March 2013

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

Foreword

I am pleased to enclose the March, 2013 issue of FICCI's Tax Updates. This contains recent case laws, circulars and notifications pertaining to direct and indirect taxes.

Union Budget 2013-14 was presented by the Hon'ble Finance Minister on February 28th, 2013. With the current levels of fiscal and current account deficits, inflation and external situation persisting to be challenging, the Budget provides some hope for the Indian economy by focusing on promoting investments. On taxation, the Finance Minister has in his speech referred to the need for clarity in tax laws, a stable tax regime, a non-adversarial tax administration, a fair mechanism for dispute resolution, and an independent judiciary.

Ms. Naina Lal Kidwai, President FICCI, in her statement in the Interactive Session of the apex chambers with the Finance Minister following the Budget, inter-alia welcomed the move to provide investment allowance and requested for lowering the eligibility limit. FICCI also organized an interactive session of its Executive Committee with Mr. Sumit Bose, Revenue Secretary, and Chairpersons of CBDT & CBEC. It provided an excellent opportunity to the members to discuss the Budget proposals and to provide suggestions for modification of some of the proposals.

On the taxation regime, the Andhra Pradesh High Court, in the case of Sanofi Pasteur Holding SA, held, that a special purpose investment company is an independent corporate entity; it has a commercial substance and purpose (*Foreign Direct Investment in Indian company*). Further, it is not required to lift the corporate veil of such investment company and tax the capital gains in the hands of shareholders of the investment company. The Capital gains arising from transfer of shares of a company incorporated under the laws of France are taxable in France under the India-France tax treaty. The retrospective amendments with respect to indirect transfer made by the Finance Act, 2012 have no impact on interpretation of tax treaty.

Gujarat High Court has recently decided on the eligibility of CENVAT credit in respect of various services (such as Courier services, testing services, clearing and

forwarding services, repair and maintenance services) used by a manufacturer as ‘input services”.

We do 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

Capital gains arising from transfer of shares of a French company which in turn held a controlling stake in an Indian operating company is taxable in France and not in India

ShanH, a company incorporated under the laws of France, was held entirely by Murieux Alliance (MA) and Groupe Industrial Marcel Dassault (GIMD), which were also incorporated in France. ShanH holds 82.40 percent of the share capital of Shantha Biotechnics Ltd (SBL), an Indian company. During the year under consideration, MA and GIMD sold their entire shareholding in ShanH to Sanofi Paster Holding (Sanofi), another French company.

The Indian revenue authorities passed an order under Section 201(1)/(1A) of the Act holding Sanofi as an 'assessee-in-default' for not withholding taxes on payments made by it to MA and GIMD for acquiring the shares in ShanH.

Thereafter, MA and GIMD made an application to the AAR to determine the taxability, if any, of the transaction in India. The AAR ruled that the capital gains arising from the sale of shares in ShanH by MA and GIMD to Sanofi was taxable in India in terms of Article 14(5) of the India-France Tax Treaty. Subsequently, all the parties, i.e., Sanofi, MA and GIMD filed writ petitions before the Andhra Pradesh High Court.

Based on the facts of the case, the Hon'ble High Court, inter alia, observed and held as follows:

- ShanH is an independent corporate entity of commercial substance, distinct from MA and GIMD. It was incorporated to serve as an investment vehicle for making foreign direct investment in India by way of participation in SBL;
- On an analysis of the documents and surrounding circumstances, ShanH is not a corporate entity brought into existence and pursued for avoiding capital gains tax liability;
- There was no case to lift the corporate veil of ShanH, as the transaction was clearly one of transfer of shares of ShanH and not of transfer of shares of SBL;
- The transaction was for the sale of shares in ShanH held by the MA and GIMD to Sanofi which falls within the ambit of Article 14(5) of the India-France tax treaty and does not constitute a transfer of shares or of

controlling/management or underlying assets of SBL;

- The consequent tax on the capital gain accrued to MA and GIMD was exclusively allocated to France under Article 14(5) of the Tax Treaty, and there was no taxability in India;
- The retrospective amendments made by the Finance Act, 2012, with respect to indirect transfers, would not override the provisions of the tax treaties;
- Since the capital gain arising to MA and GIMD is not taxable in India, the corresponding tax withholding obligation does not arise; and
- Therefore, Sanofi cannot be treated as an assessee-in-default under the provisions of the Act.

Sanofi Pasteur Holding SA v. The Department of Revenue [W P No. 14212 of 2010 and 3339 & 3358 of 2012]

Lower withholding certificate furnished by the deductee is applicable to all the units of the deductor, even if the units of the deductor have different TAN

The taxpayer was liable to withhold tax at the rate prescribed under Section 194C of the Act on payments to the contractors, executing work for the taxpayer. The contractors furnished lower withholding certificates under Section 197(2) of the Act addressing the same to the taxpayer's Mumbai office. Subsequently, the taxpayer withheld the tax at the rates specified in the certificates. The AO held that there is a short deduction of tax since the taxpayer's Mumbai office has a separate TAN than the taxpayer's Bahadurgarh office. It implies that the taxpayer's Bahadurgarh office and Mumbai office are separate entities for the purpose of deduction of tax. Consequently, the AO passed an order of raising demand against the taxpayer for violations of Section 194C of the Act.

The Bombay High Court observed that Section 197 of the Act contemplates the issuance of a certificate to the person responsible for paying the income for deduction of tax at the rate lower than the rate prescribed under Section 194C of the Act. The Income Tax Rules indicate that the certificate shall be directed to the person responsible for deducting the tax under advice to the person who made an application for the issue of such a certificate. In terms of the above provisions, the AO of the contractors have furnished a certificate under Section 197 of the Act to the Principal Officer of the taxpayer's Mumbai office. This certificate mandates the persons to whom such a certificate is issued to deduct tax at a rate lower than that prescribed under Section 194C of the Act. Merely because the taxpayer has a separate TAN for Bahadurgarh unit and for Mumbai unit will not render the certificate issued under Section 197(2) redundant. Such a certificate is to be issued to the Principal Officer of the Company as the person responsible for deduction of tax and not to any other person or unit of the taxpayer. Therefore, the High Court held that the order passed by the Commissioner of Income-tax (Appeal) [CIT (A)] and affirmed by the Tribunal cannot be said to

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be suffering from any illegality in any manner.

