February 2017

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

Foreword

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

A special post-budget meeting of FICCI's National Executive Committee was convened on February 4, 2017 at FICCI headquarters, wherein senior officials of the Ministry of Finance participated and shared their perspective on the budget. The members also got an opportunity to raise questions on issues arising out of various proposals in the budget with these officials. On February 6, 2017, the Taxation Division conducted a Post Budget Interactive Session at FICCI, to discuss in detail various amendments in direct and indirect taxes proposed in the Finance Bill, 2017. The Joint Secretaries from the Ministry of Finance participated in this session and addressed queries of the participants.

A meeting of the Taxation Committee was convened on February 14, 2017 to deliberate on the issues arising out of the amendments proposed in direct and indirect tax laws in the budget and to finalise on the issues to be included in FICCI's Post Budget Memorandum. The meeting was chaired by Mr. Dinesh Kanabar, Chairman of the Committee and CEO, Dhruva Advisors, LLP. FICCI has since submitted its Memorandum on the Budget Proposals 2017-18 to the Government.

A delegation led by Mr Pankaj Patel, President FICCI and comprising of the Members of the FICCI Presidium and some Past Presidents called on Sh. Arun Jaitley, Hon'ble Finance Minister on 17th February, 2017 to discuss some of the important Budget proposals.

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

Supreme Court Decisions

Payment to the HUF shall constitute deemed dividend under Section 2(22)(e) of the Act

During the AY 2006-07, the taxpayer, a Hindu Undivided Family (HUF) received certain advance from a company. The AO observed that in the said company, Karta of HUF held more than 10 per cent shareholding and was a beneficial shareholder. Accordingly, he held that the advance received by the taxpayer is taxable as deemed dividend in taxpayer's hands. The CIT(A) also upheld additions made by the AO. However, Tribunal reversed AO's order and deleted the addition on the ground that the taxpayer cannot be a shareholder in the company. Hence, Section 2(22)(e) conditions were not met. The High Court set-aside Tribunal's order and upheld addition made by AO.

The Supreme Court referred to Section 2(22)(e) of the Act and observed that the said section is a deeming provision and hence to be construed strictly. In the instant case the Karta is the member of HUF and has substantial interest in the HUF. It is not disputed that he was entitled to not less than 20 per cent of the income of HUF. In view of the aforesaid position, provisions of Section 2(22)(e) of the Act get attracted and it is not even necessary to determine as to whether HUF can be beneficial shareholder or registered shareholder in a company. The Supreme Court referred to company's audited annual return filed with the Registrar of Companies (ROC). The money towards shareholding in the company was given by taxpayer/HUF. Though, the share certificates were issued in the name of the Karta, but in the annual returns, it is HUF which was shown as registered and beneficial shareholder.

Even if it is assumed that it is not a registered shareholder, as per the provisions of Section 2(22)(e) of the Act, once the payment is received by HUF and shareholder is a member of the said HUF and he has substantial interest in HUF, the payment made to the HUF shall constitute deemed dividend within the meaning of Section 2(22)(e) of the Act.

Gopal and sons (HUF) v. CIT (Civil Appeal No. 12274/2016, dated 4 January 2017) – Taxsutra.com

Writ petition is maintainable against initiation of reassessment proceedings – Supreme Court

The AO recording reasons to believe that income of the taxpayer had escaped assessment, issued notice under Section 148 of the Act for reopening the assessment. The taxpayers filed a writ petition before High Court challenging the notice issued under Section 148 of the Act. The High Courts dismissed the writ petitions preferred by the taxpayers challenging the issuance of notice under Section 148 of the Act as not maintainable.

Supreme Court's decision

The view taken by the High Courts in the batch of appeals dismissing the writ petition as not maintainable is contrary to the law laid down by the Supreme Court in the case

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of Calcutta Discount[1]. Thus the rulings of High Courts are set aside, and the cases are remitted to the High Courts to decide the same on merits.

The High Courts are directed to examine each case on its merits keeping in view the scope of judicial review while entertaining such matters. The principle laid down in case of Chhabil Dass Agarwal[2] does not apply to the facts of the present cases. The stay of re-assessment granted during the pendency of appeal shall continue till the disposal of writ petitions before the High Courts.

