October 2017

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

Foreword

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

FICCI has submitted recommendations on the various issues emerging under the GST regime for the consideration of the GST Council. The various concerns of the trade and industry viz. payment of GST on procurements from unregistered persons, issues faced by exporters, GST on advance received, composite scheme etc. under the GST regime were raised by FICCI before the Finance Minister in the meeting held at Ministry of Finance on September 28, 2017.

The Central Board of Direct Taxes has constituted a committee to look into the complexities involved in the existing Income Tax Return Forms, examine the grievances/concerns of the stakeholders, and suggest suitable modifications for aligning the ITR Forms with the amended provisions of the Income Tax Act, 1961 ('the Act'). Some of the concerns of the taxpayers on the income tax forms for consideration of the Government were raised in the meeting held at Ministry of Finance on October 23, 2017.

Under the direct tax regime, the Madras High Court in the case of Fathima Harris held that the commission paid by the taxpayer to an Indian agent on behalf of the foreign entity is taxable in India and confirmed disallowance under Section 40(a)(i) of the Act. The High Court observed that the taxpayer entered into an agreement with Hong Kong-based company for canvassing of export orders and thus, commission was paid in India to the Indian agent of the foreign entity. The High Court also held that the commission has actually been received in India and there were no details to establish that the Indian entity received the same for onward transmission to Hong Kong. The High Court confirmed that the Tribunal order and concluded that the commission payments received by the Indian agent on behalf of the Hong Kong entity, in India were taxable in India and thus, provisions of Section 40(a)(i) of the Act were applicable.

In its 22nd meeting, the GST Council mainly focused on the compliance issues faced by the small and medium enterprises and the issues relating to fund blockage faced by the exporters. The Government has taken various steps to resolve the concerns of small and medium enterprises pertaining to high compliance burden and working capital issues of the exporters. The suspension of the reverse charge mechanism till March, 2018 for procurements from unregistered persons and the concessions for existing car leases are welcome. The Council has also considered the demands to realign rates of tax of some goods and services.

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.

Dr. Sanjaya Baru

Recent Case laws

I. DIRECT TAX

High Court Decisions

Export commission of non-resident paid through an Indian agent is taxable in India and hence it is liable for disallowance under Section 40(a)(i) of the Act

The taxpayer was engaged in the business of exports of garments. The taxpayer entered into an agreement with Hong Kong based company for canvassing of export orders. During Assessment Year (AY) 2002-03, in terms of the agreement, the taxpayer paid commission to Textile Services Limited, the Indian company which was an agent of the Hong Kong based company and claimed the said commission payment as expenditure in the computation of income. The Assessing Officer (AO) disallowed the claim on the ground of non-compliance of the provisions of Section 40(a)(i) of the Act, i.e., payment to foreign entity made without deducting tax at source. The Commissioner of Income-tax (Appeal) [CIT(A)] and the Tribunal confirmed the disallowance. Aggrieved, the taxpayer filed an appeal before Madras High Court.

The High Court observed that the commission was received in India by an agent of the foreign entity and hence, the CBDT Circular No. 786, dated 7 February 2000 was not applicable to the facts of the present case. The High Court observed that the disallowance was effected in terms of Section 40(a)(i) of the Act relating to a non-resident and not Section 40(a)(ia) relating to resident. The High Court relied on the wordings of Section 195 of the Act. The High Court upheld the tax department's contention that the liability to deduct tax at source was in terms of Section 40(a)(i). However, the tax department's contention was raised before the Tribunal for the first time even though all earlier orders were passed after the insertion of Section 40(a)(ia) of the Act. Thus, the High Court confirmed the Tribunal order and concluded that the commission payments received by the Indian agent on behalf of the Hong Kong entity, in India were taxable in India and thus, provisions of Section 40(a)(i) of the Act were applicable.

Smt. Fathima Harris v. ITO (T.C. (Appeal) No.121 of 2009) – Taxsutra.com

Tribunal Decisions

Payment to a non-resident agent for services utilised outside India is not taxable

The taxpayer was carrying on the business of providing Business Process Outsourcing (BPO) services under the name of A.K. Consulting. The taxpayer entered into a service level agreement with Rebecca Ann Lehew, a non-resident, USA who was an independent consultant for litigation support services outside the USA. During the AY 06-07, the taxpayer earned income by providing services to the overseas client through her proprietorship A.K. Consulting. While computing its income, the taxpayer claimed the commission expenditure. The said commission was paid to a non-resident agent on whom tax was not deducted at source. The taxpayer contended that the provisions of Section 195 of the Act were not applicable as the said non-resident agent was operating from outside the country and no part of income had arisen in

India. Further, it was contended that, the expenditure on export commission to non-resident for services rendered outside India are also not taxable in India. The AO applied the provisions under Section 195 of the Act and made disallowance under Section 40(a)(ia) of the Act. The CIT(A) upheld the order of the AO. Aggrieved, the taxpayer filed an appeal before the Delhi Tribunal.

