

November 2016

# TAX UPDATES

(containing recent case laws, notifications, circulars)

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Prepared in association with



## Foreword

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

A meeting was convened by the Delhi VAT Commissioner on October 28, 2016 to discuss the implications of the GST rate structure proposed for adoption by the Centre in the last meeting of the GST Council. FICCI representatives participated in the meeting and placed their views before the officials.

FICCI also participated in a meeting convened by the Justice (Retired) Easwar Committee on 18<sup>th</sup> October, 2016 to discuss proposals relating to simplification of Direct Tax laws.

FICCI has submitted its Pre-Budget Memorandum 2017-2018 containing suggestions / recommendations relating to Direct and Indirect taxes to the Government on October 25, 2016. FICCI will be participating in the meetings convened by the Government to discuss various Budget proposals.

Central Board of Direct Taxes (CBDT) has issued draft rules for buy-back of shares. The rules prescribe the methodology for the determination of the amount received by the companies under different circumstances in which the shares have been issued. CBDT had invited comments and suggestions from the stakeholders and the general public on the draft rules. Pursuant to comments received from the stakeholders, recently the CBDT has notified the final rules for buy-back of shares. The rules come into effect from 1 June 2016.

The Customs, Excise and Service Tax Appellate Tribunal, Ahmedabad, has allowed the plea of a taxpayer for remission of excise duty on goods cleared from a factory but which were destroyed in an accident while being transported for export. It was observed by the Tribunal that goods cleared from export under bond, if destroyed before being exported, could be considered as having been destroyed before removal for the purposes of Rule 21 of the Central Excise Rules.

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

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

A. Didar Singh

# Recent Case laws

## I. DIRECT TAX

### High Court Decisions

#### Delay in curing TDS certificate defects are attributable to the taxpayer and hence interest under Section 244A is liable to be denied

During AY 1995-96, the taxpayer filed a revised return. The return was processed and assessment was completed. However, interest under Section 244A of the Act was not granted to the taxpayer on account of the delay in curing defects in the TDS certificates. The taxpayer moved an application before the Chief Commissioner of Income Tax (CCIT) seeking interest under Section 244A of the Act. The CCIT rejected application holding that delay was attributed to the taxpayer. Similar orders were also passed in respect of AYS 1993-94, 1992-93 and 2001-02. The taxpayer then carried the matter to the Government of India, Ministry of Finance. However, Ministry of Finance was informed the taxpayer that the respective authorities were not empowered to interfere in the matter. Aggrieved, the taxpayer filed a writ petition before the Kerala High Court.

The High Court observed that the statute has given power to CCIT to decide the period to be excluded and his decision would be final. The statute made it clear that where refund of any amount was due to taxpayer, he would be entitled to receive simple interest as stated therein along with refund. The amount would be said to be due only when all the procedures were complete. It could not be stated that

amount would become due when it was deposited by the deductor to the tax department. The High Court observed that if the delay was on the part of the tax department, interest would be payable from the date on which it becomes due. As per Section 244A(2) of the Act, the taxpayer would not be entitled to interest if the delay in the proceedings was attributable to the taxpayer either in whole or in part. The delay in proceedings resulting in a refund would be with reference to the finalisation of returns and in regard to the proceedings for refund.

The High Court referring to Sections 199, 200, 201, 203 of the Act observed that it is deductor's obligation to provide a certificate for deducting tax. The question was that if there was any defect in the said certificate and taxpayer failed to get it cured before filing of the return then whether taxpayer would be termed as a person who had caused the delay. The High Court stated that if the defect was noticeable on receipt of the certificate then it was for deductee to get it cured. In the present case substantial time had elapsed for curing the defects which as per the tax department was attributable to taxpayer. Once the defect would get cured, parties would go back to their respective original positions, but the question would be whether there was an obligation on the part of the tax department to pay interest on the amount to be refunded. It was observed that when statute under Section 244A(2) specified that interest need not be paid if refund proceedings would get delayed for reasons attributable to the taxpayer. The same position would apply to the present case and no other view was justified. Accordingly, the High Court dismissed the writ petition of the taxpayer.