Jeans Knit Private Limited v. DCIT (CIVIL APPEAL NO(S).11189/2016) – Taxsutra.com

High Court Decisions

Brand promotion expenditure is an allowable expenditure despite parent company ownership

The taxpayer was set up as a 100 per cent subsidiary of Seagram India Ltd. The taxpayer was engaged in the business of blending, bottling and trading of Indian Made Foreign Liquor (IMFL). The liquor was bottled and sold within India through government agencies and private distributors and was also exported out of India. The taxpayer claimed sales and marketing expenses as brand expenses while the brand was owned by its parent company. The taxpayer claimed that the expenditure on brands did not provide enduring benefit to the company and thus was allowable as revenue expenditure. However, AO held that the expenditure incurred by the taxpayer for increasing the brand popularity of the parent company was not its business expenditure and was thus inadmissible. The CIT(A) and the Tribunal held the decision in favour of the taxpayer.

High Court's ruling

The High Court observed that the expenditure was incurred by the taxpayer pursuant to an arrangement with the brand proprietor as per which specified brands were made available to the taxpayer. No doubt that the profits reported were put through the recourse of transfer pricing exercise for the purpose of Arm's Length Price (ALP) determination, yet the fact remained that the overseas owner did not set up any other licensee as a rival at least in the area where taxpayer operated. The High Court referred to Section 48 of the Trade Mark Act and held that as long as the arrangement existed, the taxpayer, who was a licensee of the products, was entitled to claim them as business expenditure though in the ultimate analysis they might have enhanced the brand of the overseas owner. No doubt, if the arrangements were terminated, the brand presence of the overseas owner of the articles/IPR would have subsisted. But that would nevertheless subsist in any event on the theory of trans-national reputation of the IPR owner. The High Court held that disallowing a certain proportion on an entirely artificial and notional basis from the expense otherwise deductible, was unjustified.

CIT v. Seagram Manufacturing Private Ltd (ITA No. 885/2016, dated 9 December 2016) (Del)

[1] Calcutta Discount Limited Company v. ITO [1961] 41 ITR 191 (SC)
[2] Chhabil Dass Agarwal v. CIT [2013] 357 ITR 357 (SC)

Higher withholding of tax under Section 194J inapplicable on EPC-contract payments. Human intervention didn't constitute 'technical service'

During the year under consideration, the taxpayer made payment to 5 contractors in respect of various contracts and deducted tax under Section 194C of the Act. However, AO observed that such contracts involved the provision of professional and technical services and hence provisions of Section 194J of the Act shall apply. The CIT(A) and the Tribunal ruled in favour of the taxpayer and held that merely because technical personnel are employed in the execution of the contract, it does not follow that the contract is one for technical services.

On perusal of the agreement, the High Court observed that the contract was for the purposes of erecting and commissioning, testing and trial operation of the said equipment in accordance with and subject to the terms and conditions of the contract. Even though there was a requirement of deployment of manpower, it was for 'timely completion of work', to 'carry out the works as per the specifications' and for 'proper out-turn of work and discipline on the part of the labour put on the job by the contractor'. Thus, the deployment of the personnel is not under a contract for the supply of services/technical services, but to ensure the due and proper execution of the work by the contractor. The High Court held that indeed, this entire exercise would require the deployment of technical personnel, but what is important to note is that the technical personnel are deployed not for and on behalf of the customer, but for and on behalf of the contractor itself with a view to ensuring that the contractor has supplied the equipment as per the contractual specifications. Everything done in this regard is to this end and not to supply technical services to the customer. The supply of labour, material and equipment is for the satisfactory site transportation, handling, stacking, storing, erecting, testing and commissioning of the equipment to the respondent's satisfaction. Accordingly, the High Court held that the contract entered into between the taxpayer and contractors did not involve the supply of professional or technical services within the meaning of Section 194J of the Act and the consideration paid was therefore not for professional or technical services.

CIT v. Senior Manager (Finance), Bharat Heavy Electricals Ltd. (ITA No. 242/2016 (O&M), dated 9 December 2016)

Tribunal Decisions

Payments towards information system support services do not amount to royalty

The taxpayer is a wholly owned subsidiary of Bombardier Transportation (Holdings) Singapore Pte Ltd, a part of Bombardier Group, and is engaged in the business of manufacturing and supply of rail transportation system, which includes traction, auxiliary converters, vacuum circuit breakers, control electronics, signaling equipment, coaches and bogies for metro trains. During the course of scrutiny of Tax Deducted at Source (TDS) returns, the Assessing Officer (AO) noticed that the assessee has made payments, aggregating to INR9,19,96,649 to Bombardier Transportation Canada Inc (BT Canada).