CIT v. Parle Biscuits Pvt Ltd [ITA No. 207 of 2012 (O&M)]

Payment for corporate membership of Golf Club for a period of 5 years allowed as a deductible expenditure under Section 37 of the Act

The taxpayer obtained corporate membership of Golf Club, Chandigarh on payment of INR 0.6 million. The taxpayer had also paid an amount of INR 16,945 towards services and facilities used during the year. The AO disallowed the expenses on the ground that, such expenses were personal expenses of the Managing Director and other employees and such expenses were also capital in nature and hence, not allowed as deduction.

The Punjab & Haryana High Court had referred the question of law to the Larger Bench in view of the doubt expressed about the correctness of the view of the division bench in an earlier ruling in CIT v. Majestic Auto Ltd. [ITA No. 448 of 2007]. In Majestic Auto Ltd., the division bench of Delhi High Court had dissented from the Bombay High Court ruling in Otis Elevator Company (India) Ltd. [1992] 195 ITR 682 (Bom) and agreed with the judgment of Kerala High Court in Framatone Connector OEN Limited v. DCIT [2006] 294 ITR 559 (Ker). The Full Bench of Punjab & Haryana High Court held that the payment for corporate membership of Golf Club for a period of 5 years is allowed as a deductible expenditure under Section 37 of the Act. Expenditure was not capital in nature, as it did not bring into existence an asset or advantage for enduring benefit. It also overruled a division bench ruling in Majestic Auto Ltd. for incorrectly interpreting 'Capital Expenditure'.

CIT v. Groz Beckert Asia Ltd. (ITA No. 366 of 2008 dated 24 January 2013)

Renovation expenditure for the company provided accommodation not separately taxable as a perquisite in the hands of employee occupying that accommodation

The Delhi High Court has upheld the claim made by the taxpayer that the renovation expenditure borne by his employer in respect of the accommodation provided to him during his employment in India, would not be taxable separately as a perquisite, when the employer had already taxed the value of the rent-free accommodation as prescribed in the relevant provisions of the law.

Scott R Bayman v. CIT [ITA No 285/2003]

Tribunal Decisions

Royalty paid by a non-resident to another non-resident for licensing of patents is not taxable in India

The taxpayer, a company incorporated in USA, is engaged in the design, development and licensing of products and services based on CDMA technology. It had developed key patents in this respect. The taxpayer licensed its patents to Original Equipment Manufacturers (OEMs) who were situated outside India and are not residents of India. The OEMs used the patents to manufacture the products

outside India, for which a royalty was payable by the OEMs to the taxpayer.

The products manufactured by the OEMs outside India were also purchased by certain Indian telecom operators, who in turn sold the products to their customers in India.

The Assessing Officer (AO) held that the royalty paid by the OEMs to the taxpayer for licensing of patents to manufacture CDMA technology enabled handsets was taxable in India under section 9(1)(vi)(c) of the Act and under Article 12(7)(b) of the India-USA tax treaty.

The issue for consideration before the Delhi Tribunal was, inter alia, whether the royalty income earned by the taxpayer from OEMs is taxable in India as royalty under section 9(1)(vi)(c) of the Act and Article 12(7)(b) of the Tax Treaty.

Based on the facts of the case, the Tribunal, inter alia, observed and held as follows:

- The burden is on the tax department to prove that the royalty is taxable under section 9(1)(vi)(c) of the Act;

- The license to manufacture the products by using the patented intellectual property of the taxpayer has not been used in India as the products were manufactured outside India;

- The fact that such products were sold in India cannot be a basis to contend that the OEMs carried on business in India;

- The OEMs have not carried on business in India and the OEMs cannot be said to have used the patents for the purpose of such business in India;

- The source of the royalty income is where the patent is exploited, i.e., in the instant case, where the manufacturing activity takes place, which is outside India;

- The Indian telecom operators would not constitute a source of income for the OEMs in India; and

- Therefore, the royalty paid to the taxpayer by the OEMs cannot be brought to tax under section 9(1)(vi)(c) of the Act.

Qualcomn Incorporated v. ADIT [2013] 30 taxmann.com 30 (Del)

Tax demand cannot be recovered where prima facie credit for TDS is pending

The taxpayer had filed for a stay application before the Tribunal. While the original outstanding demand was INR 188.8 million, the same was rectified by the AO pursuant to taxpayer's rectification application under Section 154 of the Act and the outstanding demand was revised to INR 75.5 million. In the rectification application, the taxpayer had also requested a grant of unallowed TDS credit of INR 85.7 million; however, the same was denied by stating that 'with regards to TDS claim of the taxpayer, same is allowed as per matching available in the system'. In connection with grant of stay

not against the revised demand of INR 75.5 million, the lower authorities directed the taxpayer to deposit INR 25 million in three installments, of which INR 5 million was already deposited as per the direction of the AO before the case came up for hearing before the Tribunal. The taxpayer was thus requesting a stay of demand of INR 70.5 million before the Tribunal.

The Mumbai Tribunal observed that the AO had not denied the fact that the taxpayer had unadjusted TDS credit of INR 85.7 million in his rectification order. Merely because the Department's system did indicate the amount of the TDS refund, the taxpayer could not be compelled to deposit the amount once again. It is for the Department to check the error in its system or point out a fallacy in the taxpayer's claim and the taxpayer cannot be penalised for no fault committed by it. Prima facie, it appears that the taxpayer had an unallowed TDS credit of INR 85.7 million, which was higher than the outstanding demand and thus could not be pressed to deposit a further sum of INR 20 million as directed by the AO. Accordingly, the Tribunal granted a stay of demand for the remaining amount of INR 70.5 million till the disposal of appeal or 180 days, whichever is earlier. It further mentioned that the Department was at liberty to adjust the outstanding demand by allowing credit as per the pending TDS certificates.