*State Bank of Travancore v. CCIT (WP(C) No. 19283 of 2007) – Taxsutra.com*

### **Workplace dress code prescribed by employer does not qualify as a uniform; such an allowance is not eligible for tax exemption**

The allowance paid by an employer to its employees for the purchase or maintenance of a uniform is eligible for tax exemption in the hands of the employees under the Act. Recently, the Gujarat High Court in the case of Oil and Natural Gas Corporation Limited held that the dress code prescribed by an employer to be worn at the workplace cannot be equated to a uniform. Accordingly, the uniform allowance paid for the purchase/ maintenance of a dress code is not eligible for exemption from tax as a 'uniform allowance' and is hence liable for tax deduction at source by the employer.

*Oil and Natural Gas Corporation Limited v. CIT (Tax Appeal 368 and 371 of 2016)*

## **Tribunal Decisions**

### **Payments made in lieu of designs, drawings, plans do not amount to royalty/fees for included services**

The taxpayer is a Company, engaged in the business of development of land and construction of buildings. The taxpayer intended to develop commercial project 'IQ Business Park' at Pune as Special Economic Zone (SEZ). The taxpayer entered into an agreement with M/s. Gensler and Associates/International Ltd., USA (Gensler), an Architecture, Design, Planning and Strategy consulting company. Gensler

had provided its services to the taxpayer from its office in San Francisco and was not having any Permanent Establishment (PE) in India. As per the agreement, the services were divided into two phases; (1) Programme verification and Master Planning for Government Approval; and (2) Conceptual Development.

While making payment to Gensler, the taxpayer did not deduct the tax at source. The AO held that such payment was in the nature of FTS/Royalty and the taxpayer was liable to deduct tax at source on such payments.

The Pune Tribunal held that in the present case, the total stay of employees / executives of Gensler in India was five days only. The Department has not provided any material to show that the stay of the employees of Gensler in India was for 90 days or more. It is not the case of the tax department that Gensler has any branch, office, workshop, place of management etc. in India to be considered as the PE. Therefore, the Gensler had no PE in India.

The Tribunal held that the payments made by the taxpayer do not fall within the scope of expression FIS as defined under Article 12(4) of the tax treaty. There was no transfer of any technology or technical know-how, skill or process by Gensler. The designs, drawings, layouts of buildings does not fall within the ambit of transfer of technical know-how or technical designs. Mere passing of project-specific architectural drawings & designs with measurements does not amount to 'making available' technical knowledge, know-how or process. The taxpayer cannot independently use the drawings and designs in any manner whatsoever for commercial purpose. Since, the drawings & designs were project specific, the taxpayer

could not have used these designs for any of its other projects. Accordingly, payment made to Gensler was not taxable as royalty/FTS.

*Gera Developments Pvt. Ltd. v. DCIT [ITA No. 62 & 63/PN/2015]*

### **Part of the consideration received from the sale of shares cannot be attributed towards non-compete fees**

The taxpayer is a promoter and director in Synergetics Information Technology Services (India) Pvt. Ltd (Synergetics). It is engaged in the business of software training. Synergetics was taken over by Aptech Ltd. via share purchase and subscription agreement (SPSA) and shareholders agreement (SHA). As the shareholder of the company, the taxpayer sold shares approximately 35 per cent of the existing paid up capital and Ajay Sharad Khankhoje (another shareholder) sold 35 per cent of the existing paid up capital to Aptech Ltd. On this transaction, the taxpayer declared long term capital gain (LTCG) in his return of income. However, the AO determined the consideration received by the taxpayer, to be inclusive of non-compete compensation based on a non-compete clause in the SPSA. The AO thus assessed such income as the taxpayer's business income under Section 28(va) of the Act. The CIT(A) ruled in favour of the taxpayer.

The Tribunal agreed with CIT(A)'s observation that the non-compete compensation referred to in Section 28(va) of the Act applies to any sum received for not carrying out any activity in relation to any business or for not sharing any intellectual property relating to the

business sold or transferred. However in the present case the taxpayer was not restricted from carrying out any activity or from sharing any intellectual property. On the contrary, the taxpayer was an active participant in the routine management of business for which he was also adequately compensated. The CIT(A) was justified in observing that it was in the nature of a standard non-compete condition or clause of any employment contract and which cannot form the basis of allocation of a part of the consideration towards non-compete as the taxpayer has been paid salary for his service during the period of employment. Therefore, CIT(A) rightly held that total consideration received by taxpayer from the sale of shares should be considered as his full value of consideration under Section 48 of the Act and no part of the said consideration can be attributed towards non-compete fees.

