May 2017

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

KPMG
cutting through complexity

Foreword

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

Draft GST Rules regarding Transition, Input Tax Credit, Valuation, Accounts and Records, E-waybills etc. have been released for public comments. Rules relating to Registration, Payments, Returns, Invoice and Refunds have been in public domain for quite some time.

FICCI's Task Force on GST has met and discussed the provisions of these rules. FICCI has submitted its views on all the aforesaid rules and we have expressed concerns on behalf of the trade and industry on some of the adverse provisions. We expect the GST Council to take a view on these rules in the coming weeks.

Working Groups have been constituted by the Government to address issues of implementation of GST of some of the sectors of the industry which have special peculiarities. The sectors which have been identified in this behalf include Banking, Financial and Insurance sector, Telecommunications, Textiles, MSMEs, Exports, IT / ITES, Oil & Gas, Transport and Logistics, Gems and Jewellery etc.

FICCI has submitted its views on the compliance issues that are likely to arise in the implementation of GST for these sectors. FICCI representatives have also met with some of the Working Groups to explain the point of view of the industry.

In keeping with the current developments, FICCI is launching its third series of Interactive Sessions on GST in collaboration with the Tax Consultancy firm KPMG. Unlike the previous sessions which dealt predominantly with concepts of GST, the current series of sessions will focus more on the implementation and compliance aspects of the new tax system in the context of the Central GST Acts and the draft Rules that have been put out in public domain. The first interactive session on GST in this round kicks off on 24th May at Pune to be followed by sessions at Delhi (31st May), Mumbai (1st June), Ahmedabad (2nd June), Bengaluru (7th June), Kochi (9th June) etc. We also propose to conduct such events in some of the Tier 2 cities.

In the direct tax regime, the Supreme Court in the case of Formula One World Championship Ltd. held that the international circuit constitutes fixed place of business under the India-U.K. tax treaty since the international circuit was under the control and at the disposal of the taxpayer. Motor car race was physically conducted in India and from this race income was generated in India. Therefore, the taxpayer had made their earning in India through the said circuit over which they had complete control during the period of race. Based on the service agreements, it has been observed that the entire event is taken over and controlled by the taxpayer and its affiliates. The Supreme Court held that the payment received by the taxpayer was business income earned through a Permanent Establishment (PE) and hence it is chargeable to tax in India. Therefore, tax needs to be deducted under Section 195 of the Income-tax Act, 1961 (the Act). The Supreme Court also observed that only the portion of income which is attributable to the PE would be treated as business income and tax needs to be deducted only on such portion of income.

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

Advance tax paid will be allowed as tax credit against the final tax liability under the Income Declaration Scheme, 2016

The taxpayer has been filing its return of income till Assessment Year (AY) 2009-10. In AY 2009-10, serious disputes amongst its directors, ex-directors and certain shareholders, arise, which has resulted in litigations. As a consequence, the taxpayer could not appoint any statutory auditor. Accounts could not be made ready for subsequent years in deference to the disputes and pending litigation. In the absence of audited accounts, no return of income was filed from financial year 2009-10. The tax department initiated proceedings for the taxpayer's failure to file returns. Subsequently, Income Declaration Scheme, 2016 (IDS) was notified in May 2016 with effect from 1 June 2016. The total tax payable including interest and penalty under the Scheme was INR19.60 crore, against which advance tax paid by the taxpayer and Tax Deducted at Source (TDS) deducted to its benefit was INR16.49 crore, leaving the net tax payable of INR3.11 crore. These details were duly disclosed by the taxpayer in its application. The tax officer has issued an order disregarding the advance tax credit.

High Court's ruling

There is no provision similar to the 1998 declaration Scheme, that debars giving adjustment or credits to amounts paid in the past in respect of the period or AYs sought to be covered by the declaration under the IDS. There is no bar, express or implied, which precludes the reckoning or taking into account of previously paid amounts which have nexus with the periods sought to be covered by the scheme.

