

December 2016

TAX UPDATES



(containing recent case laws, notifications, circulars)

Prepared in association with



Foreword

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

In a major assault on black money, fake currency and corruption Government announced demonetisation of INR 500 and INR 1000 currency notes on 8th November, 2016 making these notes invalid. Following demonetisation, concerns had been raised that some of the existing provisions of the Income Tax Act, 1961 can possibly be used for concealing black money. Accordingly, the Government has introduced the Taxation Laws (Second Amendment) Bill, 2016 in the Parliament to amend the provisions of the Income Tax Act and the Finance Act to ensure that defaulting taxpayers are subjected to tax at a higher rate and stringent penalty. The Government has also introduced a scheme called 'Pradhan Mantri Garib Kalyan Yojna 2016' in the Bill.

India has also signed a revised tax treaty with Cyprus along with its Protocol. The revised tax treaty provides for source-based taxation of capital gains arising from alienation of shares, instead of residence-based taxation provided under the existing tax treaty. However, a grandfathering clause has been provided for investments made prior to April 1, 2017, in respect of which capital gains would continue to be taxed in the country of which the taxpayer is a resident. The revised tax treaty expands the scope of Permanent Establishment (PE) and reduces the tax rate on royalty in the country from which payments are made to 10 percent from the existing rate of 15 per cent, in line with the tax rate under the Act.

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

Direct Tax

Recent Case laws

High Court Decisions

Taxpayer's contractual obligation to make payment cannot ipso facto absolve such payment or taxpayer from primary duty of demonstrating the arm's length behaviour

- The taxpayer manufactured and sold Engine Control Units (ECUs) and had entered into License and Technology Assistance Agreements with its overseas associated enterprise for obtaining ECU technology for a payment of lump sum technical assistance fee (TCA) fee. The taxpayer adopted Transactional Net Margin Method (TNMM) to benchmark all its international transactions and claimed that its international transactions (which included 'payment of TCA fee') were at arm's length.
- The Transfer Pricing Officer (TPO) rejected the taxpayer's 'entity level' benchmarking approach and held that all international transactions could not be at arm's length merely because the overall operating profit was more than that of the comparable companies. Accordingly, the TPO rejected TNMM and applied Comparable Uncontrolled Price (CUP) method in respect of the transaction of payment of TCA fee and determined its Arm's Length Price (ALP) to be nil.

- The DRP upheld the TPO's order against which the taxpayer further appealed before the Tribunal.
- The Tribunal held that neither the taxpayer followed the correct methodology for determination of ALP, nor the TPO/DRP applied the CUP method correctly. Accordingly, the Tribunal set aside the order of the AO and restored the matter to the file of TPO/AO for a fresh determination of ALP.
- Aggrieved by the said Tribunal order, the taxpayer preferred an appeal before the High Court.

Issues before the High Court

- Whether payments on account of royalty and TCA fee could be treated as separate transactions for purposes of carrying out the economic benchmarking exercise.
- The second question related to choice of the most appropriate method (MAM) for purpose of determining ALP of payment of TCA fee.

High Court's ruling

First Question of Law

- The High Court relied on several jurisdictional High Court rulings¹ and observed that in case of Sony Ericsson, the aggregation principle was endorsed, and in case of Denso India

¹ CIT vs EKL Appliances Ltd. [2012] 345 ITR 241 (Del), Sony Ericsson Mobile Communications India (P) Ltd vs CIT [2015] 374 ITR 118 (Del) and Denso India Limited vs ACIT (ITA No. 443/2013 and ITA No. 451/2013)

while endorsing that view, it was also stated that whether to permit aggregation or not is a fact dependent decision.

- The lower authorities correctly turned down the method of justifying payment of technical fee with 'proof' of its necessity by relying on profits.
- The initial burden remains on the taxpayer to prove that the international transactions are at arm's length. The taxpayer's TP report necessarily had to draw a comparison with other entities (may be competitors) to show the general degree of profitability of the venture in question.
- The ALP determination in respect of each international transaction is required to be carried out irrespective of taxpayer's obligation to make payment arising out of agreement(s) between the transacting parties.
- If the transactions, in the opinion of TPO, are not at arm's length, the necessary adjustment(s), as provided in the Act, have to be made irrespective of the fact that the expenditure is allowable under other provisions of the Act. Merely relying upon the profitability and escaping relevant queries of the TPO in relation to arm's length justification of the technology-related payment is not acceptable.
- The taxpayer cannot state that payment of certain amount need not be justified as it is justified by later profits.

