June 2016

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

Foreword

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

FICCI along with KPMG had conducted a survey in May – June, 2016 on behalf of Central Board of Excise and Customs (CBEC) to gather feedback of Taxpayers' Experience on services of Customs, Central Excise and Service Tax Departments. This survey was a sequel to a similar survey conducted in August, 2015 on behalf of CBEC. Results of the FICCI-KPMG survey were presented in the Annual Conference of Tax Administrators 2016 held at Vigyan Bhawan on June 17, 2016. Suggestions emanating from the survey were made to CBEC for further improvement of procedures.

On tax front, the Delhi High Court in the case of Herbalife International India Pvt. Ltd held that payment of administrative fees to a foreign company is not liable for disallowance under Section 40(a)(i) of the Income-tax Act, 1961 (the Act) due to non-deduction of tax at source, in view of the non-discrimination clause under the India-USA tax treaty . The High Court held that under section 40(a)(i) of the Act, expenditure is allowed only when tax has been deducted at source while making payment to a non-resident. However, for the relevant assessment year the payments to a resident were neither subject to deduction of tax, nor the consequence of disallowance of expenditure was applicable. Accordingly, it was held that section 40(a)(i) of the Act imposing disallowance of expenditure in case of non-residents is discriminatory and therefore, not applicable in terms of non-discrimination clause under the India USA tax treaty.

In another case, Gujarat High Court has ruled that excise duty inadvertently paid under the wrong accounting code can be adjusted against actual duty liability. The taxpayer while discharging its excise duty liability paid the amount under the payment code of service tax due to clerical error. The High Court observed that the Revenue Authority agreed on the fact that there was no liability on the part of the taxpayer to discharge service tax and it was genuine mistake due to which tax has been deposited under service tax code. Without adjusting the earlier payment, the demand of excise duty would lead to double recovery of the duties and

taxes which is unwarranted. Hence the Court held that the incorrect payment made by taxpayer shall be appropriated against the excise duty liability.

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

High Court Decisions

Payment of administrative fees to a foreign company is not liable for disallowance under Section 40(a)(i) of the Income-tax Act for non-deduction of tax at source in view of non-discrimination clause under the India-USA tax treaty

The taxpayer is the Indian subsidiary of Herbalife International Inc. (HII), USA, engaged in the business of trading and marketing of herbal products for use in weight management, to improve nutrition and enhance personal care. The taxpayer entered into an Administrative Services Agreement (ASA) with Herbalife International of America Inc. (HIAI) for providing data processing services, accounting, financial and planning services, marketing services, etc. In terms of the agreement, the taxpayer was to pay an administrative fee to HIAI as consideration for the various services provided to the taxpayer under the ASA. During the Assessment Year (AY) 2001-02, the taxpayer claimed the administrative fee as expenditure while computing its taxable income.

The Assessing Officer (AO) held that the administrative expenditure was to be treated as Fees for Technical Services (FTS) since the services were utilised in India. Therefore, the taxpayer was liable to deduct tax at source under Section 195 of the Act on the said amount. On account of non-deduction of tax, the AO disallowed the expenditure under Section 40(a) (i) of the Act.

The Commissioner of Income-tax (Appeals) [CIT(A)] upheld the order of the AO.

The Income-tax Appellate Tribunal (the Tribunal) held that administrative fees paid by the taxpayer to HIAI were allowable as deduction. It was held that Section 40(a)(i) of the Act could not be invoked by the AO to disallow the claim for deduction as the payment was not taxable at the hands of the payee. The Tribunal held that HIAI did not have a permanent establishment (PE) in India. Further in light of Article 26(3) of the India-USA tax treaty, Section 40(a)(i) of the Act was discriminatory and could not be invoked to disallow the claim of the taxpayer for deduction even if the sum in question was chargeable to tax in India.

The Delhi High Court held that under Section 40(a)(i) of the Act, expenditure is allowed only when tax has been deducted at source while making payment to a non-resident. However, for the relevant assessment year the payments to a resident were neither subject to the deduction of tax, nor the consequence of disallowance was applicable. Accordingly, it was held that Section 40(a)(i) of the Act is discriminatory and therefore, not applicable in terms of non-discrimination clause under the tax treaty.

CIT v. Herbalife International India Pvt Ltd. (ITA No. 7/2007) – Taxsutra.com

Tribunal Decisions

Taxpayer is a beneficial owner of royalty and interest income and therefore eligible for beneficial tax rate under the India-Singapore tax treaty

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The taxpayer, a company, incorporated in Singapore, was a 100 per cent subsidiary of a French company. The principal activities of the taxpayer were to act as a headquarters for the Asia-Pacific region, rendering administrative, marketing and sales services to the group and affiliated companies, trading in paper and performance minerals and other related business activities including project work. A U.K. based company (a group company of the taxpayer) developed know-how for manufacture of products. The U.K. company wants to develop the sub-licensing market in the Asia Pacific region for its knowhow and wished the taxpayer to act as sub-licensor in order to develop its market. Therefore, the U.K. company entered into a know-how agreement with the taxpayer.

The taxpayer in lieu of this license granted, entered into a technology agreement with an Indian company. Under the technology agreement, the taxpayer undertook to provide a non-exclusive, non-transferable, non-assignable and revocable license to an Indian company. Such license was provided to use the technology and know-how in connection with the development, manufacture, use and sale of calcium carbonate and calcium carbonate products in the geographical territory of India.

During the year under consideration, the taxpayer had received payment on account of royalty and interest income. The receipt was offered to tax at the beneficial rate prescribed under the tax treaty. The Assessing Officer (AO) held that the taxpayer was not the beneficial owner of the royalty and interest, and therefore, it was not eligible to claim the lower rate of tax for interest and royalty under the tax treaty. The AO held that beneficial owner of royalty was the U.K. company. The know-how was actually transferred to the Indian entity by the U.K. company, and the taxpayer was only acting as an agent for taking the benefit of the lower rate as per the tax treaty.