The provision of IDS itself states that for the purposes of IDS, undefined terms and expressions shall be in terms of the Act, by incorporating those into the Finance Act and the scheme. Undisclosed income is the foundational provision to be invoked by declarants, thus is based on the definition under the Act. There is no bar for the taxpayer or declarant to claim credit of advance tax amounts paid previously relative to the assessment years or periods for which it seeks benefits under the scheme. This interpretation is in no way inconsonant with the ratio of the Supreme Court's rulings, relied upon by the tax department. The clarification issued by the tax department, that credit for TDS paid, can be enjoyed for availing the benefit (under the scheme in question) precludes any meaningful argument by it that advance tax payments relative for the assessment years covered by the declaration cannot be taken into consideration as payments under and for purposes of availing the benefits of the scheme.

Accordingly a direction is issued to the tax department to process the taxpayer's application under IDS, 2016, and give adjustment or credit to the amounts paid as advance tax and TDS to its account, under the Act, and accept the balance amounts. The tax department shall ensure that the taxpayer's payments and declarations are processed in accordance with IDS, 2016. Therefore, the writ petition is allowed.

Kumudam Publications Pvt Ltd v. CBDT (W.P.(C) 11216/2016) – Taxsutra.com

Share premium cannot be treated as unexplained cash credit since amendment made under the provisions of unexplained cash credit are prospective in nature

During AY 2008-09, the taxpayer had increased its share capital from INR2.50 lakh to INR 83.75 lakh. The AO noticed that the taxpayer had accumulated share premium at INR190 per share totaling to INR6.69 crore. The AO called for justification on collecting share premium at INR190 per share. The taxpayer produced a copy of the share application form, share certificate and Form No. 2 duly filed with the Registrar of Companies. The taxpayer contended that share premium was charged based on future prospects of its business. The AO rejecting the taxpayer's justification invoked Section 68 of the Act holding INR7.53 crore i.e. issue price and share premium as unexplained cash credit. On appeal, CIT(A) deleted the AO's addition. The Tribunal upheld CIT(A)'s order observing that the taxpayer had established the identity, genuineness and capacity of the shareholders who had subscribed to its shares. Aggrieved, the tax department filed an appeal before Bombay High Court.

The High Court observed that proviso to Section 68 of the Act was introduced by the Finance Act 2012 with effect from 1 April 2013 i.e. it would be effective only from AY 2013-14. The High Court observed that the Parliament neither introduced proviso to Section 68 of the Act with retrospective effect nor was it introduced for removal of doubts or it was declaratory. It is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to Section 68 of the Act is immaterial and does not change the interpretation of Section 68 of the Act both before and after adding of the proviso.

The High Court was satisfied with the genuineness of the transaction entered into by the taxpayer, its identity and capacity of the investor. The AO made addition only because large amount of share premium was generated which propagated suspicion on the genuineness of the shareholders. While upholding the Tribunal and CIT(A)'s decision, the High Court relied on the Supreme Court's decision in the case of CIT v. Lovely Exports (P) Ltd. [2008] 216 CTR 195 (SC). Accordingly, the High Court upheld the Tribunal's order.

CIT v. Gagandeep Infrastructure Pvt.Ltd. (ITA No.1613 of 2014) – Taxsutra.com

Tribunal Decisions

Income of a foreign shipping company is not taxable in India as place of effective management is outside India

The taxpayer (agent) for two voyages during the Financial Year (FY) 2010-11 was a freight beneficiary of Faber Ship Brokers APS, Denmark (Faber Ship Brokers/foreign company) filed income-tax return without paying tax. The return was accompanied with certain details like indemnity bond, etc. The foreign company did not have regular business in the Port of Porbandhar and it conducted only occasional business. On the prima facie verification of documents, it was noticed that certain details were required to be called for. Accordingly, the tax department had issued a notice under Section 172(4) of the Income-tax Act, 1961 (the Act). In response to the said notice, the taxpayer had submitted details of filing return under Section 172(3) for obtaining port clearance under Section 172(6) of the Act.

The AO observed that the taxpayer had not submitted complete details called for except the copy of vessels registration certificate. As per the AO, the benefit under the tax treaty was claimed with incriminating and forged documents. The action of the local agent has itself proved the same beyond doubt. Under the circumstance, the tax treaty claimed is provisional. Accordingly, the final return under Section 172(3) of the Act is withdrawn and demand under Section 172(4) was raised.