Second question of law

- Having accepted TNMM as MAM for all other international transactions, it was not open to the TPO to subject only one transaction, i.e. payment of TCA fee, to an entirely different (CUP) method. Accordingly, TNMM had to be applied by the TPO/AO in respect of the TCA fee payment too.

Magneti Marelli Powertrain India Pvt. Ltd. vs DCIT (ITA 350/2014)

Tribunal Decisions

Indian subsidiary represented by its managing director constitutes a fixed place PE in India

The taxpayer is a foreign company, resident in Switzerland, specialised in geo composite membrane water proofing and drainage systems for dams, canals, tunnels and other hydraulic structures. The taxpayer has a subsidiary, named M/s. Carpi India Waterproofing Specialists Pvt. Ltd. (CIWSPL) in India represented by Sri. V. Subramanian [Managing Director (MD)]. The taxpayer had rendered services for Tamil Nadu Electricity Board (TNEB) at Kadamparal, and the project was executed between 6 November 2004 and 21 May 2005. During the Assessment Year (AY) 2008-09, the taxpayer received a sum of INR11,95,56,285 from National Hydro Power Corporation Ltd (NHPC) for providing PVC geo membrane water proofing in Tanakpur Power channel (Tanakpur project) and claimed it as exempt from tax on the ground that it did not have continuous presence or business connection or a PE in India.

The Assessing Officer (AO) determined the total income as INR 1,09,84,831 after giving deduction of sales and service tax. The Dispute Resolution Panel (DRP) upheld the AO's order. Against the direction of the DRP and the final assessment order, the taxpayer went on to appeal before the Tribunal.

The Tribunal held that the claim of the taxpayer that no PE existed in view of Article 5.2(j) of the tax treaty was only a subterfuge on the face of such facts as the nature of service rendered by the taxpayer were not in relation to a building site, construction, installation or assembly project. The work was in the nature of repair and supply of material and therefore, the time limit of six months as prescribed in Article 5.2(j) would not be applicable. The Tribunal relying on the decision of the Delhi Tribunal in the case of Fugro Engineers BV² held that number of days was not significant in a peculiar type of work undertaken and if the contract is not one of assembly, construction or installation, no time limit has been prescribed for incidence of source country taxation of such projects.

All correspondences relating to prospecting of client, participation in bids, correspondence with customers, signing of contract document, execution of the project and closure of the project, etc. were initiated or routed through the business address of CIWSPL. The activities of the taxpayer and CIWSPL are intertwined and CIWSPL participates in the economic activities of the taxpayer. Since the taxpayer and CIWSPL are carrying out identical nature of jobs in India and therefore, the activities of CIWSPL necessarily are to be analysed to determine whether there is a fixed place PE.

² Fugro Engineers B.V. v. ACIT [2008] 26 SOT 78 (Delhi)

The Tribunal observed that the 'fixed place test' is a positive one for the taxpayer and there was no requirement to go for special inclusion for the purpose of determination of PE. What constitutes a place of business for Article 5 of the tax treaty is often a question of fact and law. Place of business usually means premises of the enterprises used for carrying on the business, whether or not exclusively used for the business. To constitute a PE, the business must be located at a single place for a reasonable length of time and the activity need not be permanent, endless or without interruptions. The Tribunal relied on the decision of Sutron Corporation³ and Motorola Inc⁴ wherein the residence of the country manager was held to be a fixed place of business as the same was used as an office address.

The role played by the MD as an agent of the taxpayer as also CIWSPL who renders similar services cannot be easily discerned or separated. There being a unison of interest to a great extent, while as an independent agent there would be required an objectivity in execution of the tasks of the non-resident taxpayer. In the instant case, the MD was acting exclusively or almost exclusively for and on behalf of the taxpayer during the currency of the project and to that extent, the MD was not acting in furtherance of his ordinary course of business. Accordingly, the amount received by the taxpayer pursuant to NHPC project was taxable in India since the taxpayer's subsidiary in India represented by its managing director constitutes a fixed place PE in India.