The Tribunal observed that the taxpayer utilised the services of a non-resident for obtaining business from USA and earned income from the said services. The non-resident was paid by the taxpayer for provision of the said services. The given payment was disallowed under Section 40(a)(ia) of the Act, however the aforesaid payment was not in the nature of commission but charges which were levied by the non-resident for the giving business to the taxpayer. The non-resident firm had no Permanent Establishment (PE) in India under the India-USA tax treaty and the firm was carrying on the business in USA. The non-resident firm was in the business of helping litigation support providers increase the profits through outsourcing to companies outside the USA and thus, payment to the non-resident firm is a business income. The said income was earned by non-resident firm for providing services outside India and therefore Section 195 of the Act was not applicable. The provisions of Section 9(1)(vii)(c) of the Act were also not applicable as the services by the non-resident firm were provided in USA and the said foreign party has no PE in India. The taxpayer provided services to the companies which are utilised in USA and that aforesaid income of non-resident arose out of the same and therefore not liable to tax in India. The provisions of Section 9(l)(vii)(c) were modified by the Finance Act, 2010 but in spite of that they are not applicable to the services which have been utilised outside India. The CBDT Circular No. 23 of July 1969 and No. 786 of February 2000 were withdrawn only in 2010. Thus, as such the provisions were in force during AY 2006-07. The Tribunal concluded that the provisions of Section 153A, Section 40(ia) and sec. 9(i)(vii)(c) were not applicable.

Anita Kohli v. ACIT (ITA No. 6254/DEL/2013) – Taxsutra.com

Financial grant cannot be reduced from actual cost of fixed assets for computing depreciation

During the year 1996-97 and 1997-98, the taxpayer received INR99.7 million from U.S. aid through ICICI under the Program for Acceleration of Commercial Energy Research (PACER). The said amount was credited to the capital reserve in the balance sheet of the company. During the AY 2000-2001, the taxpayer adjusted this amount against the investment in plant and machinery made during the year. However, the cost of plant and machinery was not reduced to this extent while calculating the Written Down Value (WDV) for the purpose of determining the depreciation. The AO treated the grant received by the taxpayer as cost met directly or indirectly by any other person or authority as per the provisions of Section 43 of the Act. On appeal, the CIT(A) upheld AO's order, whereas the Tribunal set aside the assessment and directed the AO to adjudicate afresh the issue in accordance with law. The AO further took the WDV of the plant and machinery for the purpose of calculation of depreciation at the cost of plant and machinery reduced by the amount of grant received by the taxpayer from US aid through ICICI under PACER. The CIT(A) upheld AO's order. Aggrieved, the taxpayer filed an appeal before the Mumbai Tribunal.

Tribunal's decision

The agreement entered into by the taxpayer was for financing the project grant under PACER. What ICICI had financed by way of conditional grant to the taxpayer was the amount received from USA under the project grant agreement for the PACER. On reference to the Explanation 10 to Section 43(1) of the Act it was observed that USA is a sovereign nation and cannot be subject to the central government or state government or any authority established by any law in India. The Tribunal referred to Section 2(31) of the Act wherein a 'person' was defined and observed that USA ought not to be regarded to be a person under the Act. Even on this basis also financial assistance given by ICICI cannot be regarded to be a cost met directly or indirectly by any other person.

The Tribunal upheld the decision of Sasisri Extractions Limited v. ACIT [2010] 122 ITD 428 (Vis) wherein the expression 'met directly or indirectly' was analysed and held that 'only in a case where a subsidy or other grant is given to offset the cost of an asset, such payment/grant would fall within the expression 'met' whereas the subsidy received merely to accelerate the industrial development of the state cannot be considered as payment made specifically to meet a portion of the cost of assets. The Tribunal relying on the Supreme Court decision in the case of Kedarnath Jute Manufacturing Co. Ltd. v. CIT [1971] 82 ITR 363 (SC) held that the condition of financial grant received by the taxpayer could not be reduced from the actual cost of fixed assets for computing the depreciation. Separately, for technical knowhow fees, the Tribunal referred to the agreement observed that since the expenditure incurred was for the improvement of the existing business and not creation of a new business for the taxpayer, it would be revenue expenditure. Thus, the Tribunal held the decision in favour of the taxpayer.

Spectrum Coal & Power Ltd. v. DCIT (ITA No. 1295/Mum/2012) – Taxsutra.com

The reassessment proceedings initiated by the AO are valid. The agreement to sell entered in anticipation of sale of agricultural land was a bogus document to avoid the payment of tax

The taxpayer is engaged in the business of trading in shares and derivatives, and his return of income was reopened under Section 147 of the Act. During AY 2004-05, the taxpayer, received an amount of INR1.75 million from the company where he was a director, which as per the AO was liable to be assessed as 'deemed dividend' under Section 2(22)(e) in the hands of the taxpayer. The taxpayer contended that this amount was received pursuant to a commercial transaction as it was an advance in anticipation of sale of agricultural land in the ordinary course of business, therefore, the same could not be characterised as 'deemed dividend' under Section 2(22)(e) of the Act. The taxpayer contended that as both the parties, viz. the taxpayer and the company were known to each other, therefore, the 'agreement to sell' was not registered with the registrar, as the same was not mandatory. The AO was not convinced and on appeal, the CIT(A) upheld the AO's order. Aggrieved, the taxpayer filed an appeal before the Mumbai Tribunal.