Tribunal's ruling

According to Section 172 of the Act, income of owner or charter who receives freight is chargeable to tax. In this case, freight is received by Faber Ship Brokers and it has earned that freight. Therefore, the income of Faber Shipbroker is chargeable to tax in India. Faber Ship Brokers is resident of Denmark having a tax residency certificate which was available on record. As per the decision of the Supreme Court in case of UOI v. Azadi Bachao Andolan [2003] 132 taxman 373 (SC), the benefit of the tax treaty shall be available to the Faber Ship Brokers.

As per Article 9 of the tax treaty, profits derived from the operation of ships in international traffic shall be taxable only in the state where POEM of the enterprise is situated. In this case the POEM of the Denmark entity is situated in Denmark as - registration certificate, residence of shareholder, passport of owner show that Faber Ship Broker is a resident of Denmark and its POEM is in Denmark. Therefore, 'head and brain' of Faber Ship Broker is situated in Denmark. The taxpayer has proved that the POEM is outside India by furnishing several documents including a declaration by the director of the company that it is 100 per cent owned by Mr. Jens Faber Anderson. A copy of owner's passport was submitted to prove his nationality.

Director of Faber Ship Brokers resides in Denmark and has been operating the business wholly from Denmark, all the important decisions are taken from Denmark in the form of meeting and therefore, the POEM and control is in Denmark only. The Faber Ship Brokers is engaged in international traffic and its residence is in Denmark. Therefore, on the basis of Article 9 of the tax treaty, the income on account of operation of ship in international traffic shall be taxable in the state in which the POEM is situated i.e. in this case Denmark. Therefore, the income from ships shall not be taxed in India as per Article 9 of the tax treaty.

Pearl Logistics and EX-IM Corporation v. ITO [2017-TII-57-ITATRAJKOT- INTL]

Tax credit can be claimed with respect to taxes deducted in the U.S.; restricted to rates prescribed in the India-USA tax treaty

The taxpayer is an individual, resident in India, and is in employment of JP Morgan India Pvt Ltd. as Managing Director and Global head of technology research of the company. During the year under consideration the taxpayer earned dividend income from foreign securities in the United States and the taxes withheld from such dividend income was of INR3,72,698. The taxpayer claimed tax credit under Section 90 of the Act with respect to dividend income earned outside India. The Assessing Officer (AO) declined the tax credit claim of the taxpayer, in respect of tax of INR3,72,698 deducted from its dividend earnings in the United States on the ground that relief will be available on actual payment made in the return of income filed in USA and tax paid thereon and tax credit cannot be given on simply Tax Deducted at Source (TDS) from foreign dividend income. The Commissioner of Income-tax (Appeals) upheld the order of the AO.

The Ahmedabad Tribunal held that the taxpayer can claim Foreign Tax Credit (FTC) in respect of taxes deducted in the U.S. against dividend income on satisfaction of the conditions specified in the FTC Article of the India-USA tax treaty. Furthermore, where tax deduction is at a rate higher than the rate prescribed in the tax treaty, the taxpayer will be eligible to claim FTC restricted to the amount computed based on the rates prescribed in the tax treaty.

Bhavin A Shah v. ACIT (ITA No. 933/Ahd/2013) (Ahmedabad Tribunal)

Under India-Italy tax treaty tax is to be deducted on actual payment of royalty

The taxpayer, an Indian company, was liable to make a payment of INR5 crore on account of technical know-how, to Saira Europe SPA, Italy. This liability was duly accounted for in the books of accounts on 22 November 2010, though the payment was made, a bit later, on 12 May 2011. The tax of INR53 lakh was duly withheld from the payment so made, and it was deposited on 20 June 2011. A demand for interest under Section 201(1A) of the Income-tax Act, 1961 (the Act) was levied on the taxpayer by treating the due date for depositing tax deductible at source as 7 December 2010, being days from the end of the month in which amount was credited in the books of accounts. Aggrieved, the taxpayer appealed before the Commissioner of Income-tax (Appeal) [CIT(A)]. It was contended by the taxpayer that the taxability on the amount of INR5 crore, which was taxable under Article 13 of the tax treaty only at the point of time when it is actually paid, did not arise at the point of time when credit was afforded to the recipient in the books of accounts. The CIT(A) rejected the taxpayer's contentions.

