discharged the excise duty liability at the time of removal of goods on the MRP, after availing abatement of 40 percent as provided under section 4A of the Excise Act. The same was done irrespective of the fact that goods were sold to retail buyers or institutional buyers. As per the RA, in cases where goods were sold at the contract price, affixation of MRP had no legal significance, and valuation had to be carried out under section 4 of the Excise Act, instead of section 4A of the Excise Act. The RA also contended that as per the provisions of Standards of Weights and Measures (Packaged Commodities) Rules, 1977 ("SWM Rules"), MRP was required to be declared only in cases where goods were intended for retail sale.

The SC observed that Rule 34 of the SWM Rules, which exempted application of MRP on goods supplied in bulk, was not applicable to the present case and therefore the taxpayer was bound to affix MRP on the goods sold (as per section 4A of the Excise Act). Relying on the judgement passed in case of Jayanti Food Processing (P) Ltd [2007 (8) SCC 34], the SC dismissed the appeal of the RA. There was no finding given by the SC on the sale at contract price adopted by the taxpayer.

CCE, Panchkula vs M/s Liberty Shoes Ltd. (Civil Appeal No 999-1001 of 2008) (SC)

Tribunal Decisions

Education cess ("EC") not payable on paper cess as the same is levied by the Ministry of Industries

The taxpayer discharged the liability of paper cess on paper and paper boards manufactured by it. The question before the CESTAT was whether EC was payable on paper cess, which was levied by the Ministry of Industries under the provisions of Industrial Development and Regulation Act, 1961. The RA contended that as paper cess was payable on excisable goods, EC would also be payable such paper cess applicable on excisable goods. The taxpayer substantiated its contention that EC was not applicable on paper cess by placing reliance on the decision given in the case of Andhra Pradesh Paper Mills [2009 (235) ELT 474] and Circular F No 262/2/2008 – CX.8 dated January 7, 2014.

The CESTAT observed that as per Clause 83 of the Finance (No 2) Bill, 2004, EC shall be levied on only on such duties which are (a) levied and collected as duties of excise/ customs, and (b) both levied and collected by the Department of Revenue, which was also clarified in Circular F No 345/2/2004-TRU (Pt.) dated August 10, 2004. Reference was also made to decision in the case of Andhra Pradesh Paper Mills, wherein it was held that since paper cess is not levied by the Department of Revenue and levied by the Department of Industrial Development, Ministry of Commerce and Industry, the second condition does not get satisfied for levy of EC.

Relying on the decision passed in case of Andhra Pradesh Paper Mills, the CESTAT observed that EC cannot be levied on duties collected by Ministry of Finance, but levied by another Ministry and hence the demand of EC was termed as unsustainable in the instant case.

Commissioner, Central Excise & Service Tax, Vapi vs M/s Shah Pulp & Paper Mills Ltd (Order No A/11580/2015) (CESTAT Ahmedabad)

Excise duty not payable on scrap not brought back from the job workers premises

The taxpayer was engaged in the manufacture of motor vehicles, and was sending goods to job workers' premises for manufacture of inputs to be used in manufacture of final products. The scrap generated in the course of manufacture of inputs at the job workers premises was not received back by the taxpayer. However, the taxpayer mistakenly paid the excise duty on the value of scrap generated at the job workers premises and subsequently claimed refund of such excise duty paid on scrap. The RA rejected the refund claim on the ground final product also includes scrap and is therefore liable to excise duty. The RA also contended that the refund claim is hit by doctrine of unjust enrichment because the taxpayer failed to substantiate that excise duty paid on scrap is not included in assessable value of final products.

The taxpayer's key contention was that the CENVAT Credit Rules, 2004 ('CCR') nowhere provides for reversal of credit and/or paying excise duty on the scrap generated at job workers premises not brought back by the principal manufacturer.

The CESTAT relying upon the ruling passed by Bombay High Court in case of Rocket Engineering Corporation Ltd [2006 (76) RLT 8 (Bom)] held that there is no requirement under Rule 4(5)(a) of the CCR either to receive the scrap generated at job workers premises or pay excise duty in case the

scrap is not received back by the principal manufacturer. Consequently appeal of the taxpayer was allowed.

