February 2016

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

Foreword

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

The Budget session of Parliament is due to commence later this month and the Finance Minister will be presenting the General Budget on 29th February, 2016. FICCI's Post Budget National Executive Committee Meeting is scheduled to be held on 4th of March, 2016, wherein Secretary (Economic Affairs), Revenue Secretary, Chief Economic Advisor etc. are expected to participate. This meeting will cover the budget in its entirety including economic issues, expenditure, taxation etc. FICCI would also be conducting an 'Interactive Session on Union Budget 2016-2017' on March 2, 2016 at its headquarters. The objective of the event is to update the participants on the key provisions of the Finance Bill, 2016 and the relevant notifications to help the participants in understanding the implications of the changes in the Income Tax, Customs, Central Excise and Service Tax laws and procedures.

In the taxation regime, the Central Board of Direct Taxes ('CBDT') vide a circular has clarified that where Minimum Alternate Tax (MAT) is applicable, no penalty for concealment of income under section 271(1)(c) of the Income Tax Act,1961 shall be levied with reference to additions/disallowances made under normal provisions of the Act for cases prior to Assessment Year 2016-17. The CBDT clarifies that in the cases prior to 1 April 2016, if any adjustment is made in the income computed for the purpose of MAT, then the levy of penalty under section 271(1)(c) of the Act, will depend upon the nature of adjustment.

In a recent decision, the Authority for Advance Rulings ("AAR") has decided that no service tax was chargeable on the car lease rent recovered by the applicant from its employees. The applicant sought an Advance Ruling seeking to understand service tax implications arising on a car lease scheme floated for its employees. Under the scheme cars were provided to employees during their stint of employment with the applicant. The applicant would hire cars from a car leasing company and make them available to employees, who were free to utilize such cars for their official as well as personal use. The applicant proposed to recover the amount of rent payable to the car leasing company from the employees on cost to cost basis, without any mark-up. At the end of employment, employees were also given an option to buy the car at the written down value of the car. AAR decided that no service tax was chargeable on the rent recovered by the applicant from its employees. The AAR also observed that service tax was not chargeable on the car lease rent merely because the car was used for official as well as for personal purpose

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 TAXES

Supreme Court Decision

Claim of depreciation is not allowed on account of 'sham' sale and lease back transaction

The taxpayer claimed depreciation on certain machinery purchased from the Andhra Pradesh State Electricity Board (APSEB). The taxpayer claimed that the said machinery was given to APSEB on lease. The lower authorities held that there was no such purchase of machinery and that the transaction in question is a sham.

The Supreme Court held that since the machinery was not purchased by the taxpayer, it never became the owner of the machinery and therefore, could not claim any depreciation thereof. These are pure findings of facts recorded by the lower authorities. Accordingly, the appeal of the taxpayer is dismissed.

Avasarala Technologies Ltd vs JCIT (Civil Appeal No. 2996 of 2004) – Taxsutra.com

Penalty under Section 271C of the Act cannot be levied if the tax department is unable to establish a contumacious conduct on the part of the taxpayer

The AO vide its order has levied a penalty under Section 271C of the Act against the taxpayer. Against the order of the AO, the taxpayer preferred an appeal before the Commissioner of Income-tax (Appeals) [CIT(A)], which deleted the levy of penalty. The Tribunal held that the present case was not with respect to collection of tax under Section 201(1) of the Act or compensatory interest under Section 201(1A) of the Act. For the levy of penalty, it is necessary to establish that there was contumacious conduct on the part of the taxpayer. The Tribunal relying on the decision of the Delhi High Court in the case of Itochu Corporation [2004] 268 ITR 172 (Del) and the Tribunal decision in the case of CIT vs Mitsui & Company Ltd. [2005] 272 ITR 545 (Del) deleted the penalty. The High Court rejected the appeal only on the ground that no substantial question of law arises in the matter.

The Supreme Court held that there is no substantial question of law arisen in the appeal. The facts and law were correctly assessed and approached by the CIT(A) as well as by the Tribunal. Accordingly, the Supreme Court dismissed the appeal of the tax department.

CIT vs Bank of Nova Scotia (Civil Appeal No. 1704 of 2008) – itatonline.org

High Court Decision

Income attributable to the taxpayer's foreign branches having a permanent establishment outside India is not taxable in India

The taxpayer, an Indian bank, had sought relief in respect of the profit earned by its foreign branches on the basis of respective tax treaties. The AO granted a benefit in respect of the branches at Singapore and Japan, but denied the benefit to the taxpayer in respect of the other branches.

The Bombay High Court held that income attributable to the taxpayer's foreign branches having a Permanent Establishment (PE) outside India shall not be taxable in India. If the taxpayer has a PE abroad, then, the taxpayer would be required to produce evidence regarding payment of taxes pertaining to the income of these establishments abroad. On production of such evidence, the taxpayer would be entitled to the tax treaty benefit. Accordingly, income attributable to the taxpayer's foreign branches having a PE outside India is not taxable in India.

CIT vs Bank of India [2015] 64 taxmann.com 215 (Bombay)

Radio programme production for broadcasting is 'manufacture' and hence eligible to claim additional Depreciation

The taxpayer is engaged in the business of FM radio broadcasting and was granted permission for operating FM radio broadcasting channels at various places in India, against the payment of a prescribed one time entry fee. On the advice of the marketing team, the taxpayer started taking trial runs by running radio programmes within the office premises at Jodhpur, Patiala and Amritsar in AY 2008-09.