3i Infotech Ltd. v. DCIT (S.A. No. 07/Mum/2013 dated 01 February 2013)

Taxpayer entitled to interest under Section 244A on TDS refund wherein TDS was not deposited voluntarily but post rejection of Section 195(2) application by AO and CBDT Circular No 7 dated 23 October 2007 not applicable in such cases

The taxpayer's application under Section 195(2) of the Act for nil deduction of tax on payments to be made on account of live matches to Nimbus Sports International Pte. Ltd. was rejected by the AO and was directed to deduct tax at source at the rate of 11.72 percent (including surcharge). On appeal, the CIT(A) held that no TDS was applicable on the above payments. Pursuant to the above, the AO issued a refund of INR 26.5 million without allowing interest under Section 244A. The taxpayer thus filed a rectification application under Section 154 of the Act, demanding interest on the amount of refund from the date of deposit of such TDS till the date of grant of refund. The AO rejected the same by stating that there was no provision in the Act for allowing interest on the TDS deducted. The CIT(A) relying on CBDT Circular No 7 dated October 23, 2007 held that the amount of TDS cannot be considered as tax, and in view of that no interest under section 244A is admissible in accordance with the Circular. It further opined that the taxpayer could not show whether the TDS was deposited voluntarily or under protest when the order under Section 195(2) was passed.

The Mumbai Tribunal held that the taxpayer was entitled to interest under Section 244A in respect of excess TDS directed to be deposited by the AO vide order under Section 195(2) of the Act and directed that such interest was payable from the date of deposit of TDS upto the date of issue of refund. It observed that the reliance placed by CIT(A) on CBDT Circular, wherein the

claim of direct refund was considered by the CBDT was not correct since, in the present case, it was not a direct refund claim placing reliance on the Board Circular, but it was granted consequent to the order of the CIT(A). It held that in a case where a taxpayer voluntarily deducted tax and claimed a refund directly, a grant of interest under section 244A may not arise and the Board Circulars on this issue are applicable, whereas in a case where AO demand the tax / interest consequent to an order under Section 195/201 or 201A of the Act, and the refund arose consequent to the orders of the CIT (A)/ITAT, then interest under section 244A has to be granted. In the present case, the taxpayer was found entitled to a refund in accordance with the provisions of the Act and section 244A provides for payment of interest on the amount of refund which becomes due to taxpayer under the Act.

Neo Sports Broadcast Pvt. Ltd. v. DDIT (ITA No. 7647/Mum/2010 dated 30/01/2013)

Payments made for carrying out tests for the purpose of certification does not amount to 'FTS' under the Act

The taxpayer was required to make payments to Pehla Testing Laboratory (PTL) (accredited by National Accreditation Board for Testing & Calibration Laboratories, Germany) for carrying out type tests of the circuit breakers manufactured by it in order to establish that the design and the product meet the requirement of the International Standards. This was a standard service provided by the Laboratory, which is done automatically by machines. For the purpose of making remittance to PTL, the taxpayer moved an application under Section 195(2) of the Act, contending that payment made to PTL was not liable to tax in India. The AO and CIT(A) rejected the contentions of taxpayer on the ground that the services provided by PTL are highly technical in nature and held that they are taxable as FTS as per India-Germany tax treaty as well as under Section 9(1)(vii) of the Act.

The Mumbai Tribunal applying the rule of noscitur a sociis held that as the word 'technical' as appearing in Explanation 2 is preceded by the word 'managerial' and succeeded by the word 'consultancy', it cannot be read in isolation and takes colour from the word 'managerial and consultancy'. As managerial services and consultancy services has to be given by human only and not by any means or equipment, the word 'technical' has to be construed in the same sense involving direct human involvement and thus a service rendered without human intervention could not be classified as FTS under the Act. It held that if any technology or machine developed by human and put to operation automatically, wherein it operates without any much human interface or intervention, then the usage of such technology cannot per se be held as rendering of 'technical services' by human skills. It is obvious that in such a situation some human involvement could be there, but it is not a constant endeavor of the human in the process. Merely because certificates have been provided by the humans after a test is carried out in a laboratory automatically by the machines, it cannot be held that services have been provided through the human skills. Accordingly, it was held that the payments made for carrying out tests for the purpose

of certification does not amount to FTS in terms of Section 9(1)(vii) under the Act.

Siemens Ltd. v. CIT (A) [2013] 30 taxmann.com 200 (Mum)

Interest paid on borrowed funds for acquiring controlling interest in a company has been allowed as a deduction since the dividend income was taxable

The taxpayer had taken loans from Kothari Metals & Alloys amounting to INR 4.61 million and these funds were invested in Kambare Chemicals (I) Pvt. Ltd. (the company) where the taxpayer was one of the Directors. The taxpayer claimed interest payment against the interest income and dividend income under Section 57(iii) of the Act. The AO observed that no dividend was earned from the company and the taxpayer had acquired the shares with the intention to acquire a controlling interest. Treating it as a colorable device to reduce tax liability, the AO disallowed the interest deduction claim.

The Mumbai Tribunal relying on the Bombay High Court judgment in the case of Srishti Securities Pvt. Ltd. [(2010) 321 ITR 498 (Bom.)] held that the object of the loan was irrelevant and the interest which was disallowed to the extent of investment would have to be allowed. It observed that the decisions relied in the case of Srishti Securities Pvt Ltd were applicable to the facts of the present case, since in those cases also, the loan was taken to acquire a controlling interest in the company. The contrary Bombay High Court decision in the case of CIT v. Amitaben R. Shah [1999] 238 ITR 777 (Bom) concluded that when two possible views are there, then, the view beneficial to the taxpayer has to be considered. The Tribunal further relied on the decision of the Supreme Court in the case of Vodafone International Holdings B.V [(2012) 238 ITR 777 (Bom)] where it was held that the controlling interest forms an inalienable part of the share itself and it cannot be traded separately unless otherwise provided by the statute. Thus, it was held that since the interest was paid on borrowed funds for acquiring the shares of a company, and the dividend income was taxable during the year under consideration, the interest was allowable as deduction under Section 57(iii) or under Section 36(1) (iii) of the Act.

Pistabai Rikhabchand Kothari v. ITO [ITA No. 4649/Mum/2008]

AO can’t lift the corporate veil to apply Section 50C provisions to share sale

The taxpayer, along with other shareholders of the Company, sold the shares held in the Company. The Company owned flats in a building at Mumbai. The taxpayer offered capital gain on the sale of shares. The AO held that through the sale of shares in the Company of all the shareholders, the taxpayer had effectively transferred the immovable property at a lesser consideration, and therefore, provisions of Section 50C of the Act are applicable. The AO also considered it to be a fit case for piercing of the corporate veil. The AO taxed the capital gains, being the taxpayer’s share in the capital gain computed applying the provisions of Section 50C on the basis of the entire property.