Such payments were towards information system support services at a group level and has been charged from the appellant based on costs incurred towards consumption of various service elements by the appellant. The cost for each service element is determined by (a) applying an explicitly given price to the number of units of service consumed, or (b) calculating the share of globally incurred cost based on defined keys. The stand of the assessee was that these payments were in the nature of reimbursements and cannot partake the character of income in the hands of the recipient concerned. It was also contended that unless there is a transfer of all or any of the rights (including granting of any licence) in respect of copyright of a literary, artistic or scientific work, taxability under Section 9(1)(vi) of the Income-tax Act, 1961 (the Act) could not be invoked and there was no such transfer of right in this case.

The taxpayer further clarified that in the context of India-Canada tax treaty, only such payments as have an element for use of Intellectual Property Rights (IPRs) could be considered as royalties, but then the present payments are for standard facilities. It was also explained that the BT Canada has not received any payments for commercial exploitation of copyright embedded in the applications.

The AO, however, rejected this stand and proceeded to hold that these amounts are taxable as royalties under Section 9(1)(vi) of the Act as also under article 12(3) of the India-Canada tax treaty.

The Tribunal observed that payments made by the taxpayer to BT Canada were in the nature of reimbursements and there were specific cost allocations which were borne by the taxpayer. Such payments have no element of income. These payments, by no stretch of logic, could be viewed as payments for right to use the equipment. The taxpayer was entitled to certain services, during rendition of which even if certain equipment were to be used, but that by itself did not result in any use of or right to use the equipment by the taxpayer. The service may involve use of equipment but that does not vest right in the taxpayer to use the equipment.

CIT v. Bombardier Transportation India Pvt. Ltd. (ITA No.555/Ahd/2016)

Foreign tax credit allowed on the basis of 'gross receipts'

The taxpayer, a wholly owned subsidiary of a U.S-based company, engaged in the business of software development and products. During the relevant previous year, the taxpayer did not have any income taxable under the normal provisions of the Act. The taxpayer computed the book profits under Section 115JB at INR4,77,79,500 and accordingly, tax liability, under Minimum Alternate Tax (MAT) provisions, was computed at INR54,13,417. During the course of the scrutiny assessment proceedings, the AO noted that the taxpayer has claimed a Foreign Tax Credit (FTC) of INR11,12,907. This credit was in respect of the taxes withheld abroad, i.e. in Singapore and Indonesia. The taxpayer had received certain amount, after TDS at the rate of 10 per cent i.e. INR5,41,029, from a Singapore based concern by the name of IBM Corporation. The taxpayer had also received certain amounts, after TDS at the rate of 15 per cent i.e. INR5,71,878, from an Indonesia based company by the name of P T Tech Mahindra. It was the aggregate of these tax

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deductions, which comes to INR11,12,907, that the taxpayer had claimed as FTC.

The AO, however, did not approve the claim of the taxpayer. The AO was of the view that the tax credit is to be allowed only to the extent corresponding income (profit after deduction of all allowable expenditure) has suffered tax in India, and that the extent to which income has suffered tax in India in respect of these receipts is to be computed by reference to the actual MAT liability being divided in the same ratio as the ratio of corresponding foreign receipts to the overall turnover of the taxpayer. The amount of eligible tax credit was thus worked out to INR75,935.

The taxpayer contended that the gross receipts, which is what are material for the purpose of computing the tax credit even if the ratio of foreign receipts to the overall receipts are to be taken into account

The Tribunal held that the India-Singapore and India-Indonesia tax treaties state that the FTC shall not exceed the part of the income tax as computed before the deduction is given, 'which is attributable as the case may be, to the income which may be taxed in that other State' but there is little guidance on how to compute such income. However, quite clearly, as the expression used is 'income', which is essentially implied 'income' embedded in the gross receipt, and not the 'gross receipt' itself. It is, therefore, not really the right approach to take into account the gross receipts, as was contended by the taxpayer, for the purpose of computing admissible tax credit.