During the year under consideration, the taxpayer filed its return of income and claimed additional depreciation under Section 32(1)(iia) of the Act in respect of programme production expenditure. However, the AO held that the production of radio programmes cannot be considered as 'production of an article or thing' and therefore, the additional depreciation was disallowed.

High Court Decisions

Additional depreciation

The production of radio programmes, involved the processes of recording, editing and making copies prior to broadcasting. When a radio programme is made there comes into existence a 'thing' which is intangible, and which can be transmitted and even sold by making copies. Therefore, radio programmes produced by the taxpayer is a 'thing', if not an 'article.' This satisfies the understood definition of 'thing' in terms of the Black's Law Dictionary. 'Thing' could, therefore, have an intangible characteristic. The word 'manufacture' envisages subjecting any material or thing to certain processes in order to produce something which has a distinct characteristic. Although the definition of 'manufacture' was inserted with effect from 1 April 2009 in the form of Section 2(29BA) of the Act, it must be understood as being clarificatory in nature given the common parlance understanding of the term 'manufacture'.

In the context of 'broadcast', manufacture could encompass the processes of producing, recording, editing and making copies of the radio programme followed by its broadcasting. The activity of broadcasting, in the above context, would necessarily envisage all the above incidental activities which are nevertheless integral to the business of broadcasting. Accordingly, the taxpayer has used the plant and machinery acquired and installed by it after 31 March 2005 for manufacture/production of an 'article or thing.' Since the taxpayer has satisfied the requirements of Section 32(1)(iia) of the Act, it is entitled to additional depreciation as claimed by it.

CIT vs Radio Today Broadcasting Ltd (ITA No. 190/2015, dated 9 December 2015) – Taxsutra.com

Ex-gratia payment made voluntarily by an employer is not taxable as 'profits in lieu of salary'

Section 17(3) of the Act brings certain payments such as profits in lieu of salary within the ambit of 'income from salaries'. Such payments include compensation due or received from an employer or a former employer at or in connection with the termination of employment or modification of the terms and conditions relating thereto and payment due or received under a Keyman insurance policy.

The Gujarat High Court held that a voluntary payment made by the employer without there being an obligation on the part of the employer to pay any further amount, would not amount to compensation in terms of Section 17(3) of the Act.

Arunbhai R. Naik vs Income-tax Officer [2015] 64 taxmann.com 216 (Gujarat)

Tribunal Decisions

An Indian company constitutes as a DAPE of a U.S. television company

The taxpayer is a U.S. based company. It holds 100 per cent shares in NGC Network (Mauritius), which in turn, holds 99 per cent shares in NGC Network (India) Private Limited (NGC India). All these companies are subsidiaries/affiliate companies of News Corporation, USA. The taxpayer is the owner of two television channels viz., the National Geographical Channel and Fox International Channel, engaged in the business of broadcasting its own channels in various countries including the Indian sub-continent. The taxpayer is eligible for the India-USA tax treaty benefit. The taxpayer has appointed NGC India as its distributor to distribute its television channels and also to procure advertisements for telecasting in the channels. Hence, the taxpayer generates two streams of revenues from India i.e. (a) fee for giving distribution rights for telecasting of its channels and (b) advertisement revenues.

The taxpayer claimed that both the types of income are not taxable in India and accordingly did not offer them in the return of income filed for Assessment Year (AY) 2007-08. The Assessing Officer (AO) held that the advertisement as well as distribution revenues are taxable in India, since NGC India constituted a DAPE of the taxpayer under the tax treaty. The AO accordingly assessed 25.34 per cent of the advertisement revenues as income of the taxpayer attributable to India i.e. in the ratio of worldwide profits to worldwide revenue, in accordance with Rule 10B(ii) of the Income-tax Rules, 1962 (the Rules).

The Mumbai Tribunal held that the Indian group company of the taxpayer has been habitually exercising in India an authority to conclude contracts on behalf of the foreign company which are binding on the foreign company. Therefore, the Indian company is to be treated as a DAPE in India under Article 5(4)(a) of the India-U.S. tax treaty.

The Tribunal observed that the AO correctly held that 'advertisement air time' does not fall under the category of 'goods'. It is only a right given to NGC India to procure advertisements. The Tribunal while establishing the inherent nexus of the telecasting channel and the airtime sold, observed that the right to procure advertisements for particular airtime, though capable of being transferred, cannot be consumed/used by the buyer of the right, in the absence of any assistance from the taxpayer by way of telecasting the same on television channels.

Accordingly, the Tribunal held that the question whether payment received by the taxpayer for giving distribution rights in the television channels falls under the category of 'royalty' and the attribution of advertisement revenues in India needs to be examined afresh at the end of the AO.

NGC Network Asia LLC vs JDIT (ITA No. 7994/Mum/2011) – Taxsutra.com

Capital gains arising to a foreign company on transfer of shares held in an Indian company under the court approved buy-back scheme is taxable in India under the India-Netherlands tax treaty

The taxpayer is a resident of Netherlands. It held 38.24 per cent of shares comprising of 1,09,52,280 shares in the paid-up capital of Century Enka Ltd, an Indian public listed company. During the year under consideration, the taxpayer tendered 85,93,109 equity shares having face value of INR10 each to Century Enka Ltd at INR122 per share under a scheme of arrangement, by way of a buy-back of shares, as per the approval given by the Calcutta High Court under Section 391 of the Companies Act, 1956. The said tendering of shares resulted in a capital gain of INR58.64 crore.