The Tribunal held that Section 50C applies only to the transfer of a capital asset, being land or building or both, 'assessed' by any authority of a State Government for stamp duty purposes. The expression 'transfer' has to be a direct transfer as defined under Section 2(47) of the Act. Section 50C is a deeming provision and has to be interpreted strictly. On facts, the subject matter of transfer was shares in a company and not land or building or both. The taxpayer did not have full ownership on the flats which were owned by the Company. The transfer of shares was never a part of the assessment of the Stamp duty Authorities of the State Government. The Tribunal also held that it is not a fit case for lifting of the corporate veil. Consequently, the action of the AO & CIT(A) to invoke section 50C to the tax planning adopted by the taxpayer is not proper and does not have the sanction of the provisions of the Act.

Irfan Abdul Kader Fazlani v. ACIT (ITA No.8831/M/2011)

Assessment on amalgamating company invalid as 'juristic' person ceases to exist

The taxpayer stood dissolved upon amalgamation with Life Time Buildcon Private Limited, with effect from 28 September 2010. The AO framed an assessment order on the taxpayer (being the amalgamating company) on 31 December 2010.

The taxpayer contented that assessment on a company which has been dissolved/ amalgamated under Section 391 and 394 of the Companies Act, 1956 (Companies Act) is invalid.

The Delhi Tribunal held that a company incorporated under the Companies Act is a juristic person. It takes its birth and gets life with incorporation and it dies with the dissolution as per the provision of the Companies Act. On amalgamation, the company ceases to exist in the eyes of the law. It further held that assessment upon a dissolved company is impermissible, as there is no provision in the Act to make an assessment thereupon.

Relying upon the decision of Micron Steels Private Limited [ITA No. 160 and Others], the Tribunal held that the assessment order was a nullity, as it was framed on the amalgamating company.

ACIT v. N.J. Steels Private Limited [545-550/Del/2012]

Section 80-IA of the Act

The taxpayer owned 2 units that are eligible for deduction under Section 80-IA of the Act and claimed loss from the same as set-off against income of other units. The AO denied this set-off, holding the view that Section 80-IA(5) of the Act deems the eligible business to be the only source of income for the years up to which the deduction is being claimed under Section 80-IA(1) of the Act and that the provisions of Sections 70, 71 and 72 of the Act, would not apply in relation to income (positive or negative) arising from the eligible business. The Taxpayer was of the view that Section 80-IA(5) of the Act operates only in the year

in which a deduction under Section 80-IA is claimed.

According to the Tribunal, the sum and substance of the provision of Section 80-IA(5) of the Act is to extend the tax shelter under the provision only to the profits of the eligible business/unit, by deeming the eligible business/unit as the taxpayer's only source/s of income for the previous year, relevant to the initial assessment year, and up to the (assessment) year of determination of deduction under Section 80-IA(1) of the Act. The deeming, thus, commences with the previous year relevant to the initial assessment year, which term is not defined under the Act and needs to be determined first.

The Tribunal noted that determination of the quantum of deduction begins from the initial assessment year, however Section 80-IA(5) of the Act operates from the year immediately succeeding the initial assessment year. The reason is explained to be that there can be no brought forward losses in the first year. Thus, once the deeming commences with the initial assessment year, the aggregation of income is to continue over every subsequent year, i.e., irrespective of whether the deduction is claimed or not.

The Tribunal held that the Section does not suggest its applicability only for the year/s the eligible business returns profits. Also, if the initial year is considered to be the year of first claim, the losses for the years prior to that year would stand to be excluded for aggregation and defeat the clear object of the provision. Therefore, it was held that the year of commencement of operations is the initial assessment year, irrespective of the years which the taxpayer may choose as the holiday period.

The Tribunal also held that the aggregation prescribed by the section is limited only to quantify the deduction under Section 80IA(1) of the Act. As a corollary, the Tribunal held that the Revenue is not correct in law in denying the set-off of the unabsorbed depreciation allowance/loss of the taxpayer's eligible unit/s against its income from other sources in terms of Section 32(2), 70 and 71 of the Act.

The Tribunal also held that such unabsorbed depreciation/business loss was to be notionally carried forward and set-off against profits of eligible unit under Section 80IA(5) for the purpose of computation of deduction under Section 80IA of the Act.

Hercules Hoists Limited v. ACIT [7944, 7946, 2255 & 7943/Mum/2011]

Compliance with conditions under Section 72A of the Act is to be tested in relation to each amalgamating company

During the AY 2004-05, BTPU and BSPPL amalgamated with the taxpayer. The taxpayer claimed set-off of losses of BTPU under section 72A.

The AO disallowed the set-off of loss brought forward on the basis that the taxpayer failed to:

- Hold three-fourth of the book value of fixed assets of amalgamating company for a continuous period of five years;

- Achieve the production of 50 percent of the installed capacity of the amalgamating company as per Rule 9C within a period of three years and nine months; and

- Furnish the certificate of particulars of production in the prescribed form under Rule 9C.

As regards the first objection of the AO, the Tribunal found that the AO computed the holding of fixed assets on the basis of aggregate fixed assets of both the amalgamating companies. It was held that if there are two or more amalgamations in a year, then the amalgamated company is required to prove satisfaction of these conditions in respect of such companies one by one as a prerequisite for availing benefit under Section 72A in respect of each such company separately. Since the taxpayer was claiming set-off for losses of BTPU only the assets of BTPU only should have been considered.

The twin condition prescribed under Rule 9C of the Rules is required to be achieved for the subsequent assessment years, relevant to previous years falling within five years from the date of amalgamation, i.e. in any year before the end of four years from the date of amalgamation. Therefore, the Tribunal held that since the period of four years is not yet over, the AO was not required to verify this condition at this stage and it was premature to require the material for demonstrating efforts taken by the amalgamated company for reviving the business of the amalgamating company.

Therefore, the Tribunal held that there is no failure on the part of the taxpayer to fulfill the requisite conditions for claiming set-off of brought forward business losses and unabsorbed depreciation of BTPU in the year under consideration.

Bayer Material Science Private Limited (ITA Nos.6666 & 6667/Mum/2009)

The Mumbai Tribunal accepted as comparable a company that was rejected by the Transfer Pricing Officer on the basis of it incurring losses in two out of three years, including the year under consideration

The taxpayer was engaged in securities broking, merchant banking and financial advisory services. The Transfer Pricing Officer (TPO) made an upward adjustment to the following international transactions (1) Business support services (2) Brokerage services and (3) Investment advisory services.