Tribunal's ruling

Whether the reassessment proceedings are valid

The taxpayer questioned the validity of reassessment proceedings by stating that the AO in the absence of any 'fresh material' after order under Section 143(1) had exceeded his jurisdiction by initiating reassessment proceedings on the basis of a mere 'change of opinion'. It was observed that the issuance of an intimation under Section 143(1) of the Act only involves a summary processing of the return of income, therefore, there arises no occasion for formation of an opinion on the part of the AO while processing the return of income. Therefore, a subsequent issuance of a notice under Section 148 of the Act cannot be assailed on the ground that the same is based on a 'change of opinion'.

The Tribunal relied on the Supreme Court decision in the case of ACIT v. Rajesh Jhaveri Stock Brokers (P.) Ltd [2007] 291 ITR 500 (SC), to hold that an intimation under Section 143(1)(a) cannot be held to be an assessment, therefore, no question of 'change of opinion' would arise where the same is thereafter subjected to reassessment under Section 147 of the Act. The Tribunal observed that it is a settled position of law that where the taxpayer after complying with notice issued under Section 148 of the Act seeks a copy of the 'reasons to believe', the AO is obligated to make available a copy of the same before proceeding with the reassessment proceedings. However, in this case, the Tribunal observed that there was nothing available on record from where it could be gathered that any request for obtaining the copy of the reasons to believe was made before the AO. Thus, the Tribunal dismissed taxpayer's appeal challenging the validity of reassessment proceedings.

The taxpayer's bogus document to avoid deemed dividend tax

The Tribunal observed that the unregistered agreement to sell was executed on a 'stamp paper' of the value of INR50 issued in 2000, i.e. more than two years prior to the date of the impugned 'agreement of sell' (i.e. in 2002), and was issued in the name of a third party who was a stranger to the impugned transaction. The Tribunal on a perusal of unregistered agreement to sell observed that it was a bogus document which was prepared with the sole intent to characterise the advance received by the taxpayer, as an advance received in lieu of an agreement to sell in respect of the aforesaid land. The fact that no transaction in respect of the property under consideration was reflected in the 'books of account' of the company and there were only two directors in the company and the taxpayer was a director as well as the chairman of the company, therefore, going by the principal of preponderance of human probabilities there arises serious doubts as regards the authenticity of the document and the transaction.

The Tribunal agreed with CIT(A)'s order and held that, the claim raised by the taxpayer and the contentions raised in context thereto have serious loose ends which clearly militate against the basic principle of preponderance of human probabilities, and rather, as a matter of fact goes to prove that the said claim of the taxpayer is an afterthought. It was guided by an ulterior motive of avoiding assessing of the aforesaid amount as a 'deemed dividend' in the hands of the taxpayer. Thus, the Tribunal dismissed the taxpayer's appeal.

Shri Kapil N. Shah v. ITO (ITA No. 1580/Mum/2013) – Taxsutra.com

Expenditure incurred to remove encumbrances on shares is deductible under Section 48 of the Act while computing capital gains

In this case, the taxpayer is an individual deriving his income from a salary and engaged in the generation of wind mill power. During AY 2011-12, the taxpayer had entered into a sale agreement for sale of shares in Navabharat Power Pvt Ltd (NPPL) with ESSAR Power Ltd. for a consideration of INR 621.7 million involving sale of 5000 shares held by the taxpayer in his personal capacity and 88,08,500 shares held by MEVPL (a company in which the taxpayer was MD). In terms of the said agreement, the taxpayer sold 5000 shares held by him in Navabharat Power Pvt Ltd to Essar Power Ltd for a sale consideration of INR50 crores and declared long term capital gains. While computing the capital gains, the taxpayer claimed deduction of INR 190 million under Section 48(i) as expenditure incurred wholly and exclusively in connection with the transfer of 5000 shares. The amount of INR190 million was paid to remove the encumbrance[1] in the way of the transaction of sale of 5000 shares. The AO denied the deduction. However, the CIT(A) allowed the deduction under Section 48(i) of the Act.

The Tribunal held that in regards to Section 48(i) of the Act, the expression 'in connection with such transfer' is to be seen in contradistinction to the expression 'for the transfer'. Whereas the latter is relatively narrower so as to embrace only such expenditure which is incurred for the purposes of transfer of capital asset, the former is quite wide in its ambit and also encompasses expenditure of any nature which is connected with the transfer of property. Any expenditure which has to be incurred to effectively transfer the property falls within its purview. Not only the expenditure directly connected with or for the immediate purpose of the transfer of capital asset, but, also all expenditure which facilitate the transfer of the capital asset, fall within its scope. It would also include the expenditure incurred to remove the impediments or encumbrances in the way of the instant transfer of capital asset. It implies that, any amount paid by the taxpayer for removing any encumbrance falls under Section 48(i) of the Act.