The taxpayer, relying on Article 13(5) of the tax treaty, claimed that the capital gain referred above is not taxable in India. The Article 13(5) of the tax treaty provides that gains shall be taxable in Netherlands if such gains are realised in the course of corporate organisation, reorganisation, amalgamation, division or similar transaction. The AO observed that the taxpayer did not pay tax on the impugned capital gains in Netherlands, since the same was exempt under the tax provisions of that country. The basic purpose of the tax treaty, as well as Section 90 of the Act, is that the taxpayer should not be liable for double taxation, whereas in the present case, the taxpayer is trying to claim double benefit by taking recourse of the tax treaty. Accordingly, the AO held that the aforesaid capital gains are taxable in India under Article 13(5) of the tax treaty. With regard to the rate at which capital gain is taxable, the AO held that the concessional rate of taxation at 10 per cent, provided in Section 112 of the Act, is not applicable to the taxpayer. Accordingly, the AO levied tax at 20 per cent.

The Mumbai Tribunal held that capital gains arising to a foreign company on transfer of shares held in an Indian company, under the court approved buy-back scheme, is taxable in India under the India-Netherlands tax treaty. The Tribunal held that the arrangement entered into by the taxpayer for selling a part of its shareholding to the company in the scheme of buy-back does not fall under the definition of 'reorganisation'. The Tribunal also held that the taxpayer is entitled to a concessional rate of tax at 10 per cent on the said capital gains.

Accordis Beheer B. V. vs DIT (ITA No.4688/Mum/2010) – Taxsutra.com

Notifications/Circulars/ Press Releases

CBDT issues draft guiding principles for determination of POEM of a company

The Finance Act, 2015 amended the provisions of Section 6(3) of the Act to provide that a company is resident in India in any previous year, if it is an Indian company or its POEM in that year is in India. POEM means a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance, made.

The CBDT has issued draft guiding principles for the determination of POEM of a company. The draft guidelines are primarily based on the fact as to whether or not the company is engaged in 'active business outside India'. For determination of 'active business outside India' factors such as passive income, total asset base, the number of employees, payroll expenses in India and outside, etc. are considered. The draft guidelines state that the concept of POEM is one of substance over form. It further states that the POEM in the case of a company engaged in active business outside India shall be presumed to be outside India, if majority of the meetings of the board of directors of the company are held outside India. The guidelines also deal with the impact of modern communication technology in POEM determination.

The AO is required to seek prior approval of the Principal Commissioner or the Commissioner to hold a company incorporated outside India as being resident in India on the basis of POEM.

Source: www.incometaxindia.gov.in

CBDT instruction on scrutiny assessment limiting the scope in CASS assessments involving AIR/CIB/26AS cases

The CBDT issued an instruction which prescribes the extent of an enquiry in scrutiny cases selected through Computer Assisted Scrutiny Selection (CASS). The said instruction is applicable only to cases selected for scrutiny under CASS and only on the parameter(s) of Annual Information Reporting (AIR)/Central Information Branch (CIB)/26AS data.

The instruction provides that the scope of an enquiry to be 'specific issue based' and should direct the AO to confine the questionnaire only to the specific issues pertaining to AIR/CIB/26AS data after giving reason for selection of the case for scrutiny to the taxpayer. The instruction also outlines the procedure for handling 'limited scrutiny' and 'complete scrutiny' cases in relation to cases selected through CASS-2015. The instruction prescribes that during the course of assessment Proceedings in 'limited scrutiny' cases, if 'potential escapement of income' is found to be exceeding INR5 lakh (INR10 lakh for metro charges) requiring substantial verification of other issues, the case may be taken up for 'complete scrutiny', subject to a written approval of the Principal CIT/CIT.

In all cases where the AO proposes to make additions or disallowances, the CBDT directs the AO to (i) give a fair opportunity of hearing to the taxpayer, (ii) issue a showcause notice duly indicating reasons for proposed additions/disallowances along with necessary evidences/reasons forming its basis and (iii) consider the taxpayer's submissions in response to the show-cause notice before passing the final order.

CBDT Instruction No. 7/2014, dated 26 September 2014

CBDT clarifies that no penalty shall be levied where a disallowance is made under normal provisions of the Act but tax is levied under MAT provisions

The CBDT vide its circular clarifies that where Minimum Alternate Tax (MAT) is applicable, no penalty under Section 271(1)(c) of the Act shall be levied with reference to additions/disallowances made under normal provisions of the Act for cases prior to AY 2016-17.

The CBDT referred the Delhi High Court ruling in the case of Nalwa Sons [2010] 327 ITR 543 (Del) where the High Court held that when tax is payable under MAT provisions, penalty under Section 271(1)(c) of the Act cannot be imposed with reference to additions/disallowances made under normal provisions. The CBDT also referred to the amended Explanation 4 to Section 271(1)(c) of the Act which has been substituted prospectively by the Finance Act, 2015 with effect from 1 April 2016. The amended Explanation provides for the methodology of calculating' the amount of tax sought to be evaded' even in situations where MAT is applicable for the purpose of computing concealment penalty.