Business Support Services – the Taxpayer adopted the Transactional Net Margin Method (TNMM) as the most appropriate method. TPO rejected one of the comparables from the taxpayer's set as a loss-making concern. The Taxpayer provided a detailed description of its business and submitted that the company was loss-making only for the last two years and had an operating profit of 27.25 percent in 2005.

The Tribunal held that since the nature of services rendered by the company was similar to that of the taxpayer, it cannot be disqualified as a comparable even though it had incurred a loss during the year.

Brokerage services – The Taxpayer adopted Comparable Uncontrolled Price (CUP) as the most appropriate method and considered the average brokerage rate charged by third party unrelated Indian brokers to its AE to benchmark its broking transaction. TPO segregated the comparables applied by the taxpayer into foreign-owned and Indian-owned comparables and determined the arm's length brokerage rate based on the brokerage rate charged by foreign-owned Indian brokers to the AE as the taxpayer was also a foreign-owned broking house.

The Tribunal held that both foreign owned brokers and Indian-owned brokers matched the business profile of the taxpayer. All third party brokers were providing services in an uncontrolled regime and there was nothing contrary in the conduct and management of business of the comparables and the taxpayer. Thus, the CUP method applied by the taxpayer was appropriate.

Investment advisory services - The TPO rejected the taxpayer's set of comparables and substituted it with his own set of comparables engaged in providing merchant banking activities.

The Tribunal, relying on Carlyle India Advisors Private Limited v. ACIT [2012] 53 SOT 267 (Mum), rejected the comparables of the TPO as they were engaged in merchant banking activities. The Tribunal took cognizance of the fact that the taxpayer did not have a license to enter the merchant banking business.

Goldman Sachs (India) Securities Pvt. Ltd. v. ACIT (ITA No. 7724/Mum/2011)

Bangalore Tribunal concludes on functionality of taxpayer based on the nature of operations carried on by taxpayer and rejects its TP documentation

The taxpayer was engaged in providing contract Research & Development (R&D) and engineering services to its affiliates. The taxpayer had selected comparables in the field of software development in its TP documentation. The TPO rejected the TP documentation of the taxpayer, on the basis that the taxpayer was rendering R&D in technical and engineering services with the aid of sophisticated labs / software in various fields of engineering and not software development services. The TPO determined the Arm's Length Price (ALP) by conducting a search for fresh comparables engaged in technical consultancy, engineering services and R&D. In respect of:

Characterization of the taxpayer - The Tribunal observed that the taxpayer is a service provider for R&D in various fields of engineering (including computer software) as enumerated in the agreements between the taxpayer and its AEs. The result of such R&D is being delivered to the clients/AE in the form of customized computer data through a network or the internet. The Tribunal held that the delivery of products through electronic media cannot determine the nature of taxpayer's functions. Thus, the Tribunal concluded that the taxpayer was carrying out R&D and engineering analysis and not Software Development Services. Considering the objection of the taxpayer, that adequate opportunity was not provided by the TPO, the Tribunal

remanded the matter back to AO/TPO for reconsideration for all the years in question.

Risk Adjustment - The Tribunal rejected the taxpayer's claim that it is a risk-mitigated service provider. However, the Tribunal observed that the notion that risk can be controlled remotely by the parent company and that the Indian subsidiary engaged in core functions, such as carrying out research and development activities or providing services as risk-free entities is something that needs to be demonstrated by the taxpayer. The Tribunal therefore remanded the matter back to the TPO for reconsideration of the matter with regard to its observations.

Interest on External Commercial Borrowings - The Tribunal held that in view of rules of uniformity and consistency, the same approach is to be adopted year on year, and thus no adjustment is required for the international transaction relating to Interest on External Commercial Borrowings.

GE India Technology Centre Pvt. Ltd. v. DDIT (ITA No. 789/Bang/2011 & ITA Nos. 487 & 925/Bang/2011)

Pune Tribunal held that TP provisions are not applicable, when a taxpayer suo-moto disallows an expense in the nature of international transaction and does not claim any benefit for the same in subsequent years

The taxpayer provided customer support services and business support services to the overseas AEs. The taxpayer was rendering customer support services from an STPI unit and was claiming a tax holiday under Section 10A of the Act and was rendering business support services from a non-STPI unit. The taxpayer was being remunerated on the basis of cost plus a mark-up for the services provided. The TPO noted that during the year, the taxpayer had paid an amount of INR 74.2 million (approximately) to Eaton Ltd. UK on account of certain pre-operative expenses in connection with setting up of a new business unit. TPO held that this transaction was an international transaction which should have been benchmarked. TPO took the value of the international transaction entered into with the AE on account of the above expenses as NIL and proposed consequent increase in the income of the taxpayer accordingly.

The Tribunal held that as per the provisions of Section 92 of the Act, the allowance of any expenditure arising from an international transaction shall also be determined having regard to the ALP. However, in the present case, the taxpayer has not claimed the expenditure and has itself disallowed the same while computing its taxable income for the impugned assessment year and no benefit of the same has been taken in subsequent years by capitalizing it and claiming depreciation on it. The Tribunal observing that there cannot be double disallowance/addition of the amount and upheld the taxpayer's contention that the provisions of Section 92 of the Act are not applicable in the present case. With regard to the risk adjustment claimed by the taxpayer, the Tribunal observed that the details furnished by the taxpayer have not been properly appreciated by the AO/TPO and restored the issue to the file of the AO with a

direction to decide the issue afresh after giving due opportunity of being heard to the taxpayer

EatoEaton Technologies Pvt. Ltd. v. DCIT Pune [ITA Nos. 16211621/PN/2011]

Delhi Special Bench of the Tribunal held that TP adjustment in relation to AMP expenditure incurred by the taxpayer for creating or improving the marketing intangible for and on behalf of the foreign AE is permissible

The taxpayer, a wholly owned subsidiary of LG Electronics Inc., Korea (LG Korea) was given a right to use the technical information, designs, drawings and industrial property rights for the manufacture, marketing, sale and services of the agreed products from LG Korea on payment of a royalty. The taxpayer was also allowed to use the brand name and trademarks owned by LG Korea without payment of any royalty during the relevant period.