³ Sutron Corporation v. DIT [2004] 268 ITR 156 (AAR)

⁴ Motorola Inc. v. DCIT [2005] 95 ITD 269 (Del) (SB)

Management support and other services do not make available technology, knowhow, skills, etc. and therefore not taxable as FTS under India-Finland tax treaty

The taxpayer is a tax resident of Finland and is engaged in the business of providing innovative and environmentally sound solutions for a wide variety of customers in metals and mineral processing industries. The taxpayer filed a nil return for the AY 2010-11 on 28 March 2012. During the year under consideration, the taxpayer earned revenue from management support and other services. These services are provided to its group company Outotec India Pvt Ltd and the revenue earned was INR82,22,381. The AO proposed to bring this amount to tax as FTS. The taxpayer contended before AO that the services provided by it are managerial services, and these services fall outside the definition of FTS under India-Finland tax treaty. The taxpayer also contended that no services have been made available so as to tax the amount as FTS. The AO did not accept the contentions of the taxpayer and held that these services constituted FTS and passed the draft assessment order. Aggrieved by the order of the AO, the taxpayer preferred objections before the DRP. The DRP upheld the order of AO.

The Tribunal held that in order to be covered by the provisions of Article 13(4) of the India-Finland tax treaty, not only the services should be technical in nature but such as to result in making the technology available to the person receiving the technical services. Merely because the

provision of the service may require technical input by the person providing the service, it cannot be said that technical knowledge, skills, etc. are made available to the person purchasing the service.

As to what are the connotations of 'making the technology available to the recipient of technical services', as is appropriately summed up in the protocol of India-USA tax treaty, 'generally speaking, technology will be considered 'made available' when the person acquiring the service is enabled to apply the technology'. Relying on various decisions⁵, the Tribunal observed that from the nature of services rendered by the taxpayer to the Indian group company, there is no technology or technical knowhow, skills, etc. that were made available by the taxpayer in order to enable the Indian group company to function on its own without the dependence of the taxpayer.

It is not in dispute that the agreement entered between the taxpayer and Outotec India Pvt Ltd is for an indefinite period and such services are provided on a recurring basis by the taxpayer to Outotec India Pvt Ltd. There was force in the argument of the taxpayer that had the technical knowhow, skills, etc. being made available by the taxpayer to Outotec India Pvt Ltd, then there would be no need for Outotec India Pvt Ltd to recourse to the recipient for these services. The other services such as IT Infrastructure, IT administration (collectively referred to as 'IT Support Services') also do not satisfy the 'make available' test as no technology, knowhow, skills, etc. were transferred to the recipient.

⁵ *Batlivala & Karani Securities (India) (P) Ltd v. DCIT (2016) 71 taxmann.com 142 (Kol)*, *Raymond Ltd. v. DCIT [2003] 86 ITD 791 (Mum)*, *CIT & Ors v. De Beers India Minerals (P) Ltd [201] 346 ITR 467 (Kar)*

The repair and supervision services provided to few other Indian parties also do not satisfy the 'make available' test as these are routine repairs and supervisory services, and there is no transfer of technology or skill or experience at the time of provision of such services by the taxpayer.

Outotec OYJ v. DDIT (ITA Nos.558/Kol/2014 & 462/Kol/2015) – Taxsutra.com

Merely because the taxpayer, by an error, had not included the details of income available in public domain in the tax return, the taxpayer is not liable for penalty under Section 271(1)(c) of the Act

During the AY 2010-11, the taxpayer filed a return of income declaring total income. Subsequently, during the scrutiny assessment, it was revealed that the taxpayer was a non-resident working in Singapore and had earned income under the head of capital gains and other sources in India. The income from Short Term Capital Gains (STCG) was not disclosed in the return of income and after processing the return, refund was processed and granted to the taxpayer. Refund was made on account of Tax Deducted at Source (TDS) on STCG due on redemption of mutual funds. The AO observed that the taxpayer should have filed revised return of income on realisation of the fact that he had derived income from STCG during the year under consideration. Thus, penalty proceedings for concealing particulars of income were initiated under Section 271(1)(c) of the Act. The Commissioner of Income-tax (Appeals) [CIT(A)] upheld the order of the AO.