Accordingly, in view of the Delhi High Court ruling and substitution of Explanation 4 to Section 271(1)(c) of the Act with prospective effect, the CBDT clarifies that prior to 1 April 2016 where income-tax payable on the total income as computed under the normal provisions of the Act is less than the tax payable on the book profits under Section 115JB of the Act, then a penalty under Section 271(1)(c) of the Act, is not attracted with reference to a disallowance made under normal provisions. The CBDT clarifies that in the cases prior to 1 April 2016, if any adjustment is made in the income computed for the purpose of MAT, then the levy of penalty under Section 271(1)(c) of the Act, will depend upon the nature of adjustment. The CBDT directs that no appeals may be filed on this ground and appeals already filed, if any, may be withdrawn/not pressed upon.

CBDT Circular No. 25/2015, dated 31 December 2015

CBDT issues a questionnaire in the cases selected for scrutiny

In the cases selected under scrutiny, while issuing the first notice, the AO does not convey the specific compliance requirements like production of accounts, furnishing of documents, information, evidences, submission of other requisite particulars, etc. This causes undue hardship to the taxpayers and unnecessary wastage of their time.

In view of the above, the CBDT has issued an instruction for issuing a questionnaire in the cases selected for scrutiny. The CBDT prescribes that it should be the endeavour of the AO that the initial notice issued under Section 143(2) of the Act is accompanied with a notice under Section 142(1) the Act along with a questionnaire containing details of specific documents, evidences, etc. that are required to be furnished by the taxpayer in connection with the scrutiny assessment proceedings in the respective case.

CBDT Circular No. 19/2015, dated 29 December 2015

CBDT notifies amended forms and Rules regarding mandatory quoting of PAN for specified transactions

The CBDT has amended Rules 114B, 114C, 114D, 114E of the Rules and amended Form No. 60, 61 and 61A, wherein, inter alia, quoting of a Permanent Account Number (PAN) was made mandatory for transactions exceeding INR2 lakh irrespective of payment mode.

Key aspects of the new Rules are as follows:

- List of PAN reportable transactions and monetary threshold for such reporting transactions.
- List of specified persons responsible to ensure that a PAN is duly quoted or in the absence of PAN, a declaration in Form 60 with complete details is furnished.
- Mode and manner of furnishing by certain specified persons of half yearly statements containing particulars of declarations received in Form 60.

Further, the new Rules have modified the AIR furnishing requirements connected with PAN reportable transactions. Apart from PAN reportable transactions, scope of AIR obligation also extends to certain additional financial transactions like cash withdrawals from bank accounts, credit card transactions, etc.

The time limit for furnishing AIR has been preponed to 31 May (instead of 31 August) immediately following the relevant financial year.

The amended Rule 114B (transactions in relation to which PAN is to be quoted), 114C (verification of PAN), 114D (furnishing of statements containing particulars of Form No. 60) has come into force from 1 January 2016 and Rule114E (furnishing the statement of financial transactions) will come into force from 1 April 2016.

Revised Form No. 60 [declaration to be filed by an individual or a person (not being a company or firm) who does not have a PAN provides details regarding the mode of transaction, number of persons involved in the transaction (in case the transaction is in joint names), Aadhaar number, estimated total income in case PAN is not available, etc.

The new Rules have modified the category of persons exempt from quoting their PAN (or giving no-PAN declaration):

- The erstwhile Rules provide an exemption to the following categories of persons from quoting PAN in the reportable transactions :
  - Non-Residents (NR);
  - Central government, state government and consular offices in transactions where they are the payers.
  - Persons who have agricultural income and are not in receipt of any other taxable income.
- Significant changes effected in the new Rules in this regard are:
  - Scope of exemption to NRs is curtailed. NRs need to furnish PAN (or no-PAN declaration) for specified PAN reportable transactions.

- Government (central as well as state) and consular offices continue to be exempt from all PAN reportable transactions whether they are payers or otherwise.

- Persons earning agricultural income (without any other taxable income) are now required to file a declaration in the the new Form 60 (instead of the old Form 61).

The amended Form No. 61A (statement of specified financial transactions) requires reporting of additional details regarding aggregated financial transactions, bank/post office account and immovable property transactions.

The new Rule 114C provides an obligation to verify compliance of reporting as follows:

- A list of specified persons who are cast with responsibility of ensuring that PAN of the taxpayers is properly quoted on the documents received by them relating to a PAN reportable transaction. The list has been duly modified to align with the expanded scope of PAN reportable transactions.

- It clarifies the obligation to obtain a no-PAN declaration in Form 60 with complete details, if PAN is not furnished.

CBDT Notification 95/2015, dated 30 December 2015

II. SERVICE TAX

Supreme Court Decisions

Service tax not applicable on land development activities like laying of sewer lines, undertaken for residential projects under the category of "construction of complex service" or "works contract service"

The taxpayer was engaged in activities like construction of roads, laying of sewer lines, underground cabling work, installing iron poles with lights, development of landscaped gardens, etc on land owned by a Housing Corporation. The construction of the residential complex was undertaken by other contractors. The RA classified the activities undertaken by the taxpayer as "construction of complex service", taxable under section 65(105)(zzzh) read with section 65(39)(a) and 65(91)(a) of the Finance Act, 1994 ("Finance Act").

The Supreme Court ("SC") observed that the taxpayer was only engaged in the development of land owned by the Housing Corporation, which was not taxable as "construction of complex service" or as a "works contract service". Consequently the appeal filed by the RA was dismissed.