The Ahmedabad Tribunal has held that unless royalty has actually been paid, the taxability under Article 13 of the India-Italy tax treaty does not arise. The Tribunal also observed that the taxpayer can adopt a beneficial tax rate under the provisions of the Act, though the timing of deduction of tax at source was determined based on the payment under the provisions of the tax treaty.

Saira Asia Interiors (P.) Ltd v. ITO [2017] 79 taxmann.com 460 (Ahd)

Since the share of profits derived from a firm is exempt under Section 10(2A) of the Act in the hands of the taxpayer, proportionate disallowance is to be made

During the Assessment Year 2010-11, the taxpayer claimed expenditure on account of payment of interest on borrowed funds. During assessment proceedings, the AO noted that the taxpayer made interest-free advances to the partnership firm wherein he was one of the partners. The taxpayer could not establish business expediency for advancing borrowed funds to the partnership firm without any interest, the

AO disallowed the proportionate interest to the extent of borrowed funds advanced to firm. The CIT(A) upheld AO's order.

The Tribunal observed that, though the taxpayer could not provide a reasonable explanation that the interest free loan was advanced for business purpose but the funds were invested by the taxpayer with an intention to earn profits. The Tribunal denied the taxpayer's contention that since the profits of the firm were under benefit of Section 80-IC of the Act, investment was not made to earn exempt income. Admittedly, the share of the profits derived from the firm is exempt under Section 10(2A) of the Act in the hands of the taxpayer and, therefore, to this extent proportionate disallowance can be made. However, interest and remuneration from the firm would be taxable as business income in the hands of the taxpayer and, therefore, interest paid on borrowed funds in this regard cannot be disallowed.

The Tribunal observed that the nature of receipt in the hands of the taxpayer is relevant as against taxability of income in the hands of the firm. The Tribunal held that the nature of profits of the firm cannot be a conclusive factor for deciding the nature of profits in hands of the taxpayer. In view of above, the Tribunal directed the AO to recompute the disallowance.

Vineet Maini v. ITO (ITA No.5240/Del/2016) – Taxustra.com

Loss on account of derivative transactions are eligible for set off against normal business profits since it was entered into specifically to hedge foreign exchange transactions which are intrinsic part of a taxpayer's normal business

During AY 2008-09, the taxpayer claimed forex loss on account of derivative transactions as business loss and claimed set-off against taxable income. The AO disallowed the said loss holding that since the contract was settled otherwise than through delivery, loss was to be considered as speculative loss under Section 43(5) of the Act. The CIT(A) upheld the order of the AO. Aggrieved, the taxpayer filed an appeal before the Tribunal.

The Tribunal observed that every loss due to a speculative transaction cannot be treated as speculative loss. Explanation 2 to Section 28 of the Act provides that where speculative transactions carried on by the taxpayer are of such a nature as to constitute a business, the business shall be deemed to be distinct and separate from any other business. When speculative transactions are carried on a standalone basis to constitute business only, then it is to be treated as a separate business from other normal business. When speculative transactions were ancillary to the main business of the taxpayer, profits or losses of such business become part of normal business and should not be treated as separate speculation business loss or profit.

The Tribunal held that the transaction settled otherwise than through a delivery would not make a transaction speculative in nature but only its independent character would alienate it from main activities of business. The detailed contract notes filed by the taxpayer provide the requisite link to the forward contracts entered into. The confirmation filed through bank indicates that the notional principal amount of the derivative transaction did not exceed the amount which was outstanding against export realisation which the taxpayer seeks to hedge. Thus, the Tribunal held that all derivative transactions entered into was to specifically hedge foreign exchange transactions which were an intrinsic part of the taxpayer's normal business. Therefore, loss on these transactions were eligible for set off against normal business profits. The Tribunal held that CBDT instructions are not binding on appellate authorities. Losses on foreign exchange contracts were genuine and therefore directed the AO to delete the disallowance and allow deduction under Section 37(1) of the Act.

Soma Textiles & Industries Ltd. v. ACIT (ITA No.472/Ahd/2014) – Taxsutra.com

India signs five unilateral APAs on management cross charges

Marking a significant development in the global Advance Pricing Agreement (APA) space, the Indian APA regime has achieved a significant milestone signing five unilateral APAs, involving transfer pricing issue for extremely complex and ever litigious transactions of management cross charges. The said APAs are signed for a period of nine years each (i.e. five future years and four rollback years).