*ACIT v. Shri Sanjay Umesh Vyas (ITA No. 3963/Mum/2011) – Taxsutra.com*

### **Where genuineness of payee is not established, withholding of tax would not be sufficient**

The taxpayer is engaged in the transportation of goods, logistics including shipping business and generation of energy. During the year under consideration, the taxpayer paid a commission to CP Sharma. However, the taxpayer failed to prove the existence of such a person and also could not provide reasons for the same. The AO inferred that CP. Sharma did not carry out any work for the taxpayer and the payments were shown to be made through bank to provide as accommodation entries to the taxpayer. The AO observed that someone whose Permanent Account Number (PAN) details were also not

available could not be reasonably involved in business. Accordingly, the AO made an addition to the total income of the taxpayer. The Dispute Resolution Panel (DRP) upheld the order of AO.

The Tribunal observed that the genuineness of the transaction was questionable as being a high value transaction. The taxpayer had paid 15 per cent of freight as commission payment and deducted 20 per cent as TDS out of the commission. However, the person to whom amount was paid, did not have a PAN. The Tribunal observed that unless the taxpayer proved the genuineness of existence of such person, it could not be held as genuine merely because it paid relevant TDS. Accordingly, the Tribunal upheld the DRP's order. The Tribunal further observed that considering the high value transaction, and such person does not have PAN, 'it does raise eye brows', and thus clarified that the taxpayer has to prove that such a person exists and why he does not have PAN even though he is involved in a high value transaction.

*Transport Corporation of India Ltd. v. ACIT (ITA No. 117/Hyd/2016) – Taxsutra.com*

**Corporate guarantee adjudged as shareholder service under exceptional circumstances; interest on outbound loans to be determined applying sophisticated manner of loan benchmarking**

- The taxpayer had set up a special purpose vehicle (SPV) in the Bahamas, Tega Investment Ltd. (Tega Bahamas) for undertaking the acquisition of two operating companies based in South Africa.

The taxpayer also provided a shareholder loan to Tega Bahamas and a corporate guarantee to ICICI Bank, U.K., in order to make adequate funds available to Tega Bahamas for acquiring the South African entities. These fundings were provided by the taxpayer as a substitute to equity funding to Tega Bahamas for furthering its own intent of acquiring the two South African entities. Accordingly, the taxpayer classified the loan as performing a shareholder function, thus warranting no charge, and guarantee as shareholder service meriting no consideration.

- The taxpayer placed reliance on guidelines of Australian Tax Office (92/11), OECD and U.K. Inland Revenue to hold that in the instant case, no third party financier would have lent money to the SPV without the guarantee having been extended by the parent company, having regard to its skewed debt equity ratio; and that no benefit actually accrued to the SPV, for which it would be willing to pay any guarantee commission.
- The Transfer Pricing Officer (TPO) and DRP disregarded the taxpayer's contention (both in connection with the provision of loans and guarantees) and computed an additional charge on both.
- In addition to the guarantee, the taxpayer had provided working capital loans to its Associated Enterprise (AE) (operational and not SPVs) in Australia on which it charged an arm's length interest on the basis of sophisticated manner of loan benchmarking, with reference to credit ratings and comparability of third party loan agreements.

- The TPO disregarded the taxpayer's approach by determining credit rating on the basis of bias selection of financial ratios and subjectively downgrading the rating determined through quantitative parameters.

#### **Tribunal's ruling**

In relation to the loan and corporate guarantee provided to its SPV, the Tribunal appreciated that the taxpayer's expectation from provision of loan and guarantee are not that of a lender or guarantor i.e. to earn a market rate of interest or guarantee fee, rather, the expectation was of a shareholder to protect its investment interest and help it to achieve acquisition of the South African entities for furtherance of its own business interest and get a return in terms of appreciation in value and dividends. The Tribunal was considerate to the evidence brought on records that no third party would have agreed to grant loans on an independent basis to Tega Bahamas given its skewed debt-equity ratio reflected in the balance sheet with low equity funding. Therefore, the loan was considered to be as quasi-equity and guarantee as a shareholder service meriting no charge.