Although expenditure were incurred to facilitate the transfer, but whole expenditure was not incurred to remove encumbrances which related to transfer of shares held by the taxpayer only but also by MEVPL. Thus, the Tribunal observed that the payment of INR190 million in order to remove encumbrances, related to the total shares held by the taxpayer himself and the company MEVPL. Further, the Tribunal observed that the expenditure has to be apportioned to the shares transferred by the taxpayer and the company MEVPL. The Tribunal observed that the value of shares transferred were not evenly valued and varied highly. i.e. 5000 shares held by the taxpayer were valued at INR 50 crores and MEVPL was holding 88,08,500 shares were valued at INR12.17 crores. Thus, the Tribunal held that the expenditure should be apportioned based on total sale consideration paid by ESSAR Power Ltd. i.e. INR 62.17 crores. Accordingly, the Tribunal held that INR19 crores was to be apportioned between the taxpayer and MEVPL in proportion of INR50 crores and INR12.17 crores, i.e. respective sale considerations. Thus, the Tribunal directed the AO to allow INR15.28 crore under Section 48 of the Act. Thus, the Tribunal partly allowed tax department's appeal.

[1] The defendant i.e. PVP group has filed a suit against the taxpayer in order to stall the sale agreement entered into between MEVPL and ESSAR Power Ltd.

DCIT v. Y. Harish Chandra Prasad (ITA No. 1592/Hyd/2014) – Taxsutra.com

Gains arising on the sale of shop by the taxpayer are taxable as short term capital gains

The taxpayer, an individual was deriving its income from business, other sources and capital gain, filed his return of income for relevant AY on 20 July 2011. The AO denied the benefit of Long Term Capital Gains (LTCG) claimed. The AO treated the LTCG as Short Term Capital Gains (STCG). After deducting the cost of acquisition, the STCG of INR 7,766,743 was calculated and was brought to tax.

Tribunal's decision

- In the return of income, the taxpayer claimed capital gain of INR 8,800,000 on sale of a shop situated in Bandra, Mumbai. The taxpayer, while substantiating the claim of LTCG, furnished the details, and contended that he was a tenant in the said shop vide agreement dated 16 January 1998 under Maneck Gidwani. The taxpayer purchased the said shop vide agreement dated 6 May 2010 from the owner for a consideration of INR 911,000 by registered Agreement. Thus, the taxpayers' tenancy right acquired on 16 January 1998 was converted into ownership right of a lump sum consideration of INR 911,000. The taxpayer sold the said Shop on 12 October 2010 for a consideration of INR 8, 800,000. The contention of taxpayer was rejected and the AO held that the taxpayer acquired the capital asset and was held by him only for five months.

- The CIT(A) upheld the order of the AO. The CIT(A) held that the taxpayer had taken the property in question on a monthly rent vide agreement dated 16 January 1998 from landlord Maneck Gidwani. The taxpayer acquired the said property vide agreement dated 06 May 2010 on payment of the consideration of INR 911,000. On purchase of the property the tenancy right was converted into ownership. The tenancy right was extinguished on 06 May 2010. The taxpayer sold the property on 12 October 2010 for a consideration of INR 8,800,000. The CIT(A) concluded that the taxpayer has not sold the tenancy right in the property, rather the taxpayer become owner of the property on payment of consideration on 6 May 2010. The taxpayer held the asset as an owner of the property only for five months thus gain arises on such sale is STCG.

- None of the decisions2 relied upon by the taxpayer is applicable to the facts of the present case as the ratio decided in all the cases are at variance.

- During the appeal before the Tribunal the taxpayer conceded that the gain could be treated as STCG. Thus, the conclusion of the CIT(A) is based on factual matrix and well as on the legal aspect is correct.

[2] CIT v. Smt. Rama Rani Kalia [2013] 358 ITR 499 (All), Mrs. Tauqeer Fatema Rizvi v. ITO [ITA No. 8862/Mum/2011], Mulya B. Das v. ITO [2014] 40 CCH 0173 (Mum), Ajit M. Pendurkar v. ITO [ITA No. 3225/Mum/2009]

Jayantilal K. Jain v. ITO (ITA No. 1125/Mum/2015 - AY 2011-12)

Notification/Circulars/ Press Releases

Procedure for filing a statement of income from a country or specified territory outside India and foreign tax credit

The Government has issued a Notification No. 9/2017 on 19 September 2017, prescribing procedure for filing statement of income from a country or specified territory outside India and Foreign Tax Credit (FTC).

As per Rule 128(9) of the Income-tax Rules, 1962 (the Rules) the statement in Form 67 and the certificate or the statement specifying the nature of income and the amount of tax deducted shall be required to be furnished for the claim of FTC.

The Notification states that the taxpayers who are required to file a return of income electronically under Section 139(1) of the Act read with Rule 12(3) of the Rules are required to prepare and submit Form 67 online along with the return of income if credit for the amount of any foreign tax paid by the taxpayer in a country or specified territory outside India, by way of deduction or otherwise, in the year in which the income corresponding to such tax has been offered to tax or assessed to tax in India. The procedure for preparation and submission of Form 67 has also been prescribed. Submission of Form 67 shall precede the filing of return of income.

CBDT Notification No. 9/2017, dated 19 September 2017

CBDT clarifies that tax deduction needs to be made in the hands of the legal heir in the case of deceased depositor

Recently, the CBDT has issued a Notification regarding TDS on interest income earned in case of deceased depositors, under the Capital Gain Accounts Scheme 1988. The CBDT has provided the following clarification with respect to cases wherein the depositor is deceased:

- TDS on the income accrued for and up to the period of death of the depositor is required to be deducted against the PAN of the depositor; and

- TDS on income accrued for the period after the death of the depositor is required to be deducted against the PAN of the legal heir.