Commissioner of Central Excise & Service Tax, Jaipur – I vs Alokik Township Corporation (Civil Appeal No 7359 of 2015) (SC)

Advance Ruling

Service tax not chargeable on cars provided on lease to employees during the course of employment

The applicant sought an Advance Ruling seeking to understand service tax implications arising on a car lease scheme floated for its employees. The scheme was floated by the applicant under an employee retention programme, wherein cars were provided to employees during their stint of employment with the applicant. Under the scheme, the applicant would hire cars from a car leasing company and make them available to employees, who were free to utilize such cars for their official as well as personal use. The applicant proposed to recover the amount of rent payable to the car leasing company from the employees on cost to cost basis, without any mark-up. At the end of employment, employees were also given an option to buy the car at the written down value of the car.

The question before the Authority for Advance Rulings ("AAR") was whether service tax would be applicable on the car lease rent recovered from employees under the scheme. The AAR observed that the service of making cars available to employees was *in the course of employment*. The AAR also observed that the car was made available to employees only because the employee was in service and the service was *in relation to the employment*. Thus the AAR held that as both conditions provided under the definition of 'service' under section 65(44)(b) of the Finance Act ie service provided in the course of employment and in relation to employment were fulfilled, no service tax was chargeable on the rent recovered by the applicant from its employees. The AAR also observed that service tax was not chargeable on the car lease rent merely because the car was used for official as well as for personal purpose.

M/s JP Morgan Services India Private Limited (Advance Ruling No AAR/ST/16/2015) (AAR)

III. CENTRAL EXCISE

Tribunal Decisions

Appeal against rebate orders for deemed exports ie supplies made to Special Economic Zone ("SEZ") from the Domestic Tariff Area ("DTA"), would also lie to the Joint Secretary, Revision Application, much like physical exports

The question before the Larger Bench ("LB") was whether an appeal against a rebate order, for supply of goods made by the DTA to the SEZ (deemed exports), would lie to the Appellate Tribunal or to the Joint Secretary, Revision Application.

The dispute arose due to a phrase used in section 35B(1) of the Central Excise Act, 1944 ("Excise Act"), which envisaged that an appeal would not lie to the Appellate Tribunal for rebate matters on goods "exported to any country or territory outside India". Thus it had to be determined by the LB whether the phrase included in its ambit only physical exports made outside the country, or whether it also included supplies by a DTA unit to an SEZ.

The LB observed that the statutory provisions authorized the Joint Secretary, Revision Application to hear appeals against orders related to exports. Although Section 35B of the Excise Act only speaks of 'exports outside India', it cannot be interpreted to mean that the Government of India was segregating matters into two categories for appeal purposes ie for physical exports and deemed exports.

The LB also observed that there was no conflict or inconsistency between the provisions of the SEZ Act and the Excise Act, as the former clearly provided benefits to deemed exports as well.

Thus it was held that with respect to rebate orders pertaining to supplies made from the DTA to SEZ, just as in the case of physical exports, the appeals would lie to the Joint Secretary, Revision Application and not to the Appellate Tribunal.

M/s Sai Wardha Power Ltd vs CCE, Nagpur (Appeal No E/89802/2013, E/89952 to 89954/2013 & E/89963 to 89966/2014) (CESTAT Mumbai, LB)

Rule 8 of the Central Excise Valuation Rules, 2000 ("Valuation Rules") would not be applicable on cars cleared by a car manufacturer for its own use

The taxpayer was engaged in the business of manufacturing cars. During the course of its business, the taxpayer cleared certain cars for use by its officials in relation to business and discharged excise duty liability on the same by adopting the same assessable value applicable to cars that were cleared to other customers.

The RA contended that the taxpayer should have discharged the excise duty by applying Rule 11 read with Rule 8 of the Valuation Rules ie assessable value should have been computed at 115 percent of the cost of production.

The CESTAT relying upon the ruling of the LB in case of *Ispat Industries vs CCE, Raigad [2007 (209) ELT 185 (Tri LB)],* held that the taxpayer had correctly assessed the excise duty under Rule 11 read with Rule 4 of the Valuation Rules. The CESTAT observed that as clearance of cars was for use by officials of the company in connection with the business and not for further manufacturing goods, the same did not warrant application of Rule 8 of the Valuation Rules.

M/s Skoda Auto (India) Ltd vs CCE, Aurangabad (Appeal No E/3028 & 2993/06 – Mum E/CO/25/07) (CESTAT Mumbai)

Refund of unutilized CENVAT Credit of a closed manufacturing unit would be available

The taxpayer was engaged in manufacturing excisable goods and availed CENVAT Credit on capital goods and inputs/input services used in such manufacturing activity. The taxpayer closed the manufacturing unit due to commercial reasons and surrendered the excise registration. Thereafter the taxpayer filed a refund application claiming refund of unutilized CENVAT Credit of such unit. The RA denied the refund claim on the ground that as per Rule 11(2) of CENVAT Credit Rules, 2004 ("CCR"), unutilized credit would lapse on closure of the manufacturing unit.