- The Tribunal also addressed the issue on working capital loans advanced by the taxpayer to its AEs (operational and not SPVs) by setting aside the matter to the file of the TPO for re-adjudication as per sophisticated manner of loan benchmarking, with reference to the credit ratings and comparability of third party loan

agreements, already provided by the taxpayer.

*Tega Industries Ltd. vs DCIT (ITA No. 1912/Kol/2012)*

#### **Transfer pricing provisions do not apply in respect of transactions between the Indian head office and its overseas branch office**

The taxpayer had an overseas Branch Office (BO) in Canada and a 100 per cent subsidiary in the U.S. Transactions between the taxpayer and its overseas BO were treated as international transactions and their ALP was determined by the TPO. The taxpayer also entered into an international transaction with Aithent Inc., USA, and adopted Transactional Net Margin Method as most appropriate method. The TPO adopted a number of search filters for selecting the comparable companies and accordingly made a Transfer Pricing (TP) adjustment.

#### **Tribunal's ruling**

*Determination of ALP in respect of transactions of the taxpayer with its overseas BO*

- The Tribunal, placing reliance on precedents set by the Supreme Court of India<sup>18</sup> and various Indian High Courts<sup>19</sup>, endorsed the 'Principle of Mutuality' and held that there can be no profit from trade with self and there cannot be a valid transaction of sale between BO and its Head Office (HO).
- However, referring to the provisions of Section 5(2) of the Income Tax Act, 1961 (the Act), it clarified that if a foreign general enterprise has a BO in India, such BO will be considered as an

'enterprise' u/s 92F(iii) of the Act and the transactions between the foreign HO and the Indian BO will be considered as an 'international transaction' in terms of Section 92B of the Act.

- In the instant case, considering the fact that, in terms of Section 5(1) of the Act, a tax-resident of India is liable to be taxed on its global income, the argument that a transaction between an overseas BO of an Indian HO and the HO itself is subject to TP provisions loses its substance.
- On aggregation of accounts of the HO and its overseas BO, any additional profit earned by the HO would be set off with the equal amount of expense of the BO, thereby not leaving any separately identifiable income on account of this transaction. Thus, over/under invoicing between the Indian HO and its overseas BO is always income-tax neutral.
- Making a TP adjustment with respect to international transactions between the Indian HO and its overseas BO will result in charging tax on income which is more than legitimately due to the exchequer which is impermissible. In the instant case, the taxpayer has rightly offered to tax, not only the amount earned by the Indian HO, but also the income earned by its overseas BO.

***Application of certain filters resulting in TP adjustment on transactions with AE in USA***

The Tribunal also ruled on non-application of upper turnover filter, exclusion of companies with less than 25 per cent of the revenues as export sales, exclusion of companies with more than 25 per cent related party transactions, companies with

diminishing revenues or persistent losses, companies with onsite income more than 75 per cent of the export revenues and adjustment on account of idle capacity.

*Aithent Technologies Private Limited v. DCIT (ITA No.6446/Del/2012)*

**Concluded APA has a considerable bearing on characterisation of prior years' international transactions**

The taxpayer is engaged in the manufacturing of footwear for its AE. Prior to Financial Year (FY) 2011-12, the taxpayer did not characterise itself as a contract manufacturer. However, the TPO re-characterised the taxpayer as a contract manufacturer and made adjustment for Assessment Year (AY) 2009-10 to AY 2011-12 which was upheld by the DRP.

**Tribunal's ruling**

- The Advance Pricing Agreement (APA) allowed for curtailment of rollback years considering the submissions of the taxpayer substantiating that it had become a contract manufacturer only from FY 2011-12 onwards.
- The APA being signed on 24 May 2016, the taxpayer had no occasion to submit the same before the lower authorities. Therefore, the additional evidence was admitted.
- Upon admission of the additional evidence, the orders of lower authorities were set aside and remitted back to the AO/TPO for fresh adjudication.