However, the above would not apply in cases where a declaration is specifically filed for credit of TDS on such interest income in the name of another person.

CBDT Notification No.8/2017 dated 13 September 2017

CBDT Order extending the last date for linking of Aadhaar number to PAN to 31 December 2017

As per Section 139AA of the Act with effect from 1 July 2017, all taxpayers having Aadhar number or enrolment number are required to link it with PAN for filing the income-tax return. Subsequently, the CBDT vide its order dated 31 July 2017 allowed further time till 31 August 2017 to link Aadhar with PAN.

Recently, CBDT has issued an order under Section 119 of the Act modifying its earlier order extending the time limit for linking Aadhar with PAN till 31 December 2017.

CBDT Order [F No. 225/270/2017/ITA.II], dated 31 August 2017

CBDT clarifies that revised guidelines for stay of demand before CIT(A) are prospective in nature

On 21 March 1996, the CBDT had issued Instruction No. 1914 containing guidelines regarding the procedure to be followed for recovery of outstanding demand, including procedure for grant of stay of demand. In February 2016, CBDT issued guidelines (Office Memorandum) revising Instruction No. 1914, stating that when an outstanding demand is disputed before the CIT(A), the AO shall grant stay of demand till disposal of the first appeal on payment of 15 per cent of the disputed demand, unless the case falls in the specified category.

On 31 July 2017, CBDT has issued an Office Memorandum, stating that the standard rate prescribed in the office memorandum is to be revised to 20 per cent of the disputed demand, where the demand is contested before CIT(A). Thus, all references to 15 per cent of the disputed demand in the office memorandum dated 29 February 2016 stands modified to 20 per cent of the disputed demand.

Recently, the CBDT has issued an Office Memorandum clarifying that the modifications laid down in CBDT's Office Memorandum dated 31 July 2017 are prospective in nature and matters already decided as per CBDT's Office Memorandum dated 29 February 2016 before the issue of Office Memorandum dated 31 July 2017 shall not be reviewed merely on the grounds of the modifications laid down in the said Office Memorandum dated 31 July 2017.

CBDT Office Memorandum (F. N0. 404/72/93-1TCC, dated 25 August 2017) – Taxguru.com

OECD releases Updated Guidance on the Implementation of Country by Country Reporting

The Organisation for Economic Co-operation and Development (OECD) and G-20 countries have committed to implement Country by Country (CbC) reporting (BEPS Action Plan 13). In this regard, OECD has been striving to provide guidelines to be referred by countries for their regulations. In continuation of implementation guidelines issued by OECD from time to time3, it has released additional guidance on implementation of CbC reporting dated September 2017, addressing some more issues relating to (a) definition of items and (b) issues relating to the filing obligation for the CbC report.

Highlights of the additional September 2017 guidance

- **Definition of items**
  - **Definition of revenues - When financial statements are used as the source of the data to complete the CbC template, which items shown in the financial statements should be reported as Revenues in Table 1?**

[3] KPMG Flash news dated 31 July 2017 - OECD releases Updated Guidance on the Implementation of Country by Country Reporting on the July 2017 Guidance

Clarification - All revenue, gains, income, or other inflows shown in the income statement or profit and loss statements prepared in accordance with the applicable accounting rules should be reported as Revenues in Table 1.

For example, if the income statement shows sales revenue, net capital gains from sales of assets, unrealized gains, interest received, and extraordinary income, those items should be aggregated and reported as Revenues in Table 1. These income items shown on the income statement need not be adjusted from a net amount.

However items reflected in net assets and the equity section of the balance sheet e.g. comprehensive income/earnings, revaluations, and/or unrealised gains should not be reported as Revenues in Table 1.

Our comments: Unrealised gains from valuing investments at fair value directly routed through reserves in the Balance Sheet will not be included in Revenue in Table 1.

It is pertinent to note that the Guidance has clarified that the member countries of the Inclusive Framework[4] are expected to implement this guidance at the earliest, taking into account their specific domestic circumstances.

Acknowledging that Multinational Enterprise (MNE) groups may need more time to make the necessary adjustments to comply, the Guidance has suggested jurisdictions to allow some flexibility during the short transitional phase (viz. fiscal starting in 2016), stating that the clarification ought to be provided in Table 3 of the CbC report.

- **Amount of Income Tax Accrued and Income Tax Paid - Where the income tax for a fiscal year has been paid in advance (e.g., preliminary tax assessments based on an estimate of the year's corporate income tax), should the amount reported in the "Income Tax Accrued-Current Year" column be linked to the amount reported in the "Income Tax Paid (on Cash Basis)" column of Table 1?**

Clarification on Income Tax Accrued-Current Year: It is the amount of accrued current tax expense recorded on taxable profits or losses for the Reporting Fiscal Year of all Constituent Entities resident for tax purposes in the relevant tax jurisdiction irrespective of whether or not the tax has been paid e.g. based on a preliminary tax assessment.

Our comments: Tax provisions are based on the current year's estimated taxable profits.