However, based on the unique facts of the instant case, the Tribunal has given relief to the taxpayer by allowing computation of the FTC on the basis of 'gross receipts'.

Elitecore Technologies Private Limited v. DCIT (ITA No.623/Ahd/2015)

Tax credit is allowed on the interest income based on the tax sparing clause under India-Cyprus tax treaty

The taxpayer granted a loan to its subsidiary in Cyprus, and the subsidiary paid interest to the taxpayer. As per Article 11 of the India-Cyprus tax treaty, 10 per cent of the gross amount of interest is chargeable to tax in Cyprus. The taxpayer submitted that the domestic law at Cyprus provides the tax incentives for the promotion of economic development in Cyprus and therefore, there was no withholding of tax on interest amount remitted to the taxpayer in India. Article 25 of the India-Cyprus tax treaty provides for the tax credit in India with respect to taxes withheld/levied in Cyprus on the interest amount, and not withstanding that no tax has in fact, been withheld as mentioned above. Accordingly, the taxpayer claimed a tax credit at 10 percent of the gross amount received from Cyprus. The Dispute Resolution Panel (DRP) observed that Cyprus did not levy any tax and therefore, the claim for credit of tax payable in Cyprus was rejected.

The DRP in relation to Assessment Year (AY) 2008-09 held that AO has to compute the tax on interest income and allow the tax attributable to interest income under the India-Cyprus tax treaty. The AO is directed to verify whether the taxpayer has paid tax on interest income, and if the tax is paid then allows the deduction for tax deemed to have been paid.

The Tribunal held that since the facts in the above case are similar to that in the present case, the issue is remanded to the file of the

AO to verify whether the taxpayer has paid tax on interest income in India, and if so, to allow the deduction of the tax admitted to have been paid under Article 25(2) read with Article 25(4) of the tax treaty.

Dr. Reddy's Laboratories Ltd. v. ACIT [ITA Nos.2229/Hyd/2011, 85/Hyd/2013 - Assessment Years: 2007-08 & 2008-09]

'De Facto' or 'De Jure' participation in the management, capital or control by itself is not relevant in establishing AE relationship in terms of Section 92A of the Act

The taxpayer, is a partnership firm, wherein the partners were three brothers (say Mr. A, Mr. B and Mr. C) along with their respective wife and children. During the relevant assessment year (AY), the taxpayer had entered into certain international transactions with a Belgian entity, which was owned and controlled by another brother (say, Mr. D), along with his family (brother of Mr. A, Mr. B and Mr. C).

The AO contended that since the Belgian entity is controlled by another brother i.e. Mr. D (along with his family), it falls under the definition of an AE in terms of Section 92A(2)(j) of the Act and accordingly, made a reference to the Transfer Pricing officer (TPO), who made an adjustment.

The CIT(A) without discussing the primary issue of existence of an AE relationship in terms of Section 92A of the Act, proceeded to examine the correctness of the arm's length price adjustment and deleted the impugned adjustment. Aggrieved by the CIT(A)'s order, both the revenue authority and taxpayer (through cross-appeals) appealed before the Tribunal.

Tribunal's ruling

- Sub-section (1) to Section 92A of the Act decides the principle on the basis of which one has to examine the existence of an AE relationship between the transacting entities. The principal condition required to be fulfilled is the expression 'participation in management or capital or control' which is not a defined expression in the Act. To ascertain its meaning, sub-section (2) to Section 92A of the Act is to be referred, which gives practical illustrations, which are exhaustive and not simply illustrative. Therefore, sub-section (2) governs the operation of sub-section (1) to Section 92A of the Act.
- Sub-section (1) and (2) to Section 92A of the Act have to be read together, and unless the provisions of one of the clauses listed under Section 92A(2) of the Act are satisfied, even if one enterprise ends up having a de facto or even de jure participation in the management, capital, or control of the other enterprises, the two enterprises cannot be said to be AEs.
- As per the tax department's argument, clause (j) of sub-section (2) to Section 92A of the Act is to be invoked. The said clause provides "where one enterprise is controlled by an individual, the other enterprise is also controlled by such individual or his relative or jointly by such individual and relative of such individual". In the present case, taxpayer is a partnership concern, therefore, it cannot be said to be controlled by 'an individual'.
- With regards to the department's references of clauses (k) and (m) of Section 92A(2) of the Act, the Tribunal

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observed that clause (k) refers to an enterprise controlled by an HUF, but an HUF has nothing to do with either of the enterprise. Similarly, clause (m) is only an enabling provision for prescribing any other relationship of mutual interest that can lead to the enterprises being treated as AEs but then no such relationship has been prescribed yet.