*Lotus Footwear Enterprises Limited vs DCIT (I.T.A.Nos.779/Mds/2014, 801/Mds/2015 & 810/Mds/2016)*



## Vacancy allowance is available only for a property that was 'let out'; 'intention to let' is not relevant

The Act allows for a deduction<sup>20</sup> (vacancy allowance) from the taxable rental value in cases where a let-out property was vacant during the year. Recently, the Mumbai Tribunal in the case of Sharan Hospitality Private Limited held that a vacancy allowance cannot be availed where a property was not let out during the year, irrespective of the 'intention to let' such a property.

*Sharan Hospitality Private Limited v. DCIT (I.T.A. No. 6717/Mum/2012)*

## AAR Ruling

### Service fees payable to the subsidiary for product promotion services are not taxable as fees for technical services

The applicant, a pharmaceutical company, entered into three separate agreements with its subsidiary DRL Russia:

- Distribution agreement under which DRL Russia imports goods from the applicant and distributes the same in the Russian market.
- Market research service agreement in respect of market research services on the study of characteristics of the brand, identifying unsatisfied needs in relation to the brand, identifying the current perception of the image of the goods in a competitive environment.
- Product promotion service agreement in respect of marketing services related to the promotion of goods

from the producer to the end-customer by way of meeting with medical and pharmaceuticals experts, participation in pharmaceutical circles, distribution of promotional materials to medical and pharmaceuticals experts.

In consideration for the market research and product promotion services, the applicant was to remunerate DRL Russia on the cost plus markup basis. The AAR held that the medical representatives of DRL Russia merely promote the goods by way of meeting doctors and pharmacies and their activities are executory in nature since such services do not entail the rendering of advice to the applicant. Based on this fact it cannot be said that DRL Russia is providing any consultancy service to the applicant. There is no evidence to suggest that the reports prepared by medical representatives have been utilised by the applicant in respect of brand promotion for the sale of goods in Russia. In order to establish that consultancy services have been provided based on work undertaken by medical representatives, it is necessary that these services should be utilized by the applicant in India for brand promotion.

The AAR relied on the decision of the Supreme Court in the case of GVK Industries<sup>17</sup> wherein it was held that consultation entails deliberations, consideration, conferring with someone, conferring about or upon the matter. Since there is no evidence to suggest that the applicant is consulting DRL Russia in pursuance of the agreement for promotion of goods, the AAR held that this agreement cannot be considered for providing consultancy services. Accordingly, such services were not taxable as FTS.

The AAR also held that the service fee payable by the applicant to DRL Russia under the agreement for promotion of goods is not taxable either under Article 7 or Article 22 of the tax treaty.

*Dr. Reddy Laboratories Limited [A.A.R. No 1572 of 2014] [taxsutra.com](http://taxsutra.com)*

## II. SERVICE TAX

### Service Tax - Decisions

#### Stay on Delhi High Court judgment quashing DGCEI's coercive action without notice

The Supreme Court has admitted the Special Leave Petition filed by Revenue authorities and passed Stay Order in relation to the judgment of Delhi High Court in the case of Make My Trip (India) Pvt. Ltd. [TS-349-HC-2016(DEL)-ST], which had quashed the arrest and coercive action by DGCEI authorities on the grounds that the authorities had bypassed the procedure laid in down in the law.

*Union of India and Ors. vs. M/s Make My Trip (India) Pvt.Ltd.[TS-390-SC-2016]*

#### Stay on Delhi High Court judgment striking down power to call for documents from taxpayers

The Supreme Court has admitted the Special Leave Petition by Revenue authorities and passed Stay Order with regard to judgement of Delhi High Court in the case of Mega Cabs Pvt Ltd [2016-TIOL-1061-HC-DEL-ST], which had struck down the Rule empowering Service tax officers/ audit party deputed by Commissioner or Comptroller and Auditor General (CAG), to seek production of cost audit/ income tax audit reports on demand.

*Union of India and Ors. vs. Mega Cabs Pvt. Ltd. [2016-TIOL-162-SC-ST]*

#### Individual truck owners not issuing consignment notes are not taxable as goods transport agent

The issue involved in the instant case was whether an individual truck owner transporting goods for public distribution, without issuing a consignment note would be taxable as goods transport agent (GTA) services.