TPO found that the AMP Expenditure/Sales ratio of the taxpayer was 3.85 percent against 1.39 percent of the two comparable companies, and held that the taxpayer promoted brand is owned by its foreign AE, and therefore, should have been compensated by the foreign AE for its excess AMP spend of 2.46 percent and accordingly made a TP adjustment. The DRP, upholding the position taken by the TPO, further applied a markup of 13 percent on the cost incurred on rendering brand promotion services to LG Korea. On appeal by the taxpayer, Tribunal constituted a Special Bench which held as follows:

Whether TPO could suo-moto assume jurisdiction without any reference from the AO on this transaction - Suo-moto assumption of jurisdiction of the TPO in this case was covered by Section 92CA(2B) of the Act, which had retrospective operation from 1 June 2002. The challenge to the retrospective operation of the sub-section was rejected.

Whether AMP spend construes a Transaction - Display of the Brand in the advertisements coupled with proportionately higher AMP spend by the taxpayer indicated an oral or tacit understanding between the taxpayer and its foreign AE regarding Brand promotion by the taxpayer. Tribunal held that a `transaction’ can be both express as well as oral. So long as there exists some sort of understanding between two AEs on a particular point, the same shall have to be considered as a transaction, whether or not it has been formalised as part of a written agreement.

Whether AMP spend construes an ‘International Transaction’ - The Special Bench held that in view of brand advertisement by the taxpayer, coupled with higher AMP spend, it could be concluded that the taxpayer had provided services to its AE, which owned the brand. ‘Provision of services’ was an international transaction in terms of Section 92B(1) of the Act.

Bright Line Test - The Special Bench upheld the tax department’s stand that the Bright Line Test is simply a tool to ascertain the cost of the international transaction. The method used to determine the ALP in this

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case is the cost plus method. In this case, since the taxpayer did not declare any cost/value of the international transaction of brand building, the onus comes upon the TPO to determine the cost/value of such international transaction in some rational manner.

Interplay amongst Sections 37(1), 40A(2) and 92 of the Act - The Special Bench held that in regard to international transactions, TP provisions as special provisions shall prevail over the other regular provisions governing the deductibility or taxability of an amount from such transactions.

Relevant factors for determining cost/value of international transaction of AMP expenditure - The Special Bench listed 14 questions that might have considerable bearing on the determination of the cost/value of the international transaction of brand/logo promotion through AMP expenditure incurred by the Indian AE for its foreign entity. These questions relate to aspects such as functional profile of the Indian entity (distributor, full-fledged manufacturer etc.), the manner of use of brand name or logo by the Indian taxpayer, any royalty paid by Indian taxpayer to its foreign AE for brand name, brand logo or technical services, any technical input or technical knowhow acquired by an Indian taxpayer from its foreign AE for the purposes of manufacturing, any subsidy received from the foreign AE, new products launched during the year, any entry level strategy implemented during the year etc. Choosing cases using the foreign brand ex facie cannot be accepted. AMP expenditure of such cases will also include contribution towards brand building of their respective foreign AEs. The correct way to make a meaningful comparison is to choose comparable domestic cases not using any foreign brand.

What does not constitute AMP Expenditure? - Special Bench accepted the taxpayer's contention that expenditure incurred directly 'in connection with' and not 'for promotion of' sales should not be put in the same basket as AMP expenditure.

Testing of entity level profits v. Transaction level profits and whether use of more than one method is permissible?

- TNMM could be applied only on a Transactional Level and not on an Entity Level. The only exception would be when all the international transactions are of sale by the taxpayer to its foreign AE and there is no other transaction of sale to any outsider and also there is no other international transaction.

- There is no bar on the power of the TPO in examining all international transactions under the TP provisions, even when the overall net profit earned by the taxpayer is higher than the comparable companies.

- The fact that the taxpayer has a better net profit rate in comparison with other comparable companies does not substantiate that the taxpayer purchased the goods at a concessional rate from its foreign AE as net profit is not dependent only on purchase cost.

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- Only one method, as against combination of the prescribed methods, can be used for determining the ALP of an international transaction. The DRP and the AO were right in applying the spirit of the cost plus method to the facts of the instant case. The mere fact that DRP did not specifically mention it in so many words, will not ipso facto mean that it did not apply the cost plus method.
- The DRP went wrong by arbitrarily determining the rate of mark-up at 13 percent without showing as to how much an independent comparable entity would have earned from an international transaction similar to that which is under consideration.

Maruti Suzuki's Case - In relation to the decision of the Delhi High Court in the case of Maruti Suzuki India Ltd. v. ACIT/TPO [2010] 328 ITR 210 (Del) , the Special Bench held that the decision on the merits of the case was not expressly or impliedly overruled by the Supreme Court. The Special Bench held that the direction of the Supreme Court to the TPO inherently recognises that there is a transaction of brand building between the taxpayer and the foreign AE, which is an international transaction as per Section 92B and the TPO has the jurisdiction to determine the ALP of such transaction.

Whether mark-up is permissible? - The Special Bench held that the addition of mark-up to the costs has the sanction of law as seen from (iv) of clause (c) to Rule 10B(1) of the Income-tax Rules, 1962 (the Rules). Thus, mark-up can be validly imposed. However, the mark-up should be based on the mark-up charged by comparable companies for rendering similar services and should not be an ad-hoc mark-up.

The Special Bench remanded the issue of determining the cost/value of the international transaction and the mark-up thereon to the TPO for deciding the same in accordance with the guidelines laid down by the Bench. By majority, the Special Bench ruled both the issues in favour of the tax department, whereas the Judicial Member of the Special Bench formed a view contrary to the Ruling and wrote a dissenting order.

LG Electronics India Private Limited v. ACIT (ITA No. 5140/ Del/2011)

Notifications/Circulars/ Press releases

India and Malaysia sign revised tax treaty

India has revised its tax treaty with Malaysia by way of a Notification dated 29 January 2013. The key highlights of the tax treaty are as follows:

- Definition of the term 'person' expanded to include any entity treated as a taxable unit under the taxation laws in force in India and Malaysia.
- Scope of the Permanent Establishment (PE) in Article 5 of the tax treaty has been expanded to include:

- A warehouse in relation to a person providing storage facilities for others; and
- A place where agricultural, forestry, plantation or related activities are carried on.