As these APAs entail great level of subjectivity, in terms multi-dimensional flow of services and charges, showcasing need benefit analysis, and explaining complex cost allocation methodology, this can be considered as a significant milestone in the Indian APA journey, which has gathered momentum in the last couple of years.

As per a press release dated 31 March 2017, the total number of APAs entered into by the Central Board of Direct Taxes (CBDT) has reached 152. This includes 11 bilateral APAs and 141 unilateral APAs. In financial year 2016-17, a total of 88 APAs (eight bilateral APAs and 80 unilateral APAs) were entered into.

www.pib.gov.in

Transfer pricing adjustment in relation to intra-group services deleted in absence of justification of nil ALP under CUP method

- The taxpayer made the payment on account of intra-group management services in the nature of finance, environment health and safety, supply chain, sales and marketing, supply chain and information technology services to its Associated Enterprises (AEs).
- The taxpayer justified the Arm's Length Price (ALP) of the charge on the basis of the Transactional Net Margin Method (TNMM). However, the Transfer Pricing Officer (TPO)/Dispute Resolution Panel (DRP) rejected TNMM and proposed to benchmark the transaction separately by applying Comparable Uncontrolled Price (CUP) method.
- For the receipt of information technology services, the taxpayer paid a mark-up of 10 per cent on costs incurred. However, the same was not accepted by the TPO and a mark-up of 3 per cent was contended to be at ALP instead of 10 per cent. The TPO/DRP observed that the services availed were general in nature and there was no quantification of the services.

Tribunal's ruling

- The Tribunal relied on the decision of Delhi Tribunal in the case of AWB

India1, wherein it was upheld that CUP method cannot be applied in absence of data pertaining to price of the same product and service in uncontrolled circumstances.

- The Tribunal upheld that it was beyond the powers of the TPO to decide if a particular expenditure incurred by a business enterprise was commercially expedient.

- The Tribunal rejected the DRP's contention that the worth of the services can be correlated with the benefit of the services.

- Based on the sample evaluation of the evidences submitted by the taxpayer, the Tribunal opined that there were reasonable evidence to substantiate the rendition of services. Thus, the Tribunal deleted the adjustment with respect to receipt of management services and rejected the nil ALP determined by the TPO under CUP method for Assessment Years 2009-10 and 2011-12.

    - The Tribunal also upheld the mark-up of 10 per cent paid by the taxpayer on information technology service vis-à-vis the mark-up of 3 per cent applied by the TPO, based on the premise that TPO did not provide any specific comparables for justification.

SABIC Innovative Plastics India Private Limited vs ACIT (ITA No. 1125/Ahd/2014 - AY 2009-10 and IT(TP) No. 427/Ahd/16 - AY 2011-12)

Notification/Circulars/ Press Releases

CBDT notifies that cash transaction restriction provided under Section 269ST is not applicable to receipt from a bank, cooperative bank or a post office savings bank

The CBDT has notified that the provision of Section 269ST of the Act shall not apply to receipt by any person from an entity referred to in sub-clause (b) of clause (i) of the proviso to Section 269ST of the Act (i.e. any banking company, post office savings bank or co-operative bank).

Notification No.28/2017, F.No.370142/10/2017-TPL, dated 5 April 2017

CBDT issues press release and draft notification for exemption of acquisitions of equity shares from long-term capital gain tax

The CBDT has issued a press release requesting stakeholders to provide their comments on draft notification to be issued under Section 10(38) of the Act. The central government for the purposes of the proviso to Section 10(38) of the Act, notifies all the transactions of acquisition of equity share entered into on or after the first day of October 2004 which are not chargeable to securities transaction tax under Chapter VII of the Finance (No. 2) Act, 2004, other than the following transactions:

[1] AWB India Private Limited vs DCIT [2015] 152 ITD 770 (Del)

- Where acquisition of listed equity share in a company, whose equity shares are not frequently traded in a recognised stock exchange of India, is made through a preferential issue other than those preferential issues to which the provisions of chapter VII of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 does not apply.