M/s Mahindra And Mahindra Ltd. vs CCE, Mumbai - V (Appeal No E/1091/10) (CESTAT Mumbai)

IV. VAT/CST/LBT

Supreme Court Decisions

Sodexo Meal vouchers would not qualify as 'goods' for the purpose of levy of LBT

The taxpayer was engaged in the business of providing pre-printed meal vouchers to its customers who were mainly corporate establishments. Such establishments passed on the meal vouchers to employees, as a part of their salary package and the employees had the option of redeeming the vouchers against meals or goods at affiliated restaurants or shops. Such affiliates in-turn provided the meal vouchers to the taxpayer and collected reimbursement for the face value of such vouchers. While reimbursing the affiliates, the taxpayer retained a service fee/ charge, as a fee, since the meal vouchers benefited the business of such affiliates.

The RA contended that as such vouchers were capable of being sold, delivered, stored and possessed, the same were 'goods' and are liable to local body tax ("LBT") and Octroi duty under the Maharashtra Municipal Corporation Act. The taxpayer resisted the same on the ground that it was providing services to establishments with whom it had entered into contracts, and therefore such contracts were for services and not for sale of 'goods'.

The SC observed that the meal vouchers could not be considered as 'goods' for the purpose of levy of LBT on the following grounds:

- The intrinsic and essential character of the entire transaction was to provide services by the taxpayer, which was achieved through the vouchers. The taxpayer only acted as a facilitator and a medium between the affiliates and the organizations that issued the meal voucher to its employees

- The said vouchers did not clear the test of "ability of being traded or sold separately" as they were printed for specific customers and could not be traded freely

- Meal vouchers were to be treated as expenditure incurred by the organization issuing the meal voucher and an amenity in the hands of the employee

Sodexo SVC India Private Limited vs State of Maharashtra & Others (Civil Appeal Nos 4385-4386 of 2015) (SC)

Tribunal Decisions

Service tax not includible in taxable turnover for payment of VAT under composition scheme

The issue involved in the instant case was whether the amount of service tax is includible in the taxable value of works contract for discharge of tax liability under composi-

tion scheme under the Maharashtra Value Added Tax Act, 2002 ("MVAT Act").

The RA contended that as there is no specific exclusion for service tax from the definition of 'sale price' under the MVAT Act, the amount of service tax collected by the taxpayer shall be included in the assessable value for payment of VAT under composition scheme. Further, no deduction shall be allowed in case the composition scheme was opted by the taxpayer and VAT is not paid under normal provisions of the MVAT Act.

The Maharashtra Sales Tax Tribunal ("MSTT") referred to Explanation II under section 2(25) of MVAT Act, which provides that the definition of sales price shall not include 'tax' paid or payable to the seller against such sale. On the basis of the above explanation, the MSTT observed that the RA cannot interpret the term 'tax' as 'sales tax' only, and therefore service tax would not be included in the taxable value under the MVAT Act.

M/s Technocrat Engineers vs The State of Maharashtra (VAT Second Appeal No 237 of 2014) (MSTT, Mumbai)

V. CUSTOMS

Advance Rulings

Components/ parts/ sub-assemblies not to be classified as motor vehicles or completely knocked down ("CKD") kit, when critical components/ parts/ sub-assemblies are to be locally assembled/ manufactured

The applicant, being a wholly owned subsidiary of a foreign car manufacturer, was engaged in the business of manufacturing and selling of motors cars in India. The applicant applied to the AAR seeking to obtain a ruling on whether import of components/ parts/ sub-assemblies would be classified as motor vehicles or CKD kits, when six essential components/ parts/ sub-assemblies were locally assembled/ manufactured by approved from local third party vendors. The RA alleged that as the local third party vendors were engaged in the business of only importing and manufacturing car parts of the applicant, the sourcing of the same by the applicant was a mere façade.