- A Service PE clause has been incorporated in Article 5 of the tax treaty.
- Withholding tax rate on dividend is reduced to 5 percent from the existing rate of 10 percent in cases where the beneficial owner of the dividend is a resident of the recipient country.
- Computer software programmes, know-how and recordings on any means of reproduction for use in connection with television or radio broadcasting are excluded from the purview of the definition of 'Royalties' contained in Article 12 of the tax treaty.
- A new Article on the taxability of Capital Gains has been introduced.
- Limitation of benefits (LOB) provisions introduced to ensure that the benefits of the tax treaty are used only by genuine residents.
- The revised tax treaty shall be effective from 1 April 2013.

Notification No. 7/2013 dated 29 January 2013

India and Sweden sign protocol amending the tax treaty

India and Sweden have signed an amending protocol to amend the existing provisions concerning the Article on Exchange of Information. The tax treaty will now allow the exchange of banking information as well as information without the domestic interest. It will also allow the use of information for non-tax purposes if allowed under the domestic laws of both the countries, after the approval of the supplying state.

The Article added in the Protocol will enable both countries to assist in conducting tax examination abroad, by allowing

Press release dated 8 February 2013 – www.pib.nic.in

Finance Ministry issues clarification regarding TRC

Concern was expressed regarding the clause introduced by Finance Act, 2012 which requires the taxpayer to produce a TRC in order to claim the benefit under the tax treaties.
In the explanatory memorandum to the Finance Act, 2012, it was stated that the TRC containing prescribed particulars is a necessary but not sufficient condition for availing benefits of the tax treaty. The same words are now proposed to be introduced by the Finance Bill 2013 in Section 90 of the Act. Hence, the press release states that there is nothing new about this and this was already done last year.

It has also been pointed out that the language of the proposed Section 90 of the Act could mean that the TRC produced by a resident of a contracting state could be questioned by the Income Tax Authorities in

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India. Therefore, the government wishes to make it clear that it is not the intention of the proposed amendment. The TRC produced by a resident of a contracting state will be accepted as evidence that he is a resident of that contracting state and the Income Tax Authorities in India will not go behind the TRC and question his resident status.

In the case of Mauritius, Circular No. 789 dated 13 April 2000 continues to be in force, pending ongoing discussions between India and Mauritius.

Press release dated 8 February 2013

Time limit for completing income tax return e-filing process for specified years further extended

Taxpayers who electronically file their Income-tax returns without attesting a digital signature are required to send the physically signed return verification form (ITR-V) to the Centralised Processing Centre (CPC) in Bengaluru within the time specified. The ITR-V form, which is automatically generated upon e-filing, is required to be signed and sent via post (either speed or ordinary) within 120 days of e-filing the return.

Recently, the Director General of Income-tax (System) has notified an extension of the time limit for sending the duly signed ITR-V forms relating to Income-tax returns filed electronically for the Assessment Year (AY) 2012-13 and a further extension of the time limit for sending the ITR-V forms for AY 2010-11 (filed during the period 1 April 2011 to 31 March 2012) and AY 2011-12 (filed on or after 1 April 2011).

The signed ITR-V forms for the above years can now be sent to the CPC anytime within the extended timelines or within 120 days of e-filing the return whichever is later, and such returns would be treated as filed within the due date.

Notification No. 01/2013 under CPR Scheme 2011 dated 7 January 2013

II. SERVICE TAX

High Court Decisions

Decision of the Gujarat HC on the availability of CENVAT credit for a manufacturer vis a vis a variety of input services

The taxpayer was a manufacturer of medicines classifiable under chapter 30 of First Schedule to Central Excise Tariff Act, 1985. The Revenue Authorities challenged the taxpayer's availment of CENVAT Credit in respect of certain services which according to them were not eligible as 'input services' in accordance with the definition provided under the CENVAT Credit Rules, 2004 ('Credit Rules'). The matter reached the Gujarat HC which held as follows on the various services in question:

- Technical Testing & Analysis

  The taxpayer procured these services from outside agencies for testing of the clinical samples before the commencement of production. The Revenue Authorities were of the view that since the products in relation to which these services were procured have not yet been manufactured and sold, such services will not fall under the definition of 'input services'. The HC observed that the taxpayer was duly paying excise duty in respect of samples manufactured by them. Further, it was mandatory for the taxpayer to avail technical and testing services in respect of samples before commencing the commercial production of such samples. Therefore, such services were essential for the taxpayer to carry on its business and hence, the same would qualify as 'input services'.

- Commission paid to the foreign agents

  The taxpayer availed services of foreign agents who were procuring sale orders for the taxpayer. The Revenue Authorities were of the view that the foreign agents were acting as commission agents and not involved in sales promotion of the product. Further, according to the definition of 'input services', services of commission agent do not fall under the ambit of 'input services'. The HC held that since there was nothing on record to indicate that the commission agents were involved in any sales promotion activities, credit of service tax paid on commission paid to such agents will not be available.

- Courier Services

  The taxpayer received courier services for export of goods, the credit of which was denied on the basis such services are not used in or in relation to manufacture of final products or clearance of final product from the place of removal. The HC held that courier services are covered in the inclusive part of the

definition of 'input services' and hence credit in respect of such services would be allowable.

- Clearing and Forwarding Services

  The taxpayer received services of Clearing and Forwarding agents across the country in relation to sale of goods in domestic market, the credit of which was denied on the basis that such services were preformed after the final products are cleared from the factory. The HC after analyzing the relevant provisions held that a clearing and forwarding agent is an agent of the principal and hence the goods stored by him after clearance of goods from the factory are stored on behalf of the taxpayer. Since such services are preformed before the final clearance of goods from the 'place of removal' and such services are performed in relation to manufactured goods, credit of such services will be available.

- Technical Inspection and Certification

  The taxpayer availed services of technical inspection and certification of instruments against the known standards, the credit of which was denied on the basis that such services have no nexus with manufacture of final products. The HC observed that such services are availed by the taxpayer to ensure that the instruments are of prescribed standard and accuracy which are further used to manufacture final products. Further, the 'means' portion of the definition of 'input services' is an expansive one and covers all services used in or in relation to the manufacture of final products and it is immaterial whether such use is direct or indirect. Furthermore, such service is used only in relation to business activity of taxpayer and not for any other purpose and is therefore, covered by the 'includes' portion of the definition of 'input services'.

- Miscellaneous Services

  In addition to the above, the taxpayer availed miscellaneous services such as repair and maintenance of copier machine, air conditioner, water cooler, Management Consultancy, Interior Decorator, Commercial or Industrial Construction Services. The HC after examining the nature of these services and definition of 'input services' under the Credit Rules held that some of the aforementioned services are covered in the inclusive part of the definition while other are coved under the 'means' part of the definition and therefore, taxpayer is entitled to claim credit of service tax paid in respect of these services.