- Where transaction for purchase of listed equity share in a company is not entered through a recognised stock exchange.

- Acquisition of equity share of a company during the period beginning from the date on which the company is delisted from a recognised stock exchange and ending on the date on which the company is again listed on a recognised stock exchange in accordance with the Securities Contracts (Regulation) Act,1956 read with Securities and Exchange Board of India Act,1992 and any rules made there under.

CBDT press release, dated 3 April 2017

CBDT notifies rules and form with respect to the patent box regime

The CBDT has notified Rule 5G and Form 3CFA with respect to the patent box regime under Section 115BBF of the Act (which provides for a concessional tax rate on income derived from patents). New Rule 5G provides that the 'eligible assessee' opting for concessional taxation regime under Section 115BBF shall furnish Form No. 3CFA electronically on or before the return-filing due date specified in Section 139(1) of the Act. In form 3CFA, the 'eligible assessee', needs to provide general details as well as 'eligible patent' details such as description of patent, date of grant of patent, whether patent granted to single persons. Similarly, the eligible assessee needs to provide details of royalty income from eligible patent and details of expenditure incurred in India and outside India on eligible patent.

CBDT Notification No. 25/2017, 31 March 2017

II. SERVICE TAX

Decisions

Service tax on lottery promotion and marketing not unconstitutional but unenforceable without computation mechanism

The issue in the instant case was whether service tax levy on incidental activities of promotion and distribution of lottery by distributors/selling agents (other than sale of lottery which has been held unconstitutional), was constitutionally valid.

In this regard, the Sikkim High Court has held that levy of service tax on incidental activities such as promotion, marketing, organising, facilitating, etc. was constitutionally valid, since the Parliament was competent to impose service tax on all services rendered by a person for a consideration under the Indian constitution. However, since there was no consideration paid for such incidental activities, the High Court held that the impugned provisions of service tax law were not capable of being implemented and accordingly, the said provisions have been quashed.

M/s Future Gaming and Hotel Services Pvt. Ltd. v. Union of India, (TS-67-HC-2017(SIK)-ST)

Notification/Circulars/ Press Releases

Advance ruling machinery for Service tax merged with income tax

The Central Government has amended the Service tax law to merge the advance ruling machinery for Service tax with the machinery provided under Income tax.

Notification No. 12/2017 - Service tax dated 31 March 2017

Scope of Settlement Commission enlarged to allow persons other than assessees to make an application

The Central Government has amended the Service tax law to enable any person, other than the assessees to make an application before the Settlement Commission in a specified format.

Notification No.13/2017-Service Tax dated 12 April 2017

Liability shifted on 'importer' for transportation by vessel services from non-taxable territory

The Central Government has amended the Service tax law to shift the liability of discharging Service tax on the 'importer' (as per customs law), for services of transportation of goods by a vessel provided by an overseas service provider to a customer located outside India from outside India up to the customs clearance station in India. The government has also granted an option to such importers to pay an amount calculated at 1.4 per cent of the CIF value of imported goods. Further, the point of taxation for such services has been prescribed as the date of bill of lading of such goods in the vessel at port of export.

Notification No.16/2017-Service Tax dated 13 April 2017, Notification No. 14/2016-Service Tax dated 13 April 2017, Notification No.15/2017-Service Tax dated 13 April 2017 and Circular No.206/03/2017-ST dated 13 April 2017

III. Customs Duty Decisions

Notification/Circulars/ Press Releases

DTA clearance of goods to EOUs/EHTP/STP units

With respect to materials/capital goods, etc., procured from indigenous sources by EOUs/EPZ/SEZ/EHTP/STP units, are transferred/ sold back to DTA except for the purpose of replacement, the deemed export benefits already availed against such goods was refunded, subject to production of a certificate from the jurisdictional Development Commissioner to the effect, that such deemed export benefits are paid back. In cases, where no deemed benefits were availed, a certificate to this effect from the jurisdictional Development Commissioner is required to be produced. Only after production of such certificate, these raw materials/capital goods could be cleared on payment of appropriate central excise duty. It was brought to the notice of the board that various difficulties are being faced in getting the said certificate from the Development Commissioner.