The Tribunal observed that upon processing of returns filed by the taxpayer and when Form 26AS available on the website was reconciled, the taxpayer immediately offered additional income towards STCG and interest income. The Tribunal observed that where complete particulars of income were disclosed by the taxpayer not in the return of income but definitely in Form 26AS, then the taxpayer could not be blamed for concealing his particulars of income. The taxpayer couldn't file revised return of income because of expiry of specified period. Since the taxpayer is a NRI and tax at source was deducted on income from STCG, the quantum of income, which was required to be assessed in the hands of the taxpayer was available in public domain.

The Tribunal held that where complete details were available in the public domain, merely because the taxpayer by an error had not included the same in computation of income, it cannot be held that the taxpayer had furnished inaccurate particulars of income, making the taxpayer liable for levy of penalty under Section 271(1)(c) of the Act. Thus, the Tribunal held the decision in favour of the taxpayer.

Shri. Dhananjay Rajaram Gupte v. ITO (ITA No.1311/PN/2015) – Taxsutra.com

Belated filing of e-TDS return due to technical problem is a reasonable cause, and penalty cannot be levied for the same

The taxpayer is a primary and secondary school functioning in the remote village in Maharashtra, India. The taxpayer was required to deduct tax at source on account of salaries paid to employees. Also, TDS returns were required to be filed by the

taxpayer under Section 200(3) of the Act for different quarters relating to Financial Year (FY) 2010-11. However, the taxpayer defaulted in filing the TDS statements for each of the quarters and thus the AO levied penalty under Section 272A(2)(K) of the Act for delay in filing the TDS returns for AY 2011-12. The CIT(A) upheld the order of the AO.

The Income-tax Rules were amended⁶ with retrospective effect from 1 April 2010 to provide that furnishing of statements electronically in accordance with the format and standards prescribed is mandatory. Since e-compliance of TDS returns was introduced in FY 2010-11, there was time and again amendments/corrections in order to make the system of filing TDS returns user-friendly. Where the software was not user-friendly and required amendments to be made by the government from time-to-time, and the compliance being a complex procedure introduced for the first time, the taxpayer has reasonable cause for not furnishing e-TDS returns in time.

On reference to the provisions of Section 273B of the Act, the Tribunal observed that CIT(A) has wrongly come to the conclusion that the provisions of Section 273B of the Act do not cover the defaults under Section 272A(2)(k) of the Act. Where there was case of reasonableness, there was no merit in levying the penalty under Section 272A(2)(k) of the Act. The Tribunal therefore accepted taxpayer's plea of reasonable cause for delay in filing TDS returns. The Tribunal held that since there was practical difficulty on the part of the taxpayer to comply with newly introduced requirement of e-filing of TDS statements, being a technical delay, merits to be considered as reasonable cause for non-

levy of penalty as per the requirements of Section 273B of the Act. Further, the Tribunal held that there are some cases where the returns were delayed for default on the part of the deductor and thus in such cases, the Tribunal held that penalty under Section 272A(2)(K) was leviable. The Tribunal held that the same is to be restricted from the date of payment of TDS to the date of filing e-TDS statements since e-TDS statements cannot be filed without payment of TDS to the credit of central government.

New Maharashtra Vidyalaya v. ACIT (832/PN/2016, dated 4 August 2016) – Taxsutra.com

Expenditure incurred towards gifting of shares for setting up subsidiary's business is deductible under Section 37 of the Act

During the AY 2010-11, the taxpayer gifted 15,75,500 shares of its wholly owned subsidiary company to Dr. Kushagra Katariya for his contribution in setting up a super specialty hospital under its subsidiary. The taxpayer claimed that the said gift was for commercial consideration since it was deeply interested in the wholly owned subsidiary, and as such expenditure was on account of commercial expediency and thus allowable as business expenditure under Section 37(1) of the Act. The AO though accepted the commercial expediency of the expenditure vis-à-vis the subsidiary, he denied the claim on the ground that expenditure pertained to subsidiary and not to the taxpayer. The AO contended that no business income was earned by the taxpayer and thus expenditure incurred was not eligible for deduction under Section 37(1) of the Act.