- While a certain degree of control may actually be exercised by these enterprises over each other due to relationships of the persons owning these enterprises, that itself is not sufficient to hold the two enterprises as AEs. Thus, the Tribunal held that the taxpayer and the Belgian entity are not AEs in terms of Section 92A of the Act and consequently deleted the impugned additions.

ACIT v. Veer Gems (ITA No. 1514/Ahd/2012 - AY 2008-09); Veer Gems vs ACIT (C.O. No. 184/Ahd/2012 - AY 2008-09)]

Consistent loss making companies cannot be rejected unless functional profile is different; allows comparability adjustments including capacity adjustment, volume adjustment and warranty cost adjustment

The following issues were discussed and decided in the consolidated hearing for two consecutive AYs:

Consistent loss making companies can be selected as comparable

- The Transfer Pricing Officer (TPO) rejected two comparable entities on the ground that these entities were making consistent losses since past many years.
- The Tribunal held that the tax department has not considered the Functional Analysis (FAR) profile of these two entities. Further, according to Rule 10B(4) of the Income-tax Rules, 1962 (the Rules), the data relevant for a time period of two preceding years may be considered only if it reveals any influence thereof in the relevant AY, whereas the tax department has not conducted any such exercise. It further cited a coordinate special bench ruling[3], wherein it was held that the consistently loss making entities cannot be solely rejected for the fact that they have incurred consistent losses. Hence, such action of tax department was outrightly rejected.

Impact of substantial depreciation to be considered

- The TPO adopted Profit Level Indicator (PLI) as Profit Before Interest and Taxes (PBIT/Sales) after rejecting the taxpayer's plea to rather take its PLI as Profit Before Depreciation, Interest and Taxes (PBDIT)/Sales since it had made substantial additions in fixed assets in the relevant AY.
- The Tribunal held that as per the stated facts, net profit of taxpayer has declined due to depreciation claim arising from substantial increase in fixed assets. It further cited a coordinate bench ruling[4], wherein the Tribunal had held that such incremental depreciation has to be

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[3] DCIT v. Quark Systems Pvt. Ltd. (2010) 132 TTJ 001 (SB)

[4] BA Continuum India Pvt. Ltd. v. ACIT (ITA No.1154/Hyd/2011)

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excluded before computing the corresponding PLI. Thus, PLI (PBDIT/Sales) adopted by the taxpayer was upheld.

Adjustment on account of capacity underutilization

- The taxpayer sought to seek capacity underutilisation adjustment. The TPO as well as DRP declined this relief. Tribunal held that, in one of the judicial precedent[5], it was held that as per Rule 10B(1)(e)(iii), such capacity underutilisation adjustment has to be made in the hands of comparable companies and not the tested party. Accordingly, taxpayer's argument was accepted.

Ahmedabad Tribunal in the case of Erhardt+Leimer (India) Private Limited vs ACIT (ITA Nos. 3298/Ahd/2011 & 2880/Ahd/2012 - AYs: 2007-08 & 2008-09)

Notification/Circulars/ Press Releases

India and Singapore sign a protocol amending the tax treaty

The Government of India signed the third protocol with Singapore to amend the India-Singapore tax treaty which is in line with India's treaty policy to prevent double non-taxation, curb revenue loss and check the menace of black money through Automatic Exchange of Information (AEOI) as reflected in India's recently revised tax treaties with Mauritius and Cyprus and the joint declaration signed with Switzerland. Key aspects of the press release are as follows:

- The Third Protocol amends the tax treaty with effect from 1 April 2017 to provide for source based taxation of capital gains arising on transfer of shares in a company.

- In order to provide certainty to investors, investments in shares made before 1 April 2017 have been grandfathered subject to fulfilment of conditions in Limit-of-Benefit (LOB) clause as per 2005 Protocol. Further, a two year transition period from 1 April 2017 to 31 March 2019 has been provided during which capital gains on shares will be taxed in source country at half of normal tax rate, subject to fulfilment of conditions in LOB clause.