Based on facts of the case, the Tribunal held that the taxpayer was the beneficial owner of royalty in line with the provisions of Article 12 of the tax treaty and the same was to be taxed at 10 per cent. The Tribunal observed that the taxpayer had entered into the know-how agreement with the U.K. based company which in turn was sub-licensed by the taxpayer to an Indian company and received royalty income on the same. The royalty income has been received in its own right as the beneficial owner. With regard to interest income received by the taxpayer, it has been held that since the amount was advanced by the taxpayer as an ECB loan to an Indian company, the interest income received by the taxpayer being the beneficial owner, taxable at 15 per cent under Article 11 of the tax treaty.

In the facts of the present case, it is not the case of tax department that the amount has not been remitted to Singapore, but the benefit of tax treaty have been denied to the taxpayer since the said amount has not been remitted in the current fiscal year i.e. the financial year 2009-10. Where the amount has been remitted to Singapore and has been subject to the tax, there is no merit in the orders of the lower authorities in denying the benefit of tax treaty provisions to the taxpayer in taxing the income at lower rates.

Imerys Asia Pacific Pvt. Ltd., v. DDIT (ITA No.233/PN/2014) – Taxsutra.com

Payment made for buy-back of shares from its employees cannot be

allowed as expenditure under the Income-tax Act

The taxpayer is engaged in the business of share broking. During the year under consideration, the taxpayer implemented Employee Stock Option (ESOP) Scheme for the benefit of its employees, through Shriram Insight Welfare Trust (the Trust). The Trust purchased 350,000 equity shares from the existing promoters of the company at a price of INR15 per equity share and thereafter, these shares were allotted to the eligible employees at the same price. Subsequently, the Trust purchased 32,700 equity shares from the employees at the price of INR340 per equity share. The taxpayer granted a sum of INR11.12 for buying back these shares. The original assessment was completed under Section 143(3) of the Act. Subsequently, the AO issued a notice to reopen the assessment under Section 147 of the Act on the ground that the ESOP cost of INR11.12 million cannot be allowed as expenditure in the hands of the taxpayer.

The Tribunal observed that there is no material available on record to suggest when the shares were allotted to the employees of the taxpayer. It is not known when the shares were allotted at INR15 per equity share, why the very same shares were claimed to be purchased at a cost of INR340 per equity share. This arrangement of allotment of shares at INR15 per equity share and then buy-back at INR340 per equity share creates a doubt whether the shares were in fact allotted to the respective employees or not. In the absence of any material, the CIT(A) has rightly confirmed the disallowance made by the AO. In the case of Novo Nordisk India Pvt. Ltd. v. DCIT [2014] 63 SOT 242 (Bang), the actual issue of shares of the parent company by the taxpayer to its employees is not in dispute. Therefore, the difference between the fair market value of the shares of the parent company on the date of issue of shares and the price at which those shares were issued by the taxpayer to its employees was reimbursed by the taxpayer to its parent company. This sum was claimed as expenditure in the Profit & Loss account. However, in the present case, the taxpayer is not claiming the difference between fair market value and allotment price as expenditure. The taxpayer is claiming the purchase price at INR340 per share from its employees as expenditure and therefore, the decision in the case of Novo Nordisk India Pvt. Ltd. is not applicable to the facts of the case. Since the shares were purchased by the trust from the promoters of the taxpayer at the rate of INR15 per equity share and the same was also claimed to be allotted to the employees of the taxpayer at a price of INR15 per equity share, the buy-back of the shares from the very same employees at a cost of INR340 per equity share cannot be treated as an expenditure for the taxpayer.

The claim of the taxpayer is only to reduce the taxable income of the taxpayer. Therefore, the same cannot be allowed under Section 37 of the Act.

Shriram Insight Share Brokers Limited v. DCIT (/ITA Nos.733,734 & 735/Mds/2015) – Taxsutra.com

Subscription payments are liable for taxation under Section 194C of the Income-tax Act and not under Section 194J of the Act

Subscription payments

The taxpayer was engaged in the business as a Multi System Operator (MSO) in the Indian Cable Industry, which is a principal

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mode of distribution of television channels. The taxpayer subscribed to various TV network pay channels like Star, Sony, Zee, etc. and paid them subscription charges for redistribution of the TV channels through cable operators by de-encryption of signals, with the help of IRDs and viewing cards. Payment of subscriptions of channels was debited in its books of accounts as pay channel subscription. In consideration of redistribution and viewing, the taxpayer recovered subscription from ultimate subscribers through cable operators. Such receipts were shown as subscription income in the books of the taxpayer. The taxpayer deducted tax on the pay channel subscription paid to broadcasters under Section 194C of the Act. The AO observed that tax should have been deducted under Section 194J of the Act on the ground that the said payment was in the nature of 'royalty' defined under Explanation (ba) to Section 194J read with explanation 2(iva) to Section 9(1)(vi) of the Act. Thus, the taxpayer was treated as assessee in default for 'short deduction' of tax. The CIT(A) accepted the stand of the taxpayer and reversed the order passed by the AO.