⁶ Vide IT(Sixth) Amendment Rules, 2010

The Tribunal observed that the main reason of the disallowance was that no business income was earned by the taxpayer and thus expenditure incurred was not eligible for deduction under Section 37(1) of the

Act. The Tribunal stated that absence of income alone is not a relevant test for allowability of claim of expenditure either under Section 37(1) of the Act or even section 57(iii) of the Act. The Tribunal relied on the Supreme Court ruling in Rajendra Prasad Moody [115 ITR 519] in this regard.

The memorandum of association of the company was amended vide postal resolution for changing the name of the company from Premier Tyres Ltd. to PTL Enterprises Ltd. and five new clauses were inserted in the object clause of the company. These clauses expanded the scope of the objects of the taxpayer company to include, inter-alia, running of hospitals, diagnostic centres, pathological laboratories, medical research, medical education, drug manufacture and setting up of facilities for providing all kinds of medical and health services. The Tribunal observed that in pursuance of the aforesaid objects, the taxpayer had set up wholly owned subsidiaries for development of health care business.

Accordingly, the Tribunal held that setting up of subsidiaries wherein the taxpayer has a 100 per cent controlling interest engaged in healthcare business, tantamount to carrying on business by the taxpayer; and, expenditure incurred in the course of the said business is also business expenditure eligible for deduction under Section 37(1) of the Act irrespective of the income from such business.

PTL Enterprises Ltd. v. DCIT (ITA No.200/Coch/2015) – Taxsutra.com

Completion certificate from a government authority is not required for claiming losses on house property

The Act allows for a deduction from income with respect to interest paid during the relevant FY on the loans acquired for the purchase or construction of house property. In order to claim such a deduction, a certificate that the construction of the property has been completed (completion certificate) needs to be furnished. Recently, the Mumbai Tribunal held in the case of Sudhakar S Mody that the completion certificate need not necessarily be from a government authority in order to claim a deduction with respect to the house property.

Sudhakar S Mody v. ACIT (ITA No. 1174/Mum/2014)

Notification/Circulars/ Press Releases

CBDT press release notifying the India-Korea tax treaty

Recently, the CBDT has issued a press release notifying the revised India-Korea tax treaty. The revised tax treaty was signed on 18 May 2015 and entered into force on 12 September 2016. The provisions of revised tax treaty will have an effect in India in respect of income derived in fiscal years beginning on or after 1 April 2017.

The press release provides some of the salient features of the new tax treaty which are as follows:

- Source-based taxation of capital gains arising from alienation of shares comprising more than 5 per cent of share capital.
- Reduction in withholding tax rates from 15 per cent to 10 per cent on royalties or FTS, and from 15 per cent to 10 per cent on interest income.
- Expands the scope of dependent agent PE provisions in line with India's policy of source based taxation.
- Introduces new LOB Article i.e. anti-abuse provisions to ensure that the benefits of the tax treaty are availed only by the genuine residents of both the countries.
- Provides recourse to the taxpayers of both countries to apply for Mutual Agreement Procedure (MAP) in transfer pricing disputes as well as apply for bilateral Advance Pricing Agreements (APA). Further, MAP requests in transfer pricing cases can be considered if the request is presented by the taxpayer to its competent authority after entry into force of revised tax treaty and within three years of the date of receipt of notice of action giving rise to taxation not in accordance with the tax treaty.
- To facilitate movement of goods through shipping between two countries and in accordance with international principle of taxation of shipping income, the revised tax treaty

provides for exclusive residence-based taxation of shipping income from international traffic.

- The Article on 'Exchange of Information' is updated to the latest international standard to provide for exchange of information to the widest possible extent. As per the tax treaty, the country from which information is requested cannot deny the information on the ground of domestic tax interest. Further, the tax treaty contains express provisions to facilitate exchange of information held by banks. Information exchanged under the revised tax treaty can now be used for other law enforcement purposes with authorisation of information supplying country.
- Introduces new Article for 'assistance in collection of taxes between tax authorities'.

CBDT Press Release, dated 26 October 2016

CBDT order on the issue of intimation under Section 143(1) of the Act beyond the prescribed time in non-scrutiny cases

The CBDT has issued an order relaxing the time-frame prescribed in second proviso to Section 143(1) and directs that tax returns having 'claim of refund' pertaining to AYS 2014-15, 2013-14 and 2012-13 shall be processed by 31 March 2017. Further, intimation of processing and consequential refund, if any, shall be issued expeditiously as per the prevailing norms and existing provisions of the Act.