The Mumbai Tribunal has held that since individual truck owners do not issue consignment note (which is mandate to qualify as 'GTA' in terms of the Service tax law), such truck owners are not liable to be taxed as GTA. The Tribunal also, held that even though basis, the Service Tax Rules GTA service provider is required to issue a consignment note, it is not within the ambit of a subordinate legislation (i.e. Service tax Rules) to create a class of taxable persons by imposing a condition (when the Service tax law provides otherwise).

*Commissioner of Central Excise & Service Tax, Aurangabad vs. Jaikumar Fulchand Ajmera [TS-397-CESTAT-2016(Mum)-ST]*

## Notification/Circulars/ Press Releases

### Exemption on the long term lease of industrial plots

With effect from 22 September 2016, services provided by the State Government Industrial Development Corporations/ Undertakings to industrial units by way of granting long term lease (30 years or more) of industrial plots, has been exempted from service tax levy.

*Notification No. 41/2016 – ST dated 22 September 2016*

### Services related to advancement of Yoga not liable to service tax during specified period

It has been notified that, for the period 1 July 2012 to 20 October 2015 service tax is not applicable on services by way of yoga advancement provided by charitable institutions (as per Income tax provisions).

*Notification No. 42/2016 – ST dated 26 September 2016*

### Amendment in monetary limits for Service tax adjudication

In relation to powers for adjudging offences under Service tax laws, the Central Government has amended the monetary limit (i.e. the amount of Service tax/ CENVAT credit specified in a notice) for each rank of officer.

*Notification No. 44/2016 - ST dated 28 September 2016*

### Services of transportation by educational institutions not liable to service tax

It has been notified that, for the period from 1 April 2013 to 10 July 2014, service tax is not required to be paid on the transportation services by educational institutions to students, faculty and staff.

*Notification No. 45/2016 – ST dated 30 September 2016*

### Guidelines on an arrest for offences punishable under Service tax

The Central Board of Excise and Customs (CBEC) has issued guidelines for arrest of a

person in case of punishable offences under Service tax, prescribing legal and factual conditions to be fulfilled before arrest, such as the disputed amount should exceed INR 2 crores, officer to be convinced that alleged offender is likely to hamper the course of investigation, etc.

*Circular No. 201/11/2016 – ST dated 30 September 2016*

### III. CENTRAL EXCISE

#### Decisions

##### Availment of CENVAT credit on services availed at job worker's premises

The taxpayer has two manufacturing units i.e. unit I and unit II. The unit II is the job worker for unit I. Unit II has availed certain services like construction and maintenance/repair service. However, the CENVAT credit attributable was taken in the books of Unit I. Such availment of credit in the books of Unit I was disputed by the department on the ground that the availment of credit was not in conformity with the CENVAT Credit law. The proceedings were initiated, where CENVAT credit availed by Unit I was disallowed. Thereafter, the taxpayer preferred an appeal before the Commissioner (A) wherein it the adjudication order was upheld. Aggrieved by the same, the taxpayer filed appeal before Tribunal.

The Delhi Tribunal observed that both unit I and unit II belongs to the taxpayer. The unit II is undertaking the job work activities exclusively for unit I and after

receipt of the job worked goods from the unit II, the same is being removed by unit I on payment of applicable excise duty after further processing. It is not the case that the CENVAT credit for input services has been taken in the books of both unit II and unit I.

Therefore, in absence of any specific finding, there is no misutilisation of CENVAT credit, the CENVAT benefit has to be extended to the manufacturer. Rule 7 of the CENVAT Rules provides that the input service distributor may distribute the credit among its other manufacturing units. The restrictions contained in the said rule have no application to the facts of this case. Further, the Tribunal also, relied on the decision in the case of Greaves Cotton Ltd and allowed CENVAT credit to unit I.

*Raymond Ltd vs CCE (2016 – TIOL – 2562 – CESTAT – DEL)*

##### Availment of CENVAT credit on goods, which are exempt from excise duty

In the present case, availment of CENVAT credit based on the invoices issued by supplier, was denied by the authorities on the ground that the Excise duty paid by the supplier was not required to be paid considering excise duty exemption available. Since the supplier was not liable to discharge Excise duty and therefore, the recipient of such goods is not eligible for CENVAT benefit.