The Tribunal observed that these payments shall be covered in the specific provisions provided under Section 194C of the Act, wherein prior to amendment by the Finance Act, 2009 it has been provided that 'work' shall include broadcasting and telecasting, etc. Even post amendment of the section, the situation remains same, as clarified by Explanation (iv) to Section 194C of the Act, wherein a similar definition has been given to explain scope and meaning of the term 'work'. It is a well-established rule of interpretation of law that when a particular situation is covered in a specific provision of law then its inclusion in the general provisions of the law is ruled out. It is noted that in the Explanation to Section 194J of the Act, it has been mentioned in Explanation (ba) that 'royalty' shall have the same meaning as given in Explanation 2 to clause (vi) of sub Section (1) of Section 9 of the Act. The dominant purpose of the impugned payment was not for the purpose of use of the equipments provided to the taxpayer but is transmission, broadcasting and telecast of the programme contents. A careful analysis of the provisions, it indicates that the taxpayer's case falls under Section194C of the Act. It has been observed that this issue is no more res-integra. Where the work of broadcasting and telecasting of the programmes specifically falls under the ambit of provisions of Section 194C, then in view of the decision of CIT v. Prasar Bharati [2007] 292 ITR 580 (Del), the provisions of Section 194J of the Act cannot be applied on such payments. The CBDT Circular No. 720 dated 30 August 1995, also supports this view.

Provision for expenses

During the year under consideration, the taxpayer made provision of expenses in the books of accounts. However, tax was not deducted at source on the same. The AO had held that the taxpayer should have deducted tax on the amount of provision of expenses credited by the taxpayer in the books of accounts. The CIT(A) held that the taxpayer was not liable to deduct tax on the amount of provisions since the same was disallowed under Section 40(a)(ia) of the Act or some of these expenditure were paid in the subsequent year on identification of the creditor or these were reversed in the subsequent year.

The Karnataka High Court in the case of Karnataka Power Transmission Corporation Ltd v. DCIT [2016] 238 Taxman 287 (Kar) has

made detailed analysis of requirement of law regarding withholding of tax on mere provision of interest, without there being any actual liability of payment of interest as per the terms between the parties, and held that as per law tax was not required to be deducted under such circumstances. In the present case the Tribunal remitted back the issue to the file of the AO for verification of facts with the following guidelines:

- If provision is made without making specific entries into account of parties and payee was not identifiable, then, TDS provisions would not be applicable.
- Once the amount has been disallowed under Section 40(a) (ia) of the Act for non-deduction of tax, it cannot be subjected to TDS provision again so as to make the taxpayer liable to pay tax under Section 201 and interest under Section 201(1A) of the Act.
- It has to be shown by the taxpayer that whenever payment has been made out of the provision after crediting the amount in the account of the payees, as and when identified, then, tax has been deducted before making the said payment or crediting the amount in the account of the payee, whichever has occurred first.
- Wherever, payees were not identified, the amount of provision was reversed.

ITO(TDS) v. Wire & Wireless (India) Ltd. (ITA NO.2383/Mum/2013) – Taxsutra.com

Overseas AEs selected as tested parties in light of the APA that concluded for later year

The taxpayer is engaged in the business of manufacturing and sale of Active Pharmaceutical Ingredients (APIs) (bulk drug)/formulations (dosage forms). The overseas Associated Enterprises (AEs) act as distributors/secondary manufacturers for the products manufactured by the taxpayer. During Assessment Year (AY) 2008-09, the taxpayer entered into transactions with its AEs in the nature of sale of APIs and drug formulations apart from other transactions which were not questioned by the Transfer Pricing Officer (TPO). The taxpayer had benchmarked the impugned international transactions by considering overseas AEs as tested parties with Transactional Net Margin Method as the most appropriate method. The taxpayer selected regional comparables for benchmarking the margins earned by overseas AEs. The TPO rejected the selection of overseas AEs as the tested parties and tested the company-wide margins of the taxpayer while determining the Arm's Length Price (ALP) of the international transactions. The Dispute Resolution Panel (DRP) upheld the Transfer Pricing (TP) adjustment made by the TPO.

Tribunal's ruling

- Observing the fact that Indian TP regulations do not provide any guidance on the concept of tested party, the Tribunal relied on international guidance.
- Taking cognizance of the Advanced Pricing Agreement (APA) entered by the taxpayer, the Tribunal stated that principles laid down in an APA by the highest revenue authority (CBDT) for comparability analysis should be given highest sanctity. Witnessing the fact that the Functions, Asset and Risk (FAR) analysis and nature of international transactions are identical, it was held

that the APA must mandatorily be followed by the TPO to determine ALP of transactions for the year under appeal.

- Relying on Rule 10MA, the Tribunal appreciated that even in the absence of rollback, the methodology accepted in the APA may be followed for an earlier year (not covered under the APA) if the facts and nature of international transactions remain the same.

- Distinguishing the earlier years' order in the taxpayer's own case, the Tribunal held that the benchmarking approach followed in the current year was different to that undertaken in AY 2004-05. It was also noted that in the order for AY 2004-05, it was held that least complex entities must be selected as tested parties, which the taxpayer has also argued extensively.

- The Tribunal held that the taxpayer has adduced reasonably comparative data based on regional benchmarking and that the TPO was incorrect in rejecting foreign AEs as tested parties. Reliance was also placed on various case laws1 cited by the taxpayer wherein selection of overseas tested party has been upheld.

- Based on the above, the Tribunal held that overseas AEs should be considered as tested parties and that due weightage be given to the APA on other issues as well.

Ranbaxy Laboratories Limited vs ACIT (ITA No. 196/Del/2013)

Agreement between the taxpayer and its AE and proof that the AMP expenditure is not for the taxpayer's business in India are prerequisite for treating AMP expenditure as an international transaction

The taxpayer is engaged in the business of manufacturing and distribution of cosmetics. The TPO found all international transactions of the taxpayer to be at arm's length, except one i.e. Advertisement Marketing and Promotion (AMP) expenses. The TPO, for benchmarking the international transaction of AMP expenses adopted Profit Split Method (PSM) and held that profits could be attributed to three major activities of the taxpayer viz. manufacturing – 50 per cent, research and development – 15 per cent and AMP – 35 per cent.