- The Third Protocol also introduces provisions to facilitate relieving of economic double taxation in transfer pricing cases which is in line with India's commitments under BEPS Action Plan to meet the minimum standard of providing Mutual Agreement Procedure (MAP) access in transfer pricing cases.
- The Protocol also updates Article 9 on Associated Enterprises to provide for both countries to enter into bilateral discussions for elimination of double taxation arising from transfer pricing or pricing of related party transactions.

- The Protocol also enables application of domestic law and measures concerning prevention of tax avoidance or tax evasion.

Source: Taxsutra.com

[5] DCIT v. EDAG Engineers & Design India Pvt. Ltd. (ITA No.549/Del/2011)

Personal tax - Decision

Determination of consideration in case of sale at less than stamp duty value and for computing exemption from Capital Gains Tax

The Act provides for determination of full value of consideration in certain cases of sale of immovable property. The Act also allows the tax exemption of capital gains arising from sale of capital assets other than a house property upon investment in a house property. The Vishakhapatnam Tribunal held that in case of sale of house property under an unpossessory sale-cum-General Power of Attorney (GPA) for a value less than that considered for stamp duty and registration, the full value of consideration shall be the value as adopted for the purpose of stamp duty and registration of the property. The Tribunal also held that for computation of tax exemption as per the Act, net consideration received would be applicable and not the value adopted for stamp duty/registration of the property.

DIT v. Chalasani Mallikarjuna Rao [2016] 75 taxmann.com 270 (Vis)

II. SERVICE TAX

Decisions

Leasing of cabs is in nature of rendering services and cannot be considered as 'deemed sale'

The issue in the instant case was whether the activity of lease of motor vehicles would be construed as 'deemed sale' or as a 'service' and become liable to Service Tax.

The Delhi Tribunal held that since the ownership of such motor vehicles would never be transferred to its customers and they could use the vehicles as long as they were paying rent for such usage, the dominant intention of the transaction was that of renting/hiring motor vehicles and not transfer of control or possession. Therefore, while the Tribunal mentioned that nature of arrangement may vary from party to party, in the present case, the activity of leasing motor vehicles would not constitute 'deemed sale' and thus become liable to Service Tax.

M/s. Carzonrent (India) Pvt. Ltd. v. CST, Delhi-I, 2017-VIL-10-CESTAT-DEL-ST

Notification/Circulars/ Press Releases

Amendments in Service Tax exemptions

With effect from 22 January 2017, the service tax exemption for following

services has been withdrawn:

- Services by way of transportation of goods by a vessel from outside India up to customs station of clearance in India. Accordingly, the person liable to pay Service Tax would be the person in India who complies with relevant provisions of the Customs Law i.e. the person-in-charge of a vessel or an agent appointed, in this regard.

- Services of a business facilitator or correspondent to a banking company with respect to accounts in its rural area branch.

Notification No. 1/2017 - Service Tax dated 12 January 2017, Notification No. 2/2017 - Service Tax dated 12 January 2017 and Notification No. 3/2017 - Service Tax dated 12 January 2017

Exclusions carved out in the definition of 'aggregator'

With effect from 22 January 2017, the definition of 'aggregator' under the Service Tax law has been amended to exclude such persons who enable a potential customer to connect with persons providing services by way of renting of hotels, inns, etc. subject to fulfillment of certain conditions.
Notification No. 2/2017 - Service Tax dated 12 January 2017

Rationalization of abatement for tour operator services

With effect from 22 January 2017, the rate of abatement for services by a tour operator has been amended to 40 percent, subject to the condition that CENVAT credit on inputs and capital goods shall not be allowed and the gross amount charged includes accommodation and transportation required for such tour.

Notification No. 4/2017 - Service Tax dated 12 January 2017

III. CENTRAL EXCISE

Decisions

Activity cannot be construed as 'manufacture' by assembling three items CPU, monitor and keyboard

The fact of the case is that taxpayer purchases and sells computer CPU, monitor and key boards. The taxpayer supplied these goods at the site of the consumer. While installing all the three items they used cord for connection.

Department's contention is that the said activity amounts to 'manufacture' of a computer and accordingly, excise duty demand was confirmed. In the appeal, before the Commissioner (A), the demand was upheld.