It is now clarified, that the indigenous goods supplied to the EOUs/EPZ/SEZ/EHTP/STP units after availing the deemed export benefits are to be treated as 'imported goods' and accordingly, duty as applicable to the imported goods is liable to be paid. Once the goods are treated as imported goods and applicable customs duty is paid at the time of their transfer/sale back into DTA or exit, there is no requirement of refund of the deemed export benefits availed on such goods or for the production of a certificate from the Development Commissioner regarding refund or non-availment of deemed export benefits at the time of clearance of such goods or exit.

Alternatively, the EOU/STP/EHTP units would also be allowed to clear the domestically procured goods or on exit, on payment of excise duty as per Notification No. 22/2003-CE dated 31 March 2003 only on production of certificate from Development Commissioner to the effect that deemed export benefits have been paid back or not availed, as the case may be, as envisaged in Circular No.74/2001-Cus dated 4 December 2001.

Circular no.13/2017-Cus, dated 10 April 2017

Foreign Trade Policy

Notification/Circulars/ Press Releases

Amendments in Chapter 4 of the Foreign Trade Policy 2015-20

For fulfillment of export obligation, the period of export obligation with contracted duration of the project execution or 18 months whichever is more, has been extended to all types of projects and not limited only to turnkey projects. Further, it is provided that no Duty Free Import Authorisation shall be issued for an input where SION prescribes 'Actual User' condition and/or where pre-import condition for such an input exists.

Notification 42/2015 – 20 dated 21 March 2017

IV. CENTRAL EXCISE

Decisions

Once the final product is treated as dutiable and duty is paid by the assessee, there is no question of reversal of CENVAT credit

In the present case, the appeal has been filed by revenue against the order of CESTAT wherein CESTAT had held that when the CENVAT credit is availed on the inputs stand utilised for payment of duty on the final product, there would be no requirement for reversal of the said credit. Even, if the activity undertaken does not amount to manufacture.

In this regard, the Hon'ble Karnataka High Court relying on the judgement in the case of Creative Enterprises 2009 (235) E.L.T. 785 (Guj.) held that it is an undisputed position that the final product is treated as dutiable and duty is paid by the assessee. When the duty is paid treating the activity as 'manufacture', there arises no question of reversal of CENVAT credit.

CCE vs Vishal Precision Steel Tubes & Strips Pvt Ltd (2017 – TIOL – 613 – HC – KAR-CX)

V. VAT

Decisions

Audit objection can constitute 'information' for the purpose of escaped assessment only if assessing officer is satisfied that turnover has escaped assessment

In the present case, the taxpayer is engaged in the business of manufacturing, trading, leasing and construction business across India. During the FY 1991-92 (relevant period), assessee was involved in the execution of civil work contracts and filed returns under Bihar Finance Act, 1981 (State Act) and also under Central Sales Tax Act, 1956. The assessment proceedings in connection to the relevant period were completed and an order was passed by the assessing authority during the year 1996. Thereafter, Auditor General, Bihar, audited the aforesaid assessment order and observed that the taxpayer has claimed exemption for goods consumed during execution of works contract however, the prescribed declaration as prescribed under the Act was not filed. The said observations were communicated by the auditor to the assessing officer.

Basis the said observations of the auditor, the assessing officer served Show Cause Notice (SCN), stating that the taxpayer has wrongly claimed exemption without filing mandatory declaration. Subsequently, a re-assessment order was passed demanding tax in respect of exemption wrongly claimed. Aggrieved by the same, the taxpayer filed a writ petition to the High Court (HC). The HC dismissed the appeal filed by the taxpayer. Aggrieved by order of

HC, the taxpayer preferred an appeal before the Supreme Court (SC).