The TPO computed that AMP expenses incurred by the taxpayer were 0.63 per cent of the global AMP expenses. Thus, out of 35 per cent of the global profits, he attributed 0.63 per cent of the profits to the taxpayer. Alternatively, the TPO had also determined the ALP of AMP expenses based on Bright Line Test (BLT) for the manufacturing segment and the distribution segment of the taxpayer and computed an adjustment based on Cost Plus Method. The DRP upheld the TP adjustment made by the TPO.

Tribunal's ruling

- The Tribunal appreciated the argument of the taxpayer that AMP expenditure incurred by it was for products launched especially for the Indian market and that the brand of the AEs was not promoted. In coming to this conclusion, the Tribunal had taken cognizance of the taxpayer's growth in sales of 19 times since the year 1999. It held that AMP expenses incurred by the taxpayer had played an important role

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in the rapid progress made by the taxpayer in the Indian market.

The Tribunal held that the TPO's assumption that AMP expenditure incurred by the taxpayer would have benefitted the AE who owned the brands used by the taxpayer, suffered from a basic flaw since it presumed that the taxpayer would not incur AMP to promote its own business.

The Tribunal held that the moot question in this case was whether in absence of any agreement for payment of AMP expenses, it could be held that there was an international transaction. The answer was an emphatic 'no' in view of the decision of the Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd. vs CIT [2015] 64 Taxmann.com 150 (Del), CIT vs Whirlpool of India Ltd. [2015] 64 Taxmann.com 324 (Del) and Bausch & Lomb Eyecare (India) Pvt. Ltd (ITA No. 643 of 2014).

- On the tax department's contention that the matter ought to be remanded to the file of the TPO, the Tribunal held that non-availability of a particular decision of the higher forum cannot justify the restoration of issues in each and every case. Unnecessary litigation has to be avoided and issues have to be settled for once and all.

The Tribunal held that in the absence of an agreement between the taxpayer and the AE on AMP expenditure, the first and primary precondition of treating the transaction in question an international transaction remained unsatisfied. Without crossing the first threshold, the second threshold of application of principles of Sony Ericsson Mobile Communication India Private Limited vs CIT [2015] 231 Taxman 113 (Del) could not be approached. Hence, when AMP expenditure itself was not an international transaction, the matter was not required to be restored to the file of the TPO.

L'Óreal India Private Limited vs DCIT [ITA Nos. 7714, 1119, 976/Mum-2014 and 518, 335/Mum-2015]

Notifications/Circulars/ Press Releases

India and Mauritius sign a protocol amending the India-Mauritius tax treaty

On 10 May 2016, India and Mauritius has signed a protocol amending the India-Mauritius tax treaty at Mauritius. The key features of the protocol are as under:

- Gains from the alienation of shares acquired on or after 1 April 2017 in a company which is a resident of a state may be taxed in that state. In other words, gains from transfer of shares of an Indian resident company may be taxed in India. The tax rate on such capital gains arising during the period from 1 April 2017 to 31 March 2019 shall not exceed 50 per cent of the tax rate applicable on such gains in the state of residence of the company whose shares are being alienated.

- A Limitation of Benefit (LOB) clause has been introduced which provides that a

resident of a state shall not be entitled to the benefits of 50 per cent of the tax rate applicable in transition period (1 April 2017 to 31 March 2019) if its affairs were arranged with the primary purpose to take advantage of such benefits.

- The service permanent establishment (PE) clause has been introduced in the India-Mauritius tax treaty.
- The existing tax treaty does not have 'Fees for Technical Services' (FTS) related article. The protocol has introduced FTS article. FTS has been defined to mean payments of any kind (other than those mentioned in Articles 14 and 15) as consideration for managerial or technical or consultancy services, including the provision of services of technical or other personnel.
- Interest may also be taxed in the state in which it arises, and according to the laws of that state, but if the beneficial owner of the interest is a resident of the other state, the tax so charged shall not exceed 7.5 per cent of the gross amount of the interest. Further, interest arising in a state shall be exempt from tax in that state provided it is derived and beneficially owned by any bank, resident of the other state carrying on bona fide banking business. However, this exemption shall apply only if such interest arises from debt claims existing on or before 31 March 2017.
- The existing tax treaty gives the right to the resident state to tax other income. However, the protocol provides that other income of a resident of a state may also be taxed in the source state.

Source - http://mof.govmu.org, 12 May 2016

CBDT issues draft rules on Foreign Tax Credit

The CBDT had set up a committee to suggest the methodology for grant of Foreign Tax Credit (FTC). After due consideration of the issues raised by various stakeholders, the committee submitted its report. On the basis of the report of the committee and the provisions of the Act, CBDT proposed the following draft rules for the grant of FTC:

- The resident taxpayer shall be allowed FTC of any tax paid in a country or specified territory outside India, by way of deduction or otherwise, in the year in which the income corresponding to such tax has been offered to tax or assessed to tax in India.
- The FTC shall be available against the amount of tax, surcharge and cess payable under the Act but not in respect of any sum payable by way of interest, fee or penalty.
- FTC shall not be available in respect of any amount of foreign tax which is disputed by the taxpayer.
- The FTC shall be the aggregate of the amounts of credit computed separately for each source of income arising from a particular country or specified territory and given effect to in the following manner:
- The FTC shall be the lower of the tax payable under the Act on such income and the foreign tax paid on such income.
- The FTC shall be determined by conversion of the currency of payment of foreign tax at the telegraphic transfer buying rate on the date on which such tax has been paid or deducted.