The Delhi Tribunal allowed the appeal, considering that the availment of CENVAT credit is in conformity with Rule 3(1) of the CENVAT Rules. The fact is not under

dispute that the goods have not been received for use in the intended purpose. Further, it has also, not been alleged that the Excise duty has not been discharged. Thus, in absence of any specific prohibition in the CENVAT Rules, restricting the availment of CENVAT credit, in the eventuality, of any dispute between Central Excise Department and the supplier, the recipient of the goods, cannot be held liable for reversal of CENVAT credit. The Tribunal also, placed reliance on the decision in the case of MDS Switchgear (2008-TIOL-245-SCCX).

*Caparo Engineering India Ltd vs CCE & ST (2016 – TIOL – 2715 – CESTAT – DEL)*

### Remission of duty on goods destroyed in transit

The taxpayer had cleared the goods on execution of UT-1 for export, by following the self-sealing procedure of export against ARE-1. The truck met an accident and the loaded material was destroyed. Necessary intimation was filed with the local police, who drew the panchnama at the site. As the goods did not reach the destination being destroyed en-route, accordingly, the taxpayer filed an application for remission of duty under Rule 21 of the Central Excise Rules.

The Commissioner observed that remission of duty could be allowed on the goods destroyed at any time before removal. In the present case, since the goods had already left the factory and accordingly, remission of duty cannot be allowed. Consequently, the application was rejected.

The Ahmedabad Tribunal allowed the appeal in favour of the taxpayer relying on the Larger Bench decision in the case of Honest Bio-vet Pvt. Ltd as the Tribunal, in the said judgment, had observed that the goods cleared for export under bond, if destroyed before being exported, could be considered as destruction before removal only.

*Alembic Ltd vs CCE & ST (2016 – TIOL – 2710 – CESTAT – AHM)*

## Notification/Circulars/ Press Releases

### Documents for the availment of CENVAT credit

Rule 9 of CENVAT Credit Rules, 2004 (the CENVAT Rules), has been amended and consequently, the benefit of CENVAT credit can also be now availed based on the Service Tax Certificate for Transportation of goods by rail issued by the Indian Railways.

*Notification 45/2016 – CE (NT) dated 20 September 2016*

### Amendment in the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable and Other Goods) Rules, 2016

A notification has been issued to enable the applicant manufacturer to execute a general bond with security for obtaining the benefit of a concessional rate of duty under Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable and Other Goods) Rules, 2016.

*Notification 46/2016 – CE (NT) dated 26 September 2016*

## **IV. Customs duty Notifications/Circulars/ Press Release**

### **Discontinuation of the practice of making manual debits on the physical copy of Advance Authorisations (AA) registered at the EDI Customs port**

It was brought to the notice that for Advance Authorizations registered electronically, the physical authorizations are simultaneously issued and are endorsed by Customs authorities with manual debits. The Board, as a measure of enhancing the ease of doing business has decided that the practice of evidencing debits manually shall be discontinued with respect to future authorizations electronically registered. Henceforth, the officer examining the imported goods and/ or giving Out-of-Charge order shall also, re-check that the proper debit of the authorization in the EDI system has been made.

Once the manual debits are discontinued, if a holder of AA is desirous of obtaining an ARO/Invalidation letter etc. from the Regional Authority, he is required to request the Group DC/AC to issue an Advice Letter for the intended quantity and value and thereafter, the holder of AA may apply (based on the Advice Letter) to the Regional Authority to issue ARO etc. Further, the change does not effect the use of Telegraph Release Advice (TRA) facility at non-EDI

port, since the authorization gets debited in the EDI System at the port of registration.

*Instruction No F.No.605/30/2015-DBK dated 28 September 2016*

## **V. Foreign Trade Policy Decisions**

### **Merchandise Exports from India Scheme – Additions and Revision in Rates**

Rate of benefit for few products under Merchandise Exports from India (MEIS) Scheme has been revised. Further, the product list has also been amended with immediate effect to claim of benefit under the MEIS Scheme.

*Public Notice 32/2015 – 2020 dated 22 September 2016*

### **Amendment in ANF-5A [Application for issue of EPCG Authorization]**

ANF 5A of Aayat Niryat Forms of FTP 2015-20 has been amended to include guidelines for designating/certifying a Common Service Provider by DGFT, Department of Commerce or State Industrial Infrastructure Corporation in a Town of Export Excellence.