The CESTAT observed the appellant has closed its unit and filed ER return claiming refund of unutilised Cenvat credit which he is entitled to as per Rule 5 of the Cenvat Credit Rules, 2004. Thus, the excise return filed along with refund application would be sufficient for granting refund of unutilized CENVAT Credit as per Rule 5 of the CCR. The CESTAT placed reliance on the SC ruling in case of *Slovak India Trading Co P Ltd*

[2008(223) ELT A170] and held that the RA misinterpreted the rules governing the refund. Thus the Tribunal ordered refund of the unutilized CENVAT Credit amount to the taxpayer.

M/s Century Rayon-Twisting Unit vs CCE, Thane – I (Appeal No E/1463/2010-Mum) (CESTAT Mumbai)

IV. VAT/CST

Supreme Court Decisions

Situs of sale of motor vehicles for the purpose of levy of sales tax to be the place of registration of vehicle under the Motor Vehicles Act, 1988 ("MV Act")

The taxpayer, engaged in the business of purchase and sales of motor vehicles, had its head office ("HO") located in the state of Kerala and branch office in Pondicherry. The RA imposed penalty on the taxpayer, alleging that the sale of motor vehicles was concluded by the taxpayer in the State of Kerala, but the motor vehicles were registered in Pondicherry to avoid higher sales tax applicable in the State of Kerala. The RA also alleged that the taxpayer had provided incorrect addresses of buyers for the purpose of registering the motor-vehicles as per the MV Act in Pondicherry, thus deriving the benefit of lower sales tax payment.

The taxpayer in its response submitted that the situs of sale of motor vehicle, would be the place of registration of motor vehicle under the MV Act, and not the place where invoice is generated for the sale of motor vehicle.

The SC observed that though sale precedes the event of registration, in normal circumstances, it was co-terminus with the registration of the motor vehicle as per MV Act. It was also observed that under the Sale of Goods Act, 1930 and Kerala General Sales Tax Act, 1963, the dealer could not permit the intending buyer to use the motor vehicle prior to registration or even to take the motor vehicle for the purpose of registration under MV Act.

The SC held that motor vehicles remained in the category of unascertained or future goods, till the time they were handed over by the dealer at or near the office of registration authority under the MV Act in a deliverable and registrable state. Dismissing the appeal of RA, SC upheld the order of HC passed in favor of taxpayer and the penalty levied on the taxpayer was also revoked.

CCT, Thiruvananthapuram vs KTC Automobiles (Civil Appeal No 2446 of 2007) (SC)

High Court Decisions

Taxpayer to get relief to the extent of declarations made in the filed VAT returns

The taxpayer, a civil works contractor, was engaged in the business of construction and sale of apartments. For certain apartments sold by it, the taxpayer disclosed the cost of land as 45 percent of the total sales value of apartments in its VAT returns, and thereupon paid VAT only on the balance 55 percent. The RA challenged the valuation of land as declared by the taxpayer in the VAT returns and assessed the tax by considering the value of land as 40 percent of the total sales value of the apartment. The first appellate authority came to the conclusion that the cost of land was actually over 50 percent, but as the claim was made by the taxpayer for only 45 percent of the sale consideration, the same was considered at 45 percent only.

Thereafter while preferring an appeal, the taxpayer claimed the value of land to be 50 percent of the sale consideration ie more than the value that was declared in the filed VAT returns.

The Karnataka High Court ("Karnataka HC") observed that as per the Karnataka Value Added Tax Act, 2003 ("KVAT Act"), the taxpayer had an option to revise the original VAT return subject to fulfillment of conditions. If the taxpayer failed to revise the return, the return filed by the taxpayer originally would be considered for assessment purposes. Thus it was held that the values disclosed by the taxpayer in the originally filed return would be considered by the assessing authorities for the purpose of assessment of tax. If the same is not done, then it would be construed as if the assessing authority or the appellate authority is given unfettered power to grant relief, which was not sought in the VAT returns.

Thus, the appeal filed by the taxpayer was dismissed by Karnataka HC.

M/s Nandi Constructions vs The State of Karnataka (STRP NO 216/2015 & 242-252/2015) (Karnataka High Court)

State Government is bound by the principle of promissory estoppel, thus it cannot shy away from providing tax exemptions/ concessions provided under an old law, once the new law introduced

The taxpayer entered into a Framework Agreement ("FWA") in 1997 with the Government of Karnataka ("GOK") to undertake an infrastructure project in the State. As per the terms and conditions of the FWA, GOK was liable to make available to the taxpayer and its affiliates certain concessions, incentives and holidays in respect of state and local taxes, registration fees, etc. Pursuant to above, the GOK issued a Notification dated August 1, 1998 under the Karnataka Sales Tax Act ("KST Act"), providing tax exemptions on sale of machinery/ equipment and construction material to a dealer undertaking an infrastructure project in State of Karnataka. Accordingly, the taxpayer was exempted from payment of sales tax. The question before the court was with respect to extension of such tax exemptions under the VAT regime.

As the taxpayer established its business in Karnataka based on the promises of the GOK, it was the taxpayer's submission that the tax exemptions should be honored under the Karnataka VAT regime as well. Subsequent withdrawal of exemptions under the VAT regime would be contrary to the principle of promissory estoppel. As the taxpayer had not collected any tax from its customers, withdrawal of the tax exemption and demand for retrospective taxes would result in increased costs to the taxpayer.

The Karnataka HC relied on the judgement of the SC in the case of *Orient Weaving Mills Pvt. Ltd. and others vs Union of India and others [AIR 1963 SC 98]* and observed that the GOK was sufficiently empowered to issue similar exemption notifications under Karnataka VAT Act to the taxpayer. Thus the same could not be denied on the ground that it had no powers under KVAT Act to grant such exemptions.