- In the case where any tax is payable under the provisions of Minimum Alternate Tax (MAT) under the Act, the credit of foreign tax shall be allowed against such tax in the same manner as is allowable against any tax payable under the normal provisions of the Act.
- Where the amount of FTC available against the tax payable under the provisions of MAT, exceeds the amount of tax credit available against the normal provisions, then while computing the amount of MAT credit in respect of the taxes paid under MAT provisions, as the case may be, such excess shall be ignored.
- The FTC shall not be allowed unless the prescribed documents are furnished by the taxpayer i.e. certificate from the tax authority of a country or specified territory outside India specifying the nature of income and the amount of tax deducted, acknowledgment of online tax payment or bank counter foil or slip or challan for foreign tax payment and a declaration that amount of foreign tax in respect of which credit is being claimed is not under any dispute.

CBDT F. No. 142/24/2015-TPL, dated 18 April 2016

CBDT prescribes an online procedure for filing TDS statement

The CBDT has prescribed the procedures of registration on the e-filing portal, the manner of preparation of TDS statements and submission of TDS statements. As per the new procedure, deductors/collectors will have an option of online filing of e-TDS/TCS returns through an e-filing portal or submission at TIN facilitation centres.

As per the online procedure, the deductor/collector holding a valid TAN is required to get registered through the e-filing website. The deductor/ collector is required to download Return Preparation Utility (RPU) from the tin-nsdl website. The RPU shall prepare the TDS/TCS statement and File Validation Utility (FVU) to validate the statements. The deductor/collector is required to upload the zip file along with the signature file. The uploaded file shall be processed and validated at the e-filing portal. Upon validation the status shall be either 'Accepted' or 'Rejected' which will reflect within 24 hours from the time of upload. The status of the uploaded file will be visible on the portal. In case the submitted file is rejected, the reason for rejection shall be displayed.

Notification No. 6/2016, dated 4 May 2016

CBDT prescribes an online procedure for declaration by a person claiming receipt of certain incomes without deduction of tax

The CBDT issued a notification prescribing the procedure for online submission of declaration by a person claiming receipt of certain incomes without deduction of tax through the e-filing portal.

As per the online procedure, the deductor/collector holding a valid TAN is required to get registered through the e-filing website. The Form 15G/15H utility can be used to prepare the XML zip file. The declaration is required to be submitted using a digital signature certificate (DSC). The designated person is required to upload the zip file along with the signature file. The uploaded file shall be pro-

cessed and validated at the e-filing portal. Upon validation, the status shall be either 'Accepted' or 'Rejected' which will reflect within 24 hours from the time of upload. The status of the uploaded file will be visible at 'My account'. In case the submitted file is rejected, the reason for rejection shall be displayed.

Notification No. 7/2016, dated 4 May 2016

CBDT prescribes an online procedure for submission of form by an authorised dealer in respect of foreign remittances

The CBDT has prescribed the procedure for submission of Form 15CC by an authorised dealer in respect of remittances under Section 195(6) of the Act. The authorised person is required to login to the e-filing website with the ITDREIN, PAN and password. The prescribed schema for the report under Form 15CC and a utility to prepare an XML file can be downloaded from the e-filing website home page under the forms (other than ITR) tab. The authorised person will be required to submit the PAN of the reporting entity, period for which report is to be submitted and the reporting entity category for which the report is to be submitted. The authorised person will then be provided the option to upload the Form 15CC. The form is required to be submitted using a DSC of the authorised person.

Notification No.8/2016, dated 4 May 2016

CBDT clarifies on taxability of income from the transfer of unlisted shares

The CBDT has issued a clarification that the income arising from the transfer of unlisted shares would be considered under the head 'capital gain', irrespective of the period of holding, with a view to avoid disputes/ litigations and to maintain uniform approach. Further, the clarification would not be necessarily applied in the following situations:

- The genuineness of transactions in unlisted shares itself is questionable or
- The transfer of unlisted shares is related to an issue pertaining to lifting of the corporate veil; or
- The transfer of unlisted shares is made along with the control and management of the underlying business.
- The AO would take the appropriate view in such situations.

CBDT Clarification F No. 225/12/2016/ITA.II, dated 2 May 2016

II. SERVICE TAX

Advance Ruling

Joint revenue sharing contract – services from members to unincorporated association of person liable to service tax

The taxpayer entered into an arrangement with a Society, for setting up of an educational institution. As per the arrangement the infrastructure for education institution was to be provided by the taxpayer while the academic services were to be provided by the partnering entity and total revenue received in form of fee from students shall be shared between the taxpayer and the Society for a period of thirty years. The taxpayer posed the question before the Authority for Advance Rulings ("AAR") as to whether service tax is applicable on the revenue share received by them in the education services provided by such institution, by treating such institute as unincorporated association of persons.

The AAR observed the conglomeration of taxpayer and the Society would be a third person (referred as 'partnering person') and fall under Section 65B (37)(VII) of the Finance Act, 1994, which includes an association of persons or body of individuals, whether incorporated or not. The AAR further states that the taxpayer, the Society and the partnering person are three different persons and therefore services provided by the taxpayer to partnering person for a consideration would be treated as service for service tax purposes. Accordingly, it was held that the services provided by the taxpayer to the partnering person i.e. an unincorporated association of persons would be liable to service tax under taxable category of 'renting of immovable property service'.

M/s Choice Estates & Constructions Ltd vs Commissioner of Customs, Central Excise & Service Tax, Cochin (Ruling No AAR/ST/14/ 2016) (AAR)

Incentives/discounts which are gratuitous and non-obligatory in nature, not liable to service tax

The taxpayer being an advertising agency intended to undertake advertisement activities for its client. The services also include renting of space on various medium for display of advertisement, which is to be arranged by the media owner. With respect to such space, the taxpayer proposed two model (i) to act as an agent; where the invoice for space on various medium would be raised by the Media owner directly on the client and (ii) to work on a buy sell model, where the media owner would bill the taxpayer for the space and the taxpayer in turn will bill customer for the same.