*Public Notice 33/2015 – 2020 dated 23 September 2016*

## **V. VAT**

### **Decisions**

### **Cleaning materials supplied to SEZ unit not to be considered as**

## 'consumables', not entitled to Exemption

The taxpayer had supplied cleaning material to a unit in SEZ. Further, as per the provisions of the Kerala VAT Act, 2003 (KVAT Act), sale of any building materials, industrial inputs, plant and machinery including components, spares, tools and consumables to any developer or industrial unit or establishments in any SEZ in the State for setting up a unit or use in the manufacture of other goods shall, subject to such conditions or restrictions, as may be prescribed, would be exempted from VAT levy. Accordingly, the taxpayer had not charged VAT in the invoice issued to the SEZ unit. Further, against this invoice, the SEZ unit had issued a declaration in Form No. 43 evidencing purchase of goods without payment of VAT.

The competent authority in this regard has issued penalty orders imposing penalty equivalent to double amount of VAT payable under the Act, stating that the exemption under the Act shall not be available to the taxpayer as the commodities prescribed under Form-43 does not come under the purview of VAT exemption.

In respect to the above, the taxpayer filed two writ petitions before the Kerala High Court. The council for the taxpayer claimed that the taxpayer is eligible for VAT exemption under the KVAT Act. Further, he also contended that even if VAT exemption is not available to the taxpayer, still the penalty proceedings are invalid as the taxpayer has acted based upon Form-43 provided by the SEZ unit.

On the other hand, the Revenue contended that the taxpayer had not raised any invoice showing the tax payable but instead invoices were raised showing Nil VAT. On the basis of such an invoice, the SEZ unit had issued Form No. 43 for claiming exemption for sale to SEZ unit. Therefore, it is a clear case of evasion of tax and the revenue is justified in initiating penalty proceedings.

The HC held that consumables used by SEZ developer / unit should be for 'setting up of the unit' or 'use in the manufacture of other goods'. Further, Form No-43 issued by purchasing SEZ unit also clearly mentions the product as 'house-keeping materials' and 'house-keeping consumables', hence the penalty proceedings is justified as there was no doubt regarding the liability to pay tax by the taxpayer in relation to the sale of cleaning material supplied to SEZ unit.

Further, the HC stated that, in the instant case the bare reading of the provisions of the KVAT Act would clearly indicate that the product supplied by the taxpayer is liable to be taxed and no exemption can be claimed. Also, considering that the taxpayer had not raised any invoice showing the taxable component, it would have been a different situation had the taxpayer indicated consumables as taxable and the SEZ unit had issued Form No-43.

Given the above, the HC denied the VAT exemption on cleaning materials supplied to the SEZ unit for the purpose of cleaning of building, other facilities and furniture.

*The Commercial Tax Officer, Cochin and the Intelligence Officer, Kochi vs. Hygiene Solutions- [TS-391-HC-2016(KER)-VAT*

## **Notifications/Circulars/Press Release**

### **Uttarakhand**

With effect from 4 October 2016, the VAT rate of goods other than those included in any of the schedules to the Uttarakhand Value Added Tax, 2005, has been increased from 13.5 per cent to 14.5 per cent.

*Notification No. 824/2016/13(120)/XXVII(8)/2016 dated 4 October 2016*

### **Maharashtra**

With a view to give more time to dealers to amicably settle the disputes relating to the payment of tax and to facilitate compliance under the Maharashtra Settlement of Arrears in Disputes Act, 2016 Act, the last date for the said purpose has been

extended from 30 September 2016 to 15 November 2016.

*MAHARASHTRA ORDINANCE No. XXIV OF 2016*

### **Uttar Pradesh**

With effect from 22 September 2016, Entry tax at 5 per cent rate is applicable on all kind of goods except the goods described in Schedule-1 of the Uttar Pradesh Value Added Tax Act, 2008, purchased or ordered through online shopping or e-commerce and consigned or brought into local area from outside the state of Uttar Pradesh, otherwise than in connection with business or for personal use.

*Notification No. K.A. NI-2-1342/XI-9(107)/U.P. Act-30-07-Order-(166)-2016 dated 21 September 2016*

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