The relaxation shall not be applicable to those cases where the said tax return was not processed in view of provisions of Section 143(1D) of the Act. Further, this relaxation shall not be applicable to those cases where either demand is shown as payable in the tax return or is likely to so arise after processing the tax return.

CBDT Order dated 25 October 2016

CBDT issues circular on Chapter VI-A deduction on enhanced profits

Chapter VI-A of the Act states that while computing the profits and gains of a business, the AO may make certain disallowances, such as disallowances pertaining to Sections 32, 40(a)(ia), 40A(3), 43B, etc. of the Act. At times disallowance out of specific expenditure claimed may also be made. The effect of such disallowances is an increase in the profits. Doubts have been raised as to whether such higher profits would also result in claim for a higher profit-linked deduction under Chapter VI-A of the Act. Courts have held that if the expenditure disallowed is related to the business activity against which Chapter VI-A deduction has been claimed, the deduction needs to be allowed on the enhanced profits.

The CBDT has issued a circular clarifying that it has accepted the settled position that the disallowances made under Sections 32, 40(a)(ia), 40A(3), 43B, etc. of the Act and other specific disallowances, related to the business activity against which the Chapter VI-A deduction has been claimed, result in enhancement of the profits of the eligible business, and that deduction under Chapter VI-A is admissible on the profits so enhanced by the disallowance.

Accordingly, CBDT instructed that appeals may not be filed on this ground by tax officers and appeals already filed in Courts/Tribunal may be withdrawn/not pressed upon.

CBDT Circular No. 37/2016, dated 2 November 2016

II. SERVICE TAX

Decisions

Enactments honouring international agreements conferring immunity against taxes prevail over Service tax laws

The issue in the instant case was whether commitment fee, upfront charges etc. charged by international lending organisations (such as Asian Development Bank, International Finance Corporation, etc.) would be exempted from Service tax by virtue of the exemption provided under separate enactments honouring international agreements with such organisations.

The Mumbai Tribunal held that such charges would be exempted from Service tax levy basis the following rationale:

- The Constitution of India provides that any law enacted to honour international agreements are binding on every authority in the country;
- When there is specific immunity under any law honouring international legislations, provisions of Service tax laws contrary to such immunisation would not prevail.

Coastal Gujarat Power Ltd v. Commissioner of Service tax, Mumbai - I [2016-TIOL-2925-CESTAT-MUM]

Exemption conferred on Reserve Bank of India under Service tax law extends to its agents

The issue in the instant case was whether the Service tax exemption granted to RBI can be extended to commission received by the appellant (i.e. an agent of RBI) on the ground that the appellant is also a banking company acting as an agent of RBI.

The Delhi Tribunal has held that the exemption needs to be extended to the appellant basis the following rationale:

- There are specific laws and mandates, which provide that appellant constitutes an 'agent' of RBI, entrusted by the Central Government to carry out sovereign functions on behalf of the Government.
- Further, in terms of the Service tax law, an agent is deemed as a person liable to pay tax and accordingly, the exemption should also be extended to an agent.

Commissioner of Central Excise and Service tax, Chandigarh – II v. State of Patiala [2016 – TIOL- 2849-DEL-LB]

Notification/Circulars/ Press Releases

Amendment in taxability of Online Information and Database Retrieval Services (OIDAR services)

The Central Government has issued various notifications to amend certain key provisions pertaining to OIDAR services provided by persons located outside India. Accordingly, with effect from 1 December 2016, OIDAR services provided to non-assessee online recipient i.e. Government/local authority/Governmental

authority or an individual in relation to any purpose other than commerce, industry or any other business or profession, located in taxable territory, then, in such a scenario, the service provider located outside India providing such services would be required to obtain registration under Service tax laws, discharge Service tax liability and undertake periodic compliances in India. In other cases (such as where such services are provided to companies), the liability to discharge Service tax would devolve on the service recipient under the reverse charge mechanism.