In both the models, the taxpayer may receive some volume discount/ incentives from the Media owner, which is entirely at the discretion of the media owner and the media owner is under no obligation to pay such volume discount/ incentive to the taxpayer. Thus, the question for which ruling was sought was whether the taxpayer is required to discharge any service tax on such gratuitous payments received by them at the year end.

The AAR observed that under both the proposed business models the incidental receipts of incentives/volume discounts from media owners are gratuitous payments and there is no contractual obligation on part of

the media owners to pay such incentives to the advertising agency. Further there is no evidence which indicates that an activity is to be undertaken by the taxpayer which will result in receipt of incentives/discount from the media owner. Further, the taxpayer cannot be said to be providing marketing and promotion services, as choice of selecting the media owner lies with the advertiser.

The AAR also relied on the judgement of Mumbai CESTAT in the case of M/s Grey Worldwide India Private Ltd., [2014-TIOL-1650-CESTATMUM], wherein the CESTAT held that in the absence of any contractual obligation, no service tax shall be payable on gratuitous payments. Thus, no service tax is applicable on the volume discounts/ incentives received by taxpayer from the media owner.

M/s AQKA Media India Pvt Ltd vs Commissioner of Service tax – VI, Mumbai – II (AAR/ST/11/2016) (AAR)

Tribunal Decisions

CENVAT credit on common services used for provision of taxable services and trading activity allowed for period prior to April 2011

The taxpayer was running an Authorized Service Station for the vehicles and was also engaged in trading of vehicles. The issue involved was whether, prior to April 2011, the taxpayer was allowed to avail the full CENVAT credit on the common input services used for servicing of vehicles as well as towards trading of vehicles. The contention of Revenue Authorities ("RA") was that the credit pertaining to trading activity should be reversed by the taxpayer.

The CESTAT relied on the decision in the case of Badrika Motors (P) Ltd. [2014 (34) STR 349 (Tri Del)] and Shariff Motors [2010 (18) STR 64 (Tri Bang)], wherein the courts have allowed CENVAT credit on GTA services pertaining to transportation of vehicles and related to trading activity, on the ground that without sale and purchase of the vehicles, the services by way of Authorized Service Station cannot be provided by the taxpayer. Hence, the GTA services have direct nexus with the Authorized Service Station services. Applying the principle laid down in the aforementioned judgements, the CESTAT allowed the benefit of CENVAT credit to the taxpayer and rejected the contention of RA to reverse the CENVAT credit.

M/s Kundan Cars Pvt Ltd vs CCE, Pune (Order No A/87239/16/SMB) (CESTAT, Mumbai)

Deputation of employees within group companies not liable to service tax

The taxpayer along with its three group companies was engaged in manufacturing of pharmaceutical products. The group companies shared the marketing network of the taxpayer under a cost sharing arrangement. The taxpayer deputed its employees within the group companies and recovered the expenses (i.e. salary, wages, bonus, demand and other incidental expenses of employees) in form of percentage of sales made by such group companies through the deputed employees on a cost to cost basis.

The RA contended that the taxpayer is promoting and marketing the products manufactured by the group companies and therefore liable to service tax under Business

Auxiliary Services ("BAS"). The RA further contended that the services if not taxable under BAS would fall under the category of 'Manpower Recruitment or Supply Service'.

The CESTAT observed that deputed employees were governed by rules and regulations of respective group company and the arrangement between taxpayer and its group companies does not indicate provision of marketing services. Further, the conduct of employees and the companies predicated the arrangement as a joint employment arrangement. The CESTAT is of the view that services by an employee being out of purview of service tax the same ratio applies evenly to the joint employment arrangements and the recoveries made by taxpayer are not liable to service tax under BAS. The CESTAT remanded back the matter for re-determination of issue and granted consequential benefit to the taxpayer.

M/s Franco Indian Pharmaceutical (P) Ltd vs Commissioner of Service Tax, Mumbai (Appeal No ST/368/12-Mum) (CESTAT, Mumbai)

Service tax cannot be paid through CENVAT credit availed during subsequent period

The issue involved in this case was whether the service tax liability for a period (i.e. October 2008) can be discharged by utilizing the CENVAT credit accrued during the subsequent period (i.e. Nov 08 to Jan 09). The RA contented that utilization of CENVAT credit accrued in subsequent period for payment of service tax is not permissible as per Rule 3(4) of the CENVAT Credit Rules, 2004 ("CCR").

The CESTAT observed that Rule 3(4) is prohibitory in terms of utilizing the CENVAT credit and provides that service tax liability of a particular month (if to be discharged by utilizing CENVAT credit) can be paid only through CENVAT credit availed and lying in balance on the last day of the month for which the service tax is due. The CESTAT upheld the order passed by lower authorities however the penalty was waived on the ground that intention of taxpayer was not to evade taxes.

Axis Private Equity Ltd vs Commissioner of Service Tax, Mumbai – I (Appeal No ST/86799/2015) (CESTAT, Mumbai)

III. CENTRAL EXCISE

Supreme Court Decisions

Excavators classifiable as motor vehicles, definition of 'motor vehicle' under Motor Vehicles Act, 1988 "MV Act") to be read comprehensively

The issue raised before the larger bench ("LB") of Supreme Court ("SC") was whether excavators would be classifiable as 'motor vehicles' within the meaning of Section 2(28) of the MV Act and are liable for registration and paying taxes thereunder. The issue was referred to the LB as there were contradictory rulings passed by a 3-judge bench in case of Goodyear India Ltd [1997 (5) SCC (752)] and a 2-judge bench in case of Natwar Parikh & Co Ltd [2005 (7) SCC 364].