The Karnataka HC further relied on judgement in case of *State Of Punjab vs Nestle India Ltd and others [2004 6 SCC 465]* and held that the principle of promissory estoppel was rightly applicable on the GOK, and it could not retract from its promises or assurances made earlier by demanding retrospective taxes.

M/s Nandi Infrastructure Corridor Enterprise Limited and Others vs The State of Karnataka and Others [Writ Appeal Nos 268 and 294-436 of 2015 (T-Res)] (Karnataka HC)

V. CUSTOMS

High Court Decisions

Imported goods supplied 'as such' to a power generation project, without any indigenous manufacturing activity, would not qualify for the benefit of 'deemed exports'

The taxpayer, an advance authorization holder, imported capital goods like turbines, generators, UPS devices, etc without payment of duty. The taxpayer supplied the Boiler Turbine and Generators ("BTGs") to a hydel power generation project (awarded under ICB) after undertaking the activity of assembly of various parts, fabrication, reconditioning, testing, etc and also installation at the project site.

The taxpayer contended that the aforesaid activities would amount to 'manufacture', and as the goods were ultimately supplied to a power generation project (awarded under ICB), the same would qualify for the benefit of 'deemed exports'. Basis the same, the taxpayer claimed the export obligation discharge certificate ("EODC") from the RA.

The RA rejected the claim of the taxpayer on the ground that goods were not 'manufactured' in India as required under Para 8.2 of Foreign Trade Policy 2009-2014 ("FTP"). The RA was of the view that goods were supplied by the taxpayer 'as such' and were assembled / installed at the project site. The RA further relied on Circular No 50/2009- 2014 dated December 28, 2011 issued by Director General of Foreign Trade ("DGFT"), wherein it was clarified that deemed export benefits would be admissible only if goods were manufactured in India.

The Karnataka HC observed that the taxpayer had imported capital goods and supplied the same 'as such' and installed them at the project site. The HC held that such supplies could not be considered as 'manufactured in India' and would not be entitled for the 'deemed export' benefit under the FTP, thus the EODC was denied to the taxpayer.

M/s Saikala Power Private Limited vs Additional Director General of Foreign Trade and Others [Writ Petition No 10561/ 2013 (GM-RES)] (Karnataka HC)

Tribunal Decisions

Doctrine of unjust enrichment applicable on refund claims filed as a result of orders/ decrees

The issue before the Tribunal was whether the doctrine of unjust enrichment would be applicable on refunds arising as a consequence and operation of a SC judgement. In the present case, the taxpayer produced a chartered accountant certificate and accounting ledgers and journals to substantiate that the tax (for which refund was sought) was paid under protest at the beginning of the dispute and no recovery for the same was made from the customers.

The CESTAT observed that refund claims arising out of any court order or decree would also be subject to provisions of unjust enrichment. The CESTAT observed that no supporting documents, such as sales invoices, had been produced by the taxpayer before the adjudicating authority to substantiate its position. The CESTAT also observed that while the taxpayer produced accounting ledgers and journals mentioning that tax had been paid under protest, it nowhere mentioned that such amounts were recoverable from the government. Thus the CESTAT denied the claim on the ground that the taxpayer had not produced enough concrete evidence in support of its claim.

M/s Jindal Drugs Ltd vs Commissioner of Customs (Export), Mumbai - I (Appeal No C/1028 & 1029/07) (CESTAT, Mumbai)

Directorate of Revenue Intelligence ("DRI") can exercise jurisdiction under the Customs Act, 1962 ("Customs Act") to issue show cause notices

The issue before the CESTAT was whether DRI officers were to be considered as "proper officer" for the purpose of initiating proceedings and issuing show cause notices ("SCN") for assessment, re-assessment or short levy of custom duty under section 17 and 28 of the Customs Act. The taxpayer contended that DRI officers were not specifically assigned to do so in terms of the Customs Act.

The CESTAT observed that as per the provisions of section 28(11) of the Customs Act, all persons appointed as "officers of customs" under section 4 of the Customs Act shall be deemed to have the power to initiate proceedings and issue SCN's under section 17 and 28 of the Customs Act. The CESTAT also observed that there was no dispute as to whether DRI officers were covered under section 4 of the Customs Act as "Officers of customs". The CESTAT referred to the Statement of Object and Reasons accompanying the Customs Bill, 2011, which supports the validity of an SCN issued by the DRI.

Relying upon the rulings passed by the Bombay High Court in case of *Sunil Gupta vs Union of India [2015 (315) ELT 167]* and by the *Gujarat High Court in case of Swati Menthol & Allied Chemicals Ltd vs Joint Director, DRI [2010 (304) ELT 21]*, the CESTAT held that the SCN issued by the DRI does not suffer from any jurisdictional infirmity.

M/s Bhagwati Components Mfg Co vs Commissioner (Customs), New Delhi and Others [Appeal No C/Misc./353/2011 & C/422/2010-CU (DB)] (CESTAT, New Delhi)

Notification & Circulars

E-payment of refund and rebate amounts to taxpayers

CBEC has issued a circular providing guidelines for implementation of an e-payment facility for payment of refund and rebate charges directly in the authorized bank account of the taxpayers. The facility is expected to be operationalized from February 2016.