Clarification on Income Tax Paid (on Cash Basis): It is the amount of the taxes actually paid during the Reporting Fiscal Year, which should thus include not only advanced tax payments fulfilling the relevant fiscal year's tax obligation but also payments fulfilling the previous year(s)' tax obligation (e.g. payment of the unpaid balance of corporate income tax accrued in relation to the previous year(s), including payments

[4] Link - Members of inclusive framework include a group of 102 countries, updated as on 6 July 2017

related to reassessments of previous years), regardless of whether those taxes have been paid under protest.

Our comments: : Includes Advance Taxes, TDS and taxes paid as a result, Notice of demand raised by the Assessing officer based on Assessment orders or Appellate orders (Tax Demand).

The amount of Income Tax Accrued-Current Year and Income Tax Paid (on Cash Basis) should be reported independently.

Where taxes have been paid and subsequently refunded, how should the tax refund be reported for the purposes of Table 1?

In general, a refund of income tax should be reported in Income Tax Paid (on Cash Basis) in the reporting fiscal year in which the refund is received. An exception to this may be permitted where the refund is treated as revenue of the MNE group under the applicable accounting standard or in the source of data used to complete Table 1. Where this is the case, taxpayers should provide the following statement in Table 3:

'Tax refunds are reported in Revenues and not in Income Tax Paid (on Cash Basis)'.

- **Issues relating to the filing obligation for the CbC report**

  - **Short accounting period - Is transitional relief available for MNE Groups with a short accounting period that starts on or after 1 January 2016 and that ends before 31 December 2016?**

Clarification - As a transitional measure, jurisdictions may allow the Reporting Entity of an MNE Group with a short accounting period beginning on or after 1 January 2016 and ending before 31 December 2016 to file the required CbC report in accordance with the same timelines as for MNE Groups with a fiscal year ending on 31 December 2016. The date by which the CbC report is to be exchanged would be similarly extended. This transitional relief would not frustrate the policy intention of the Action 13 minimum standard.

BEPS Action 13: Guidance on the Implementation of CbC reporting dated September 2017

II. CENTRAL EXCISE

Decisions

When credit was reversed prior to utilisation, interest cannot be demanded

In the said case, the appeal was filed against the demand of interest on credit reversed by the appellant without utilising the same.

The taxpayer relied on the decision of the High Court in the case of Bill Forge Pvt. Ltd. 2012 (279) ELT 209 (Kar.), 2011-TIOL-799-HC-KAR-CX, wherein it was held that, where the credit was reversed before utilising, then interest cannot be demanded.

The Department had relied on the decision of the Supreme Court in case of Indswift Laboratories Ltd. 2011(265) ELT 3, 2011-TIOL -SC-CX to assert that the interest can be demanded even in the circumstances when the credit has not been utilized.

In this background, the CESTAT had held that, where the credit was reversed prior to utilization thereof, interest cannot be demanded. In the instant case, it was seen that the show-cause notice confirmed that the taxpayer had not utilized the said credit. In view of the above, the demand of interest on the credit reversed before utilizing the same was set aside.

HYT Engineering Company Pvt Ltd. [2017-TIOL-3344-CESTAT-MUM]

CENVAT credit availed on basic excise duty can be utilized towards discharging liability of Education Cess and Secondary & Higher Education Cess

The appellant had utilized the CENVAT credit availed on Basic Excise Duty (BED) towards Education Cess (EC) and Secondary & Higher Education Cess (SEC).

Alleging that utilization of said credit was irregular and contrary to the provision of Rule 3 of the Cenvat Credit Rules, 2004 (CCR), a show cause notice was issued for recovery of the said credit along with interest and penalty. On adjudication, the demand was confirmed with interest and penalty under Rule 15(1) of the CCR. Aggrieved by the said order the taxpayer filed appeal before the Commissioner (Appeals), who in turn, rejected the appeal.

The taxpayer filed an appeal against the said rejection, wherein it was submitted that, the issue of utilization of BED in discharging liability of EC and SEC was no more res integra and was covered by the decision of the Gujarat High Court in the case of C.C.E. & S.Tax, Vapi vs. Madura Industries Textiles - 2012-TIOL-1094-HC-AHM-CX.

The Department submitted that, since the appellant had availed area based exemption, the CENVAT credit availed on BED cannot be utilized in discharging their liability towards EC and SEC.

Against this background, the CESTAT had held that, the issue was no more res integra being settled by the judgment of Hon'ble Gujarat High Court in the case of Madura Industries Textiles (supra), wherein it was observed that CENVAT credit availed on BED can be utilized towards discharging liability of EC and SEC.

Electrotherm India Ltd [2017-TIOL-3174-CESTAT-AHM]

Goods cleared for export under Bond destroyed before the same could be exported would be eligible for remission of duty

The taxpayer was in appeal against denial of remission of duty on goods destroyed in the warehouse after the same were cleared from the factory for the purpose of export.

The appellant had pointed out that identical issue had been decided by the Larger Bench of the Tribunal in the case of Honest Bio-Vet Pvt. Ltd. vs. CCE, Ahmedabad-I - 2014 (310) ELT 526 (Tri.-LB) 2014-TIOL-2286-CESTAT-AHM-LB. In the said order, following has been observed:-

"14. We are of the view that the goods cleared for export under Bond which were destroyed before the same could be exported, can be treated as having been destroyed before removal only. This would be the fair interpretation of the Rule 21 of the Central Excise Rules, 2002. Thus, primary condition of eligibility of Remission of duty on the destroyed goods is fulfilled as required u/r 21 of Central Excise Rules, 2002. Appellant is eligible for the Remission of duty in respect of goods for export under Bond which were destroyed before the same could be exported."