In the said appeal, the taxpayer contended that 'audit objection' cannot be construed as 'information' under Section 19 of the State Act, for the purpose of reopening the assessment by the assessing officer. Further, the audit objection pertains to the consumables and there is no sale/deemed sale which involved transfer of property in execution of works contract and non-filing of declaration does not attract tax. Also, the original assessment order specifically considered whether purchase tax is to be paid on such items and the same was decided in the favour of taxpayer. Thus, levy of tax through re-assessment is a mere change of opinion by the assessing authority on the same set of facts that were available at the time of original assessment. It was further contended by the taxpayer that the initiation of the re-assessment proceedings and the re-assessment order are illegal and the assessing officer did not know that turnover has escaped assessment and it was initiated on the basis of observations of the auditor. In this regard, the revenue contended that 'audit objection' in the present case is an 'information' for the purpose of re-assessment and thus, revenue has rightly re-assessed the turnover and demanded tax which was escaped by the assessee. Further, it was contended that if there is a mistake apparent on the face of the record of assessment, such record itself becomes source of information. Thus, in this case, basis the information available with the auditor and its own analysis, revenue has rightly reopened the assessment.

In this connection, the SC agreed on the scope of word 'information' as described by the revenue. However, the SC observed that a mere change of opinion of revenue on the same facts and materials on the record, does not constitute 'information' for the purposes of the State Act. Further, SC, on perusal of the report of the audit team, observed that the assessing officer was of the opinion that since the goods has not been transferred but had been consumed by the taxpayer, it shall be out of purview of taxation. Therefore, assessing officer was not satisfied with the information submitted by the audit team and issued notice on the basis of direction given by the audit party and not on his personal satisfaction, which is not permissible under law. The SC opined that if assessing officer is satisfied that reasonable ground exist, then only assessment can be reopened by him.

Based on the above, the SC held that order passed by the DC is without jurisdiction and HC is not right in dismissing the petition filed by the taxpayer and allowed the appeal filed by the taxpayer.

M/s Larsen & Toubro Ltd. vs State of Jharkhand and Ors (TS-62-SC-2017-VAT)

Notifications/Circulars/ Press Release

Karnataka

Karnataka government has announced Karasamadhana Scheme, 2017 in view of proposed introduction of Goods and Services Tax (GST), with the aim of reducing arrears of tax and other amounts due. The key features of the said Scheme are under:

- This scheme provides for waiver of penalty and interest under:
  - the Karnataka Sales Tax Act, 1957 (KST Act)

- the Central Sales Tax Act, 1956 (CST Act)
- the Karnataka Value Added Tax Act, 2003 (KVAT Act)
- the Karnataka Tax on Entry of Goods Act, 1979 (KTEG Act)
- the Karnataka Tax on Professions, Trades, Callings and Employments Act, 1976 (KTPTC & E Act)
- the Karnataka Tax on Luxuries Act, 1979 (KTL Act)
- the Karnataka Agricultural Income Tax Act, 1957 (KAIT Act) and
- the Karnataka Entertainments Tax Act, 1958 (KET Act)

- Under the scheme, any dealer, who will make full payment of arrears of tax on or before 31 May 2017 shall be granted waiver of 90 per cent of arrears of penalty and interest payable i.e. dealer has to pay amount of tax along with 10 per cent of arrears of penalty and interest

- For the purpose of this scheme, arrears of tax shall mean tax assessed/reassessed under respective Acts and arrears of penalty and interest for the below mentioned period, unpaid up to 15 March 2017:

Act	Period
KST Act and CST Act	up to 31 March 2005
KVAT Act and CST Act	1 April 2005 to 31 March 2016
Other acts: KTEG Act, KTPTC & E Act, KTL Act, KAIT Act and KET Act	up to 31 March 2016

- Further, if a dealer has filed an appeal or other application against the order or proceedings relating to 'arrears of tax' and 'arrears of penalty and interest' before any appellate authority or court and its disposal is still pending, the dealer shall withdraw the appeal or other application before availing the benefits this scheme. In such case, the quantum of arrears of tax/penalty and interest for purpose of this scheme shall be considered as per the order against which appeal or other applications had been filed by the dealer

- The dealer shall not file an appeal or other application before any appellate authority or court or shall not seek rectification of orders/proceedings after filing application under this scheme;

- Further, the dealer shall not be eligible to avail of the benefits of this scheme if, in relation to the order giving rise to arrears of tax/penalty and interest:-
  - State has filed appeal before the Karnataka Appellate Tribunal; or
  - State has filed appeal or revision or any kind of application before the High Court or the Supreme Court; or
  - Any officer of the Commercial Taxes Department has initiated suo-moto revision proceedings as on 15 March 2017.

Order NO.FD 24 CSL 2017 dated 31 March 2017