The taxpayer submitted that they undisputedly are purchasing CPU, monitor and key boards. They are selling the same as such, at the most, while installation of the computer, when cord of each other are connected. Therefore while clearing, right from purchasing of these three items and clearance from their premises no manufacture activity is carried out. All these three items are sold as such, the only activity at the customer's site is connecting the cord of monitor and key board into

CPU, which cannot be termed as manufacture.

In this regard, the Mumbai Tribunal held that since, the said goods are being sold as such and entire computer has already been manufactured earlier, hence, the aforesaid activity does not amount to manufacture, accordingly the appeals were allowed.

Info Expert Computer System vs CCE (2017-TIOL-97-CESTAT-MUM)

Credit taken on the strength of photocopy copy of invoices or invoices, where serial number of the invoices were either not printed or handwritten, cannot be denied

In the present case, the taxpayer availed credit on the invoices, wherein serial number of the invoices were either not printed or hand written. In one of the instances, the credit was taken on the basis of the photocopy of the invoice.

For the above reasons, the adjudicating authority denied the CENVAT credit. Being aggrieved by the Order-in-Original, the taxpayer had filed appeal before the Commissioner (A) which was rejected, hence the present appeal was being filed.

The taxpayer submitted that as regard to the printed serial number on the invoices, the Mumbai Tribunal in one of their own earlier case, has held that as per the Rule 11 of CENVAT Credit Rules, 2002 the only requirement is that invoice should be serially numbered, therefore allegation of not having printed serial number is not correct. As regard the credit availed on photocopy copy, it was submitted that substantial compliance for availing the credit are met and accordingly, the benefit should be extended. The taxpayer also, relied on various judicial precedents.

Considering the arguments, the Mumbai Tribunal held that for such procedural lapse, substantial benefit of CENVAT credit cannot be denied.

Pepsico India Holding Pvt Ltd vs CCE (2017-TIOL-26-CESTAT-MUM)

EOU is entitled for credit at the time of conversion from DTA unit to EOU

The taxpayer, a 100 per cent Export Oriented Unit (EOU), engaged in the manufacture of parts and accessories for Automatic Teller Machine (ATM) machine, classifiable under Chapter Heading 84 of Central Excise Tariff Act, 1984. The taxpayer obtained Central Excise registration as a Domestic Tariff Area (DTA) unit and converted their DTA unit into a 100 per cent EOU. During the period prior to conversion of DTA unit as an EOU, taxpayer was undertaking the physical and deemed exports in addition to DTA clearances. Consequently, taxpayer accumulated CENVAT credit balance and on conversion from DTA unit to EOU, taxpayer carried forward/transferred the unutilized CENVAT credit balance from DTA unit to EOU.

Thereafter a show-cause notice was issued, which culminated into passing of Order-in-Original confirming the demand and the appeal of the taxpayer was also rejected by the Commissioner (A) and hence the present appeal.

The taxpayer submitted that the issue involved is no more *res integra* and are covered by the decisions of the Hon'ble High Court as well as various decisions of the Hon'ble Tribunal. The Hon'ble Tribunal

in the case of Sandoz Pvt. Ltd. in 2012 (278) E.L.T. 259 observed that the EOU is entitled for CENVAT credit available in the books of accounts at the time of conversion from DTA unit to EOU. Further, the taxpayer submitted that there is no provision under the CENVAT Credit Rules, which provides lapsing of CENVAT Credit on conversion of DTA unit to EOU. They further submitted that as per new scheme even 100 per cent EOU can procure the goods on payment of duty and avail the CENVAT credit. Therefore, the 100 per cent EOU are not debarred from availing the CENVAT credit and under any circumstances they cannot be denied the unutilized CENVAT credit.

In this background, the Bangalore Tribunal relying on judgments cited above held that the appellant is entitled to transfer the unutilized CENVAT credit on conversion from DTA to 100 per cent EOU.