In view of above judgment, the CESTAT had held that, the said issue was squarely covered by the decision of the Larger Bench of the Tribunal. Consequently, the appeal was allowed and the taxpayer was allowed remission of duty.

Metropolitan Eximchem Ltd [2017-TIOL-CESTAT-Mum]

III. CUSTOMS

Notifications/Circulars/Press Release

Implementing Electronic Sealing for Containers by exporters under self-sealing procedure prescribed

The Board has approved the procedure which shall be adhered by the exporters opting for self-sealing. The new self-sealing procedure shall come into effect from 1st October 2017. Till then the existing procedure shall continue.

The procedure, standard specification of the seal, application, record keeping and data retrieval system are clarified by the Board. Officer of the rank of Superintendent shall be responsible for coordination of the arrangements for installation of reader-scanners, whether fixed or hand-held for the self-sealing procedure.

Circular 36/2017 – Customs dated 28 August 2017

Clarification on difficulties related to recent amendments in Customs Act, 1962

Importers were not been able to file Bill of Entry (BOE) for clearance of imported goods within the stipulated time period because of certain technical problems related to ICEGATE connectivity, server, etc. Further, there were instances when, even after filing a BOE within the prescribed time period, it was subjected to the payment of charges for late filing as its number is not generated within the free period.

The Board is of the view that importer should not be penalised for delay happening due to any system related fault. In this regard, section 46 of the Customs Act, 1962 provides that payment of charges for late presentation of the BOE is subject to existence of sufficient cause to the satisfaction of proper officer.

The proper officer in this regard is Additional or Joint Commissioner of Customs (AC/JC), as provided in Notification No. 40/2012-Cus (NT) dated 2 May 2012. The jurisdictional AC/JC are advised to judiciously exercise the power conferred on them to ensure that the trade and stakeholders particularly the diplomatic community are not put to undue hardship and necessary relief, as applicable, may be provided to the importers in bona-fide cases.

Further, the jurisdictional Chief Commissioners were requested to identify cases where reasons for late filing of BOE are not attributable to the importers and issue suitable standing orders so that proper officers can exercise powers in the interest of ease of doing business.

Instruction 12/2017 – Customs dated 31 August 2017

Foreign Trade Policy - Notice

Export of Red Sanders wood and Sandalwood and import of Sandalwood from Special Economic Zone (SEZ)

Proforma for submission of application by SEZ units with respective jurisdictional authority of SEZ for obtaining 'No Objection Certificate' of Ministry of Environment, Forests & Climate Change through Directorate General of Foreign Trade (DGFT) has been notified.

Public Notice 21/2015-2020 dated 31 August 2017

Establishing, 'Contact@DGFT' service as single point contact for all foreign trade related issues

'Contact@DGFT' system has been activated at the Directorate General of Foreign Trade (DGFT) website (www.dgft.gov.in) as a single point contact for resolving all foreign trade related issues.

Exporters/Importers are requested for using this facility for resolution of foreign trade related issues either directly concerning DGFT (headquarters or regional offices) or concerning other agencies of the Central or State Governments.

A reference number will be issued for each request so that the status of action taken can be tracked.

Trade Notice 17/2015-2020 dated 6 September 2017

IV. SERVICE TAX

Decisions

Classification of services has to be made on the basis of essential character of the services rendered

The taxpayer was a service provider and registered with the Service Tax Department under the taxable category of 'Goods Transport Agency'. The taxpayer carries on the activity of transportation of commercial and household goods. In case of transportation of household goods the taxpayer carry on certain ancillary activities such as packing/ unpacking/ loading as per the requirement of the customers.

The Department alleged that the above services provided by the taxpayer for loading, unloading, together with shifting/transportation of household goods falls under 'Cargo Handling service' instead of 'Transportation of Goods by Road Service' on the grounds that the essential characteristic of service is to provide safety of the goods by adopting means of loading, unloading, packing and unpacking.

In this context, the CESTAT held that pursuant to section 65A(2)(b) in case of composite services consisting of combination of different services which cannot be classified in specified manner, the classification has to be made on the basis of their essential character. As per Section 65(50b) of the Finance Act, 1994 a person qualifies to be GTA if he issues a consignment note in relation to transportation of goods.

Also, the contractual relationship between the taxpayer and its customers are primarily confined to transportation of household goods and the customers never approach the taxpayer only for loading, unloading, packing or unpacking of goods. Thus, the modus operandi adopted by the taxpayer transpires that the principal aim and objective is for transportation of goods and providing of other services is incidental/ancillary to the main purpose of transportation. Thus, in the given case, the services provided by the taxpayer merits classification under the GTA Service.

DRS Logistics Pvt. Ltd. v. CST [2017-TIOL-3237-CESTAT-DEL]

Service qualifies for export of service if the recipient of the service is located outside India

Verizon India (Taxpayer) is engaged in providing connectivity services to its parent company abroad i.e. Verizon US. Verizon US is providing telecommunication services to its customers globally by utilizing the services of taxpayer. The taxpayer raises invoices to Verizon US for the services. Taxpayer is claiming a refund of said services on the grounds that the services qualify as 'export of services'.