The AAR observed that CBEC Circular F No 528/128/97-Cus-TRU dated December 5, 1997 clarified that if all components or parts or sub-assemblies are imported, Rule 2(a) of the general rules of interpretation would be applicable. The AAR further observed that if a few components or parts or sub-assemblies were not imported, but manufactured or purchased locally, it would be difficult to take a view that 'essential characteristics' of a motor car has been achieved for invoking Rule 2(a) of the general rules of interpretation. Thus the AAR held that import of components/ parts/ sub-assemblies by the applicant would not be classifiable as motor vehicle or as CKD kits when essential components are locally assembled/manufactured by approved local third party vendors.

M/s BMW India Private Limited (Ruling No AAR/Cus/12/2015) (AAR)

Notification & Circulars

Comptroller and Auditor General of India ("CAG") submits report on levy

and collection of service tax on works contract service

CAG has submitted its report on levy and collection of service tax on works contract service for the year ended March 31, 2015 for perusal by the Parliament. The report summarizes results of performance audit on levy and collection of service tax and also gives recommendations in respect of works contract services. Following recommendations of the report are important to note:

- Inter departmental co-ordination should be made obligatory, mainly with Commercial Tax Departments, for identification of unregistered service providers and broadening of tax base through the regional economic intelligence committee meetings. The result of this exercise should be reflected in periodical reports

- Central Board of Excise & Customs ("CBEC") may consider designing a tool for reconciling service tax payments received from the taxpayers with the filed service tax returns of the taxpayers

- Monitoring mechanism to watch non/ late filers to be strengthened

CAG Report on works contract service

Applicability of service tax on job work services received by apparel exporters

The Tax Research Unit ("TRU") has issued a circular which provides clarification on the applicability of service tax on job work activities by apparel exporters. The Circular touches upon aspects which are pertinent for classification of activities performed by a job worker as 'manpower supply services' or 'process amounting to manufacture'. As per TRU, essential characteristics for an activity to qualify as 'manpower supply service' are as under:

- The supplier provides manpower which is at the disposal, and temporarily under effective control of the service recipient during the period of contract

- Service provider's accountability is only to the extent of quality of manpower Deployment of manpower normally rests with the service recipient

- The value of service has a direct correlation to manpower deployed ie, manpower deployed multiplied by the rate

Circular No 190/9/2015 – ST dated December 15, 2015

Revised monetary limit for filing appeals to the CESTAT and High Court ("HC") by the RA

CBEC has issued an instruction revising the monetary limits for filing appeals to the

CESTAT and HC by the RA. The revised monetary limit to file an appeal to the CESTAT is INR 10 lakhs and to the HC is INR 15 lakhs. It was further clarified that the revised monetary limits shall apply to pending appeals also.

Instruction F No 390_Misc_163_2010 – JC dated December 17, 2015, updated by subsequent instruction bearing same number issued on January 01, 2016

Rule 52B inserted under Maharashtra Value Added Tax Rules, 2005 ("MVAT Rules") providing restriction in set-off of VAT credits in specified cases

- The Department of Sales Tax, Maharashtra issued a notification for inserting rule 52B under the MVAT Rules providing that if a dealer has purchased goods in the nature of aerated and carbonated non-alcoholic beverage (whether or not containing sugar or other sweetening matter, or flavor or any other additives) or cigar and cigarettes, as covered under Schedule D of the MVAT Act, such dealer shall be entitled to claim set-off only to the extent of aggregate of:

- the taxes paid or payable under the Central Sales Tax Act, 1956 on the inter-state resale of the corresponding goods; and

- the taxes paid on the purchases of said goods, if are resold locally under the Act

- Prior to this insertion, full credit was allowed on aerated and carbonated non-alcoholic beverages and the same was not limited vis-à-vis onward sales.

Notification No VAT 1515 / CR – 158 / Taxation – 1 dated December 30, 2015

Revised rates of VAT under Odisha Value Added Tax Act, 2004 (Odisha VAT Act)

Commercial tax department of Odisha has increased the residuary rate of VAT as prescribed under Schedule B of Odisha VAT Act from 13.5 percent to 14.5 percent. Also rate of VAT on foreign liquor has been increased from 25 percent to 35 percent. The revised rates shall come into force from January 1, 2016.

Notification No 80-FIN-CT1-TAX-0020-2015 dated January 01, 2016