Carclo Technical Plastics Private Limited v. CCE (2017-TIOL-119-CESTAT-BANG)

IV. VAT

Decisions

Renting of earthmoving equipments considered as 'transfer of right to use' and hence, taxable as 'deemed sale' and not Service Tax under 'supply of tangible goods for use'

The taxpayer in the present case, is engaged in the business of renting of earthmoving equipment. Revenue considered such activity taxable under service category of Business Auxiliary Service (BAS) for the period prior to 16 May 2008 and with effect from 16 May 2008, under the category of 'supply of tangible goods for use' and accordingly, issued a notice demanding service tax on such activity for both the periods. Subsequently, the Commissioner adjudicated the show cause notice and confirmed the demand of service tax under the category of 'supply of tangible goods for use' for the period post 16 May 2008 and dropped the demand for the period prior to 16 May 2008 under BAS. Aggrieved by the same, the taxpayer filed an appeal before the Customs Excise and Service Tax Tribunal (CESTAT) in relation to demand confirmed and the department filed an appeal for the demand dropped.

The taxpayer submitted that the activity undertaken by him is in nature of leasing of machinery/equipment and shall be considered as 'deemed sales'. Accordingly, taxpayer was discharging VAT under Maharashtra Value Added Tax Act, 2002 (MVAT Act) considering the same as 'transfer of right to use'. Further, it contented that in the Budget Speech of FY 2008-09 and TRU, it was clarified that the 'supply of tangible goods for use' shall not cover the cases of 'deemed sales' where VAT is leviable. Hence, service tax shall not be applicable on the same.

On the other hand, the revenue contented that the transaction is one of supply of tangible goods for use, since the effective possession and control of equipment lies with the taxpayer as per agreement entered with the customers. Further, it cited the reference to Central Board of Excise and Customs (CBEC) circular, wherein it has been stated that the transaction of allowing another person to use the goods without giving legal right of possession and effective control, shall be treated as a service. Further, in connection to Revenue's appeal for the period prior to 16 May 2008, it

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submitted that activity of the taxpayer is not only limited to renting of equipment's but the taxpayer is also under obligation to provide erection, installation and commissioning of the machines free of cost etc. Therefore, combining all the activities, the service clearly falls under BAS.

The CESTAT, noted that the revenue's contention was based on the restrictions placed on the lessee (customers). Merely because of restrictions, it cannot be said that there is no right to use by lessee. CESTAT also, stated that the responsibilities casted under clauses mentioned in the agreement, clearly show that right of possession and effective control was lying with the customers and the agreement also stated that VAT shall be leviable on such transactions.

In view of the above, it was held that the activity of giving various equipments on hire does not fall under the category of 'supply of tangible goods for use' and hence, the same was not liable to service tax for the period post 16 May 2008 and allowed the appeal filed by the taxpayer. Further, in relation to revenue's appeal for the period prior to 16 May 2008, CESTAT held that even though the Commissioner has dropped the demand on the ground that the service is of 'supply of tangible goods for use' and does not fall under the BAS, the activity in itself is not a service at all. Accordingly, the same was remanded back to the original adjudicating authority for passing fresh order in relation to demand prior to 16 May 2008.

M/s Gimmco Ltd. v. Commissioner of Central Excise and Service Tax, Nagpur and Commissioner of Central Excise and Service Tax, Nagpur v. M/s Gimmco Ltd. - [TS-552-CESTAT-2016(Mum)

Notifications/Circulars/ Press Release

Maharashtra

The MVAT department notified full/partial exemption from payment of late fee for delayed filing of returns upto the period ended 31 March 2016.

A registered dealer who uploads the pending returns for any period upto 31 March 2016, during the period 1 January 2017 to 31 January 2017, shall not be liable to pay any late fee. However, if the returns are filed during the period 1 February 2017 to 28 February 2017, late fee of INR2000 shall be applicable and for returns uploaded on or after 1 March 2017, late fees of INR5000 shall be imposed.

Notification no. VAT 1516/C.R.178/Taxation – 1 dated 28 December, 2016 and Trade circular no. 1T of 2017 dated 2 January 2017

Gujarat

The due date for submission of Audit Report and Annual Return for the FY2015-16 has been extended from 31 December 2016 to 28 February 2017.

Circular No. VAT – 17C/16-17/ No. 193-158 Dated 20 December 2016

With effect from 19 December 2016, the Point of Sale (POS) terminal machine (swipe machine for cashless transaction) has been exempted from whole of tax leviable under the Gujarat Value Added Tax Act, 2003.

Notification No. (GHN- 72) VAT-2016-S.5 (2) (52)-TH dated 19 December 2016

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