The LB observed that issue in case of Goodyear India Ltd pertained to the classification of tyres only and therefore would not have any application in the present case. Whereas in case of Natwar Parikh & Co Ltd the 2-

Judge bench held that section 2(28) defines "motor vehicle" in a comprehensive manner which includes any mechanically propelled vehicle apt for use upon roads irrespective of the purpose for which the same is being designed. In the instant case the LB held that excavators shall be classified as motor vehicle under section 2(28) and is liable for registration and payment of taxes. The LB upholds the ruling in case of Natwar Parikh & Co Ltd.

M/s Western Coalfields Ltd vs State of Maharashtra & Anr. (Civil Appeal No. 2708/2004) (SC)

High Court Decisions

Excise duty inadvertently paid under the wrong accounting code to be adjusted against actual duty liability

The taxpayer while discharging its excise duty liability paid the amount under the payment code of service tax due to clerical error. The taxpayer filed a letter with the Commission for rectification of the error however the same was not rectified due to internal procedures of Department and subsequently a demand for the excise duty was also raised on the taxpayer.

The High Court ("HC") observed that the RA agreed on the fact that there was no liability on the part of the taxpayer to discharge service tax and it was genuine mistake due to which tax has been deposited under service tax code. Without adjusting the earlier payment, the demand of excise duty by the RA would lead to double recovery of the duties and taxes which is unwarranted hence the HC held that the incorrect payment made by taxpayer shall be appropriated against the excise duty liability.

M/s Falah Steel vs UOI (Special Civil Application No 7051 of 2015) (HC, Gujarat)

Assembly of components of Lamp shades procured from different sources and sealed under a logo and code number does not tantamount to manufacturing, no duty payable

The taxpayer was engaged in procurement of various components of lamp shades and chandeliers from different sources, assembling those components and sale the completed units after affixing its own logo and code number. The RA demanded duty on the premise that assembling of various components amounts to manufacture of the lamps and light fittings.

The HC relied on the ruling of SC in case of TI Diamond Chain Ltd vs Commissioner [2001 (130) ELT (A259)] observed that assembling of different manufactured components does not amount to a new manufacturing process which may invite excise duty. Consequently the HC upheld the CESTAT order and dismissed the appeal filed by the RA.

CCE, Faridabad-II vs Kapoor Lamp Shade Company (Factory Shop) (CEA No 70 of 2015 (O&M)) (HC, Punjab & Haryana)

Tribunal Decisions

Export of exempted goods – Duty payment on exempt goods cannot render them as 'dutiable'; common credit to be reversed under Rule 6(3)

The taxpayer was engaged in manufacture and export of goods against payment of excise duty and subsequently claimed the re-

bate of duty paid. The goods exported by the taxpayer were exempt from payment of duty and therefore the RA demanded 10 percent of the value of exempted goods under amount due under Rule 6(3) of the CCR for utilizing common inputs in manufacturing of both excisable as well as exempted goods.

The contention of the taxpayer was that once goods are cleared on payment of duty they could not be considered as exempted goods. Further, the credit should not be denied in terms of Rule 6(6) of Credit Rules, which allows credit on inputs used for exported goods.

The CESTAT held that mere payment of excise duty at the time of clearance of exempted goods would not make them dutiable goods. Further, the benefit of Rule 6(6) is available only when goods are exported under bond, without payment of excise duty, whereas in the instant case the goods were cleared after payment of duty, hence the benefit of Rule 6(6) of Credit Rules shall not be available. Thus, the appeal of the taxpayer was dismissed.

M/s Castleton Tea Co. (P) Ltd vs CCE, Kolkata – III (Order No FO/A/75275/2016) (CESTAT, Kolkata)

IV. VAT/CST

High Court Decisions

Sales tax valuation - Anti Dumping Duty ("ADD") payable on imported goods needs to form part of sale price of finished goods manufactured using such imported inputs

The taxpayer was carrying out manufacturing operations in SEZ by utilizing the material imported from China, however no import duties including ADD were payable on import of such goods into SEZ. The imported goods were used in the manufacture of finished goods which were sold to the customer in DTA on ex-works basis. Accordingly, the customer was liable to clear the goods from SEZ upon filing of bill of entry and payment of applicable excise duty. The customer accordingly deposited the duties, as applicable on clearance of such goods and also deposited ADD, as applicable on imported goods which are used in manufacture of finished goods cleared outside SEZ.

The key issue was whether the ADD payable on imported goods and paid by the customer would be includible in the value of the finished goods for the purpose of levy of sales tax/ VAT.

The HC observed that the ADD is leviable on import of goods into India from China, however the exemption was available to the taxpayer because of being located in SEZ. The moment goods are cleared from SEZ to DTA, the ADD will become payable. The arrangement between the taxpayer and the customer located in DTA cannot alter the tax incidence by concluding the sale within the SEZ premises and the taxpayer cannot shift the burden of paying import duties along with ADD on the customer. The HC held that the ADD was payable by the taxpayer and not the customer and accordingly the same needs to be included to the value of goods for the purpose of levy sales tax/ VAT.

M/s Flextronics Technologies (India) Private Limited vs The State of Tamil Nadu (Tax case revision no. 35 of 2014) (HC, Madras)

Tribunal Decisions

Disclosure of the transaction in the books and the intention of the parties relied to determine the state of the transaction - mechanism for providing access to database treated as transaction of 'software' liable to VAT

The taxpayer was engaged in providing 'online information and database access' services by way of a mechanism/ program installed on the computers of the customers on which service tax was duly discharged by the taxpayer. The access to the database related to certain information was granted to the customer only when the mechanism/ program was installed on the computer of the customer. The RA alleged that the transaction is that of right to use software and therefore liable to VAT under Maharashtra VAT laws.