Circular No 1013/1/2016 - CX dated January 12, 2016

Levy of Additional Tax under Madhya Pradesh Value Added Tax Act, 2002 ("MPVAT Act")

The Commercial Taxes Department of Madhya Pradesh has issued a notification to levy additional tax under MPVAT Act, based on weight, volume, measurement on unit, on sale of goods specified in Schedule II of the MPVAT Act, other than declared goods.

Notification No 816-13-21 dated January 14, 2016

CBEC clarifies on valuation of construction services; states that departmental circular would prevail over Education Guide on taxation of services

CBEC has issued an instruction to address the contradiction between the Education Guide and a CBEC Circular on the issue of service tax valuation of construction services provided to landowners by builders. In the instruction it is clarified that valuation of such services would be equal to the value of similar flats charged by the builder from independent buyers as per the CBEC Circular, although the Education Guide specifies that the services will be valued basis the value of the land at the time when it was transferred by the landowner to the builder.

The instruction further states that circulars issued by CBEC will always prevail over the Education Guide, as the Education Guide is merely an educational aid and has no legal backing.

Instruction F No 354/311/2015 - TRU dated January 20, 2016

Central Excise and Service Tax Audit Manual, 2015 ("CESTAM – 2015")

CBEC has issued the Central Excise and Service Tax Audit Manual, 2015. The manual is based on EA 2000 Audit methodology, incorporating recent changes under the central excise and service tax laws.

Integrated Central Excise and Service Tax Audit Manual 2015 (CESTAM-2015)

Enhancement of Standard VAT rates under Daman and Diu Value Added Tax Act, 2005 ("DDVAT Act")

The Commercial Taxes Department of Daman and Diu has issued a notification enhancing the standard VAT rate from 4 percent to 5 percent.

Notification No DMN/VAT/Part File/57-2/2014-15/453 dated January 13, 2016

Restriction on eligibility of CENVAT Credit in respect of Counterveiling Duty ("CVD") to the extent of 85 percent on ships, boats and other floating structures for breaking up omitted retrospectively from March 1, 2015

CBEC has issued a notification to amend the CCR, 2004 retrospectively, with effect from March 1, 2015. Vide the amendment, the proviso to clause (vii) of Rule 3(1) of CCR, 2004 has been omitted, thereby removing the restriction on eligibility of CENVAT Credit of CVD to the extent of 85 percent on ships, boats and other floating structures for breaking up, falling under tariff item 8908 00 00 of the first schedule of Customs Tariff Act, 1975.

Notification No 01/2016 – Central Excise (NT) dated February 1, 2016

Enhancement of VAT rates under Rajasthan Value Added Tax Act, 2003 ("RVAT Act")

The Government of Rajasthan has issued a notification enhancing the VAT rate on goods falling under Schedule IV of RVAT Act from 5 percent to 5.5 percent with effect from February 02, 2016. Further the rate of exemption under various exemption notifications is also enhanced from 5 percent to 5.5 percent.

Notification No F 12(42)FD/Tax/2010-123 dated February 01, 2016

Swachh Bharat Cess ("SBC") related amendments in the CCR

CBEC has introduced the following amendments through notifications with respect to SBC:

- A proviso has been inserted in Rule 3(4) of the CCR, 2004 to provide that CENVAT Credit of any duty specified in Rule 3(1) of CCR shall not be utilized for payment of SBC
- Refund of SBC paid on specified services utilized in an SEZ has been allowed by way of an amendment to Notification No 12/2013 - ST, dated July 01, 2013
- Rebate of SBC paid on all the services that have been utilized in provision of export of services in terms of Rule 6A of the Service Tax Rules, 1994 has been allowed by way of an amendment to Notification No. 39/2012 - ST, dated June 20, 2012

Notification No 02/2016-CE (NT) dated February 03, 2016, Notification No 02/2016-ST dated February 03, 2016 and Notification No 03/2016-ST dated February 03, 2016

Procedural amendments under the Tamil Nadu VAT Rules, 2006 ("TNVAT Rules")

The Commercial Tax Department of Tamil Nadu has amended the TNVAT Rules, as a move towards implementing e-governance in the state. Highlights of the amendments are provided below:

- Mandatory electronic filing of application for dealer registrations, with registration being granted within 2 days
- Mandatory filing of monthly returns
- Persons deducting tax at source are required to obtain Tax Deductor Identification Number ("TDIN") electronically before deducting tax
- Rule 10(2-A) has been inserted stipulating that RA can ask taxpayer to establish that input tax credit claimed on purchases is remitted by his seller to the Government

- Rule 14 is amended to provide an option to the taxpayer to electronically file appeals under section 51 and section 52 and pay filing fees and mandatory pre-deposit electronically

- Forms related to movement of goods are now mandatorily required to be generated electronically from the website of VAT department

- The audit report in Form WW is required to be filed electronically within nine months from the end of relevant financial year

- Payment of any tax, fees or any other amount due under the Tamil Nadu VAT Act, 2006 ("TNVAT Act") is to be made electronically only

- All forms under TNVAT Rules are required to be submitted electronically with Digital Signature certificate ("DSC") authorizing the forms. In case of non-availability of DSC, the hard copy of forms is required to be filed in stipulated time in addition to electronic filing.

- The RA is empowered to serve notice, summons, etc in electronic mode

G.O. (Ms) No. 18 dated January 29, 2016