Notification No.46/2016-Service tax dated 9 November 2016, Notification No.47 /2016-Service tax dated 9 November 2016, Notification No.48/2016-Service tax dated 9 November 2016, Notification No.49 /2016-Service tax dated 9 November 2016 and Circular No. 202/12/2016 – Service tax dated 9 November 2016

III. CENTRAL EXCISE

Decisions

CENVAT credit on car parking and sales office

In the present case, the taxpayer is engaged in the manufacture of goods classifiable under HS Code 8523 5910 and 8471 9000. The taxpayer had availed CENVAT credit of service tax paid on 'office rental' and 'rental charges paid for car parking space' during the year April 2012 to September 2013. The departmental officer objected to the same and disallowed the CENVAT credit.

The taxpayer submitted that the tax authorities had wrongly observed that the credit of input service tax on rent paid for

car parking space and rent paid for sales office are not used either directly or indirectly, in or in relation to the manufacture of final goods. He further submitted that it is not required that each and every service should be used in or in relation to manufacture of goods. The definition of input service as contained in 2(l) of the CENVAT Rules has been given wide interpretation to include any service used by the manufacturer whether directly or indirectly, in or in relation to the manufacture of final product.

The Customs, Excise and Service Tax Appellate Tribunal (CESTAT) considering the submissions and also the judicial precedents allowed the appeal and mentioned that the benefit of CENVAT credit is available to the taxpayer.

Hid India P Ltd v. Commissioner of Service Tax (2016 –TIOL – 2987 – CESTAT – Bang)

Notification/Circulars/ Press Releases

Notifications/Circulars/Press Release Exemption from filing of annual returns for FY 2015-16

Post Union Budget 2016, vide Notification No. 8/2016-CE(N.T) and Notification No.13/2016-CE(N.T) dated 1 March 2016, Rule 12 of Central Excise Rules, 2002 and Rule 9A of CENVAT Credit Rules, 2004 ('the CENVAT Rules'), respectively, were amended replacing the Central Excise Forms ER-4 to ER-7 with an Annual Return form. Similarly, under Service tax provisions, vide Notification No.19/2016-ST dated 11 March 2016, Rule 7 of the Service

Tax Rules, 1994 was amended to prescribe an Annual Return.

Accordingly, in terms of Rule 12 of Central Excise Rules, 2002 and Rule 7 of the Service Tax Rules, 1994, the format of the Annual Return, which was required to be filed by 30 November, was to be specified by CBEC, by way of a notification.

However, in view of impending implementation of Goods & Services Tax (GST) the CBEC has decided that the aforesaid Annual Return shall not be required to be filed for the year 2015-16, which is due to be filed by 30 November 2016. Subsequent to implementation of GST, annual return for non-GST goods only may be required.

Circular No. 1050/38/2016-CX, dated 8 November 2016

IV. CUSTOMS DUTY

Decisions

Exemption of customs duty on importation of goods

The taxpayer had filed a refund claim on the ground that they had not availed the benefit of Notification No.345/86, which provided for concessional customs duty rate on the goods imported by them. The benefit is subject to the condition that a certificate issued by Directorate General of Technical Development (DGTD) is submitted at the time of clearance of imported goods. However, the tax authorities observed that the taxpayer had not submitted the certificate for the claim of exemption and

accordingly, refund is not available to the taxpayer.

The CESTAT, after considering the submissions, observed that the benefit of concessional rate of customs duty is subject to the condition that the importer produces a certificate issued by the Industrial Advisor in the office of the DGTD and since the basic condition of the notification is not complied with, the refund claim filed by the taxpayer is not available to him.

MP Polypropelene Ltd vs Commissioner of Customs (2016 – TIOL – 2994 – CESTAT – MUM)

V. VAT

Decisions

Sale of goods under brand name by fully owned subsidiary / group company of holding entity with unusually high margin, taxable as 'first sale'

The taxpayer in the present case is a dealer of home appliances in the state of Kerala on which sales tax is leviable at first point of sale under Kerala General Sales Tax Act, 1963 (KGST Act). The holding company had sold goods to the taxpayer and discharged relevant tax under KGST Act. Subsequently, the taxpayer had sold the same goods in the state of Kerala and did not pay any tax on the same, claiming the benefit of second exemption, as tax had already been discharged on such sale of goods at the first point of sale.