The Tribunal observed that from the official website of the taxpayer and the separate invoices raised by the taxpayer for software license and the services of visit and data updation, the dominant intention of the client is sale of software. Thus, the transaction was held to be of sale of software and hence liable to VAT. The Tribunal further held that mere fact that service tax has already been discharged by the taxpayer on the transaction, does not absolve him from his liability under VAT.

M/s Reliable Software Systems Pvt Ltd vs The State of Maharashtra (VAT Second Appeal No 346 of 2014) (MSTT)

V. CUSTOMS

High Court Decisions

Unjust enrichment principle applies to refund of customs duty consequent to encashment of bank guarantee

The issue involved in the present case is whether the refund arising out of the order of Supreme Court, of an amount recovered by the RA by encashment of Bank Guarantee furnished by the taxpayer, would attract principle of natural justice. The taxpayer contended that encashment of bank guarantee tantamount to recovery affected through security and not payment of duty thus principle of unjust enrichment is not applicable in this case.

The HC on the basis of SC ruling passed in case of Mafatlal Industries vs UOI [1997 (5) SCC (536)] observed that principle of unjust enrichment would be applicable to every claim of refund irrespective of the reason to claim such refund. The bank guarantee was en-cashed by the RA on account of duty payable by the taxpayer and later when the amount becomes refundable, the same needs to pass the test of unjust enrichment. Thus, the taxpayer was given time to prove unjust enrichment to claim the refund recovered by the RA by way of encashment of Bank Guarantee.

M/s Ruchi Soya Industries Ltd vs UOI (Special civil application No 14540 of 2015) (HC, Gujarat)

Notification & Circulars

Services provided by Arbitral Tribunal are taxable under reverse charge and not under forward charge

CBEC has issued a circular clarifying that service tax liability for services provided by an Arbitral Tribunal including the individual arbitrators of the Arbitral Tribunal shall be on the service recipient if it is business entity located in taxable territory with a turnover exceeding rupees ten lakhs in the preceding financial year. The circular also clarified that any reference in the service tax law to an 'Arbitral Tribunal' necessarily includes the natural persons in the Arbitral Tribunal.

Circular No 193/03/2016 – Service Tax dated May 18, 2016

Mega Exemption Notification (Notification No 25/2012 dated June 20, 2012 – Service Tax) amended

CBEC has issued notification to amend the mega exemption notification to insert an explanation which provides that following services provided by Government or local authority to a business entity shall be taxable irrespective of the turnover of business entity:

- services by the Department of Posts by way of speed post, express parcel post, life insurance and agency services provided to a person other than Government;
- services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport;
- transport of goods or passengers
- services by way of renting of immovable property

Notification No 26/2016 – Service Tax dated May 20, 2016

Levy of Krishi Kalyan Cess ('KKC') notified by Government, to be applicable on value of services w.e.f. June 01, 2016

The Central Government has notified the union budget proposal to levy KKC on the value of services at the rate of 0.5 percent w.e.f. from June 01, 2016. Key notifications issued in this regard provides that:

- Taxable services which are exempted from the levy of whole of service tax or are not liable to service tax in terms of Section 66B of the Finance Act, 1994 shall also be exempted from the levy of KKC
- With respect to services for which abatement is available in terms of Notification No 26/2012-ST dated June 20, 2012, KKC shall also apply only on the abated value of service
- CENVAT Credit of KKC shall be allowed to a provider of output service only for payment of output KKC
- CENVAT Credit of any other duty/ tax specified under Rule 3(1) of the CENVAT Credit Rules, 2004 cannot be utilized for payment of KKC
- Benefit of rebate of service tax allowed on export of services in terms of Rule 6A of the Service Tax Rules,

1994 shall also be available in respect of KKC

- Service receivers liable to pay service tax under reverse charge mechanism in terms of Notification No 30/2012-ST dated June 20, 2012 would also be liable to pay KKC at the rate of 0.5 percent

- SEZ unit or the Developer shall also be entitled to ab-initio exemption or refund of KKC in terms of Notification no 12/2013 – ST dated July 01, 2013

Notification No 28/2016 – ST, 28/2016 – CE(NT), 29/2016 – ST, 27/2016 – ST and 30/2016 – ST dated May 26, 2016

Legislation introduced for settlement of arrears in disputes under various Acts administered by Maharashtra Sales Tax Department ("MSTD")

The Government of Maharashtra has introduced legislation for settlement of arrears in disputes under the various Acts administered by MSTD. The Act so passed is titled as 'the Maharashtra Settlement of Arrears in Disputes Act, 2016.

Circular No VAT/MMB-2015/47/ADM-8/B-120 dated May 03, 2016

New warehousing regulations notified under Customs

CBEC has issued following notifications and circular to notify the new regulations related to warehousing under Customs:

- Notification No 67/2016 - Warehoused Goods (Removal) Regulations, 2016

- Notification No 68/2016 - Warehouse (Custody and Handling of Goods) Regulations, 2016

- Notification No 69/2016 - Special Warehouse (Custody and Handling of Goods) Regulations, 2016

- Notification No 70/2016 - Public Warehouse Licensing Regulations, 2016

- Notification No 71/2016 - Private Warehouse Licensing Regulations, 2016

- Notification No 72/2016 - Special Warehouse Licensing Regulations, 2016

- Circular No 18/2016 – Specifies the new format of the bond to be executed in respect of the goods to be cleared for deposit in a warehouse in terms of Section 59 of the Customs Act, 1962.

Customs notifications and circulars hosted on CBEC website

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