The Revenue contended that as the final users of the said services are the subscribers located in India, place of provision of such services shall be in India, therefore rejected the refund application for the period from January 2011 to September 2014.

The High Court held that as per the export of service rules as amended on 27 February 2010 and further replaced by rule 6A of service tax rules 1994 on 1 July 2012, the service qualifies for export of service if the recipient of service is located outside India which in the current case is the location of Verizon US. It is the location of the service recipient that is to be seen and not the location of users or the service consumption. Accordingly, services to be claimed as 'export' since the POPOS lies outside India and all the conditions specified under Rule 6A are satisfied.

Verizon communication India Pvt Ltd v. A.C, Service tax [2017-TIOL-1863-HC-DEL-ST]

V. GST Notifications/Circulars/Press Releases

- Rule-138, 138A to 138D, the E-way rules notified along with e-way bill forms applicable for movement of goods where consignment value exceeding rupees fifty thousand.

  Notification No. 27/2017 – Central Tax New Delhi, 30 August 2017

- Waives the late fees payable for late filing of return in Form-GSTR-3B for the month of July-17.

  Notification No. 28/2017 – Central Tax New Delhi, 01 September 2017

- On the recommendations of the Council, the time period for filing GSTR

1, GSTR 2 and GSTR 3 has been extended for the month of July as per table given below:

GSTR-1	Having turnover of more than one hundred crore rupees	Upto 3rd October, 2017
	Having turnover of upto one hundred crore rupees	Upto 10th October, 2017
GSTR-2	All	Upto 31st October, 2017
GSTR-3	All	Upto 10th November, 2017

Notification No. 30/2017 – Central Tax New Delhi, 11 September 2017

- Extended time limit for furnishing return in form GSTR-6 for the month of July-17, upto 13th October, 2017. The extension of time limit for GSTR-6, for the month of Aug-17 shall be notified subsequently.

Notification No. 31/2017 – Central Tax New Delhi, 11 September 2017

- The Commissioner (GST), on the recommendations of the Council, revision under rule-120A in the declaration made in FORM GST TRAN-1 can be made till 31st October 2017, provided original FORM GST TRAN-1 filed within due date. i.e. 28 September 2017.

Order No. 02/2017-GST, New Delhi, 18 September, 2017

- Notified the job workers engaged in making inter-State supply of services to a registered person and the persons making inter-State taxable supplies of handicraft goods as the category of persons exempted from obtaining registration under the IGST Act subject to provisos.

Notification No. 7 & 8 /2017 – Integrated Tax, New Delhi, the 14 September, 2017

- TDS Section 51(1) made applicable from 18 September 2017 and person responsible to deduct tax under clause (d) of Section 51(1) notified.

Notification No. 33/2017 – Central Tax New Delhi, 15 September 2017

- August-17 to December-17 specified as months for which return in form-GSRT-3B to be filed by 20th of subsequent month.

Notification No. 35/2017 – Central Tax New Delhi, 15 September 2017

- Extended facility of Letter of Undertaking to all registered persons who intend to export of goods/services without payment of IGST (including supply to SEZ developer or unit).

Notification No. 37/2017 – Central Tax New Delhi, 4 October 2017

- The time period for filing GSTR 4, GSTR 5A and GSTR 3 has been extended as per table given below:-

Form	**Applicable to**	**Period**	**Extended date**
GSTR-4	composition supplier	For the quarter July to September-2017	15th November 2017
GST R-	person supplying online informat	July,	20th November 2017

5A	ion and database access or retrieval services	August & September, 2017	
GST R-6	input service distributor		15th November 2017

Notification No. 41, 42 & 43/2017 – Central Tax New Delhi, 13 October 2017

- Aggregate turnover limit for person opting to pay tax under composition scheme has been enhanced to one crore rupees for states other than northeastern states and seventy five lakh rupees for northeastern states.

Notification No. 46/2017 – Central Tax New Delhi, 13 October 2017

- Exempts supplies of goods or services received by a registered person from unregistered person till 31st March 2018.

Notification No. 38/2017 – Central Tax (Rate) New Delhi, 13 October 2017

- Exempts supplies of taxable goods by a registered supplier to a recipient for export, in excess of the amount calculated at the rate of 0.1% subject to fulfillment of conditions specified in the Notification.

Notification No. 40/2017 – Central Tax (Rate) & 41/2017 – Integrated Tax (Rate) New Delhi, 23 October 2017

- The Commissioner (GST), on the recommendations of the Council, extended time limit for filing declaration in FORM GST TRAN-1 till 31st October 2017

Order No. 03/2017-GST, New Delhi, 21 September, 2017

- Service Provider having turnover of less than INR 20 lakhs is exempted from mandatory registration for provision of inter-state supply of services.

Notification No 10/2017-Integrated Tax

- The registered person (recipient) has been exempted from payment of IGST under reverse charge mechanism in case of interstate supply of goods or services or both by an unregistered supplier.

Notification No 32/2017-Integrated Tax – Rate