The assessing authority in this regard issued a show cause notice, denying the exemption of second sale claimed by the taxpayer and considered same as first sale as such goods were sold under brand name of 'Sansui' and held that the taxpayer was the holder of the brand name. Accordingly, the sale by taxpayer was taxable under provisions of the KGST Act as first point of sale and passed an order against the taxpayer.

The Deputy Commissioner (Appeals) rejected the appeal filed by the taxpayer, against which the taxpayer filed an appeal before the Kerala Sales Tax Appellate Tribunal (Tribunal). The Tribunal passed an order in favour of the taxpayer. The State, aggrieved by the Tribunal's order, filed for a revision petition with the Kerala High Court. A Division bench of the High Court allowed the revision petition filed by the State and held that the taxpayer is the brand name holder of 'Sansui'. Further, aggrieved by the decision of the division bench, the taxpayer filed a review petition with the High Court, which was also dismissed.

Subsequently, the taxpayer preferred an appeal to the Supreme Court by way of Special Leave Petition (SLP), wherein, the taxpayer contended that the company had purchased goods from the holding company, which shall be considered as brand name holder and accordingly, relevant tax has been discharged under KGST Act. Hence, taxpayer had correctly claimed the exemption of second sale at the time of further sale of such goods.

On the other hand, the revenue submitted that the taxpayer could not produce any

valid evidence to substantiate the contention that the holding company is the brand name holder during the relevant year. Further, it contended that the taxpayer, in the present case, is performing various marketing activities for products like television, washing machine, etc., which are being manufactured under the brand name 'Sansui' and purchased from holding company. Moreover, it was stated that the taxpayer had used the letterhead of 'Sansui' for departmental communications. It was further submitted that, one of the most important conditions as specified under provisions of KGST Act i.e. 'the sale is by the brand name holder or the trademark holder within the State' was satisfied in the present case as per documentary evidences. Hence, the taxpayer is correctly liable to be taxed under KGST Act.

Given the above, the Supreme Court held that the taxpayer is satisfying all the conditions stipulated under KGST Act to constitute the same as first sale in the state of Kerala and accordingly, such sale shall be leviable to tax as the taxpayer is the brand name holder of 'Sansui'. Hence, the Supreme Court upheld the decision rendered by High Court in revision petition.

State of Kerala vs. Kitchen Appliances India Limited- [TS-457-SC-2016-VAT]

Notifications/Circulars/ Press Release

Jammu and Kashmir

The Government has notified the Amnesty Scheme under General Sales Tax Act to

facilitate voluntary payment of tax arrears and allowed remission of 100 per cent penalty and interest on such tax arrears for the dealers who have been assessed/reassessed up to AY 2015-16. The Scheme has also been extended to the dealers who are yet to be assessed for any accounting period, provided they file their original returns or revised returns along with trading accounts and proof of payment of 1/6th of total amount admitted/assessed tax. Further, any default in payment of first installment shall entail outright disqualification from this Scheme.

Notification No. SRO 360 dated 13 November 2016

Chhattisgarh

The Chhattisgarh Government has exempted the sale of debit card/credit card swipe machine from VAT up to 31 March 2017.

Notification No. F-10/42/2016/CT/V (75) dated 16 November 2016

Tamil Nadu

The Government of Tamil Nadu has clarified the issue of inter-state movement of goods,

wherein it was stated that in case of inter-State movement of goods by transfer of documents of title to goods, the assessing authorities shall issue E-1 Certificate pursuant to fulfillment of conditions stipulated under Sections 3 and 6(2) of Central Sales Tax Act, 1956.

Circular No. 12/2016 dated 28 October 2016

Odisha

With effect from 1 November 2016, VAT rate on e-rickshaw and Battery Operated Vehicles (BOV) and LPG Cylinders has been reduced from 14.5 per cent to 5 per cent.

Notification No. 29280- FIN-CT1-TAX-00202015 dated 1 November 2016

Karnataka

With effect from 17 October 2016, VAT on CCTV cameras, CCTV recording devices, CCTV cables, CCTV power supplies, CCTV racks and CCTV accessories has been reduced from 14.5 per cent to 5.5 per cent.

Notification No. FD 73 CSL 2016 dated 17 October 2016

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