CCE v Cadila Healthcare Ltd [2013-TIOL-12-HC-AHM-ST]

Runways at airports would also qualify for the service tax exemptions available vis a vis 'roads'

The taxpayer was engaged in the business of maintenance and repairs of roads includ-

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ing runways at different airports and was availing the benefit of exemption under Notification No 24/2009-ST dated July 27, 2009 providing for an exemption from service tax levied on services of maintenance and repair of road. The Revenue Authorities objected to the availment of the said exemption and the matter reached before the Bombay HC.

The HC prima facie observed that runways at the airports are a species of the genus 'road' and therefore, runways should receive the same treatment as that of roads.

The HC set aside the order passed by the CESTAT, remanded the matter to CESTAT to hear the appeal afresh and decide the matter on merits.

D P Jain & Co Infrastructure Pvt Ltd v CCE, Nagpur [2012-TIOL-1030-HC-MUM-ST]

Tribunal Decisions

Availment of credit on Consulting Engineering Services used for R&D activities for developing prototypes exempted from excise duty, upheld on the basis of Rule 6(5) of the Credit Rules

Taxpayers were engaged in the manufacture of motor vehicles and motor vehicle parts falling under Chapter 87 of the Central Excise Tariff Act, 1985 and also had an Engineering Research Centre (ERC) situated in their premises where R&D activities were being undertaken. CENVAT credit was availed by them on input services utilized and consumed in the R&D activities in the ERC. Prototypes manufactured in ERC were exempted from payment of duty under Notification No 167/71-CE dated September 11, 1971 basis which the Revenue Authorities denied availment of credit by the taxpayers of input services i.e. Consulting Engineering Services (on the ground that the same are used in or in relation to manufacture prototypes).

Taxpayers contended that since they are manufacturing prototype motor vehicles and also clearing them on payment of duty at the time of export, the CENVAT credit cannot be denied in view of the provisions of Rule 6(5) of Credit Rules. Further the prototypes were used in manufacture of motor vehicles and so are entitled for credit.

The Tribunal prima facie held that the taxpayers are not eligible for CENVAT credit when input services are exclusively used for manufacture of exempted goods [Rule 6(1)]. However, given that duty was paid on prototypes which were cleared for export, Consulting Engineering Services were used in or in relation of the manufacture of dutiable as well as exempted goods and would be eligible for Cenvat credit vide Rule 6(5) of the Credit Rules (as it existed during the period of the dispute).

Tata Motors Limited v CCE [2013-TIOL-40-CESTAT-MUM]

Though decision of the AAR is binding only to the parties involved in that ruling, but when the facts involved are similar and the question for decision is identical, due consideration needs to be given by Tribunal

The taxpayer conducted training courses in Aircraft Maintenance Engineering (AME) and operated a flying school and sought to avail service tax exemption under Notification No 9/2003-ST dated June 20, 2003 and 24/2004-ST dated September 10, 2004 up to February 26, 2010 which was objected to by the Revenue Authorities.

Reliance was sought to be placed on the advance ruling in the case of CAE Flight Training (India) Ltd ('CFTI') [2010 (18) STR 785 (AAR)] where in identical circumstances it was held that to qualify as a "commercial training or coaching centre" the certificate should be recognized by law but the certificate of course completion issued by CFTI was not recognized by law for the time being in force. Reliance placed on this advance ruling was objected to on the ground that decision of the Advance Ruling Authority ('AAR') is binding only to the parties involved in that ruling.

The Tribunal held that though the decision of the AAR is binding only to the parties involved in that ruling, since the facts involved are similar and the question for decision is identical, the decision of the AAR can be relied upon especially because AAR is presided by a Retired Judge of the Supreme Court and the other members of the authority are erstwhile members of the Central Board of Excise & Customs and Central Board of Direct Taxes. Thus the status of AAR is higher than that of this Tribunal and therefore, the Tribunal cannot ignore the ruling by the AAR.

Bombay Flying Club v CST [2013 (29) STR 156 (CESTAT-MUM)]

III. VAT/ CST

High Court Decisions

Gold declared by a partner's wife under the Voluntary Disclosure Scheme under Income Tax does not amount to purchase in course of business and is not liable to purchase tax

Section 7A of the Tamil Nadu General Sales Tax Act (the 'TNGST') levies a purchase tax inter alia on purchase of goods meant for sale or disposal from any person on which tax is leviable under the provisions of TNGST but has not so been paid. Section 3 of TNGST provides that every dealer in bullion, gold, silver and platinum jewellery including articles thereof and worn-out or beaten jewellery including casual trader whatever be his turnover for the year, shall be liable to pay tax under TNGST at the specified rate.

The dealer (partnership firm) disclosed a turnover of INR 11,76,630/- for the assessment year 1997-1998 in respect of old gold under the Voluntary Disclosure Scheme ('VDS') of the Income Tax Act which belonged to the wife of one of the partners. The assessing authority assumed that such disclosed gold being the capital introduced by partner in the firm is a purchase made by the firm, and included the

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estimated value of such gold in the taxable turnover.

An appeal against the said order of the assessing authority was filed by the dealer with the Tribunal. The Tribunal while relying on a clarification dated January 21, 1999 issued in this regard held that gold personally declared under the VDS and sold in the same condition will not attract tax under Section 7A of TNGST.

In the present revision filed with the Madras HC against the order of the Tribunal, the HC dismissed the revision petition and held that when the jewellery, in respect of which the voluntary disclosure of income was made by the wife of one of the partners of the firm, was pooled into the capital of the firm by her husband could not be treated as purchase made by firm during the course of business. Hence, such gold shall not be liable to be taxed under Section 7A of TNGST.

State of Tamil Nadu v Variety Jewellery [2013-57-VST-190 (MAD)]

Mere supply of goods from another state does not change the nature of transaction and liability to pay tax remains under the Act of the state where the transaction is entered and executed

The taxpayer being a registered dealer under the Karnataka Sales Tax Act, 1957 (the 'KST') and the Central Sales Tax, 1956 (the 'CST') is a manufacturer of diesel generator sets ('DG sets'). The taxpayer entered into a works contract in respect of electrical works with a customer in Mangalore. For execution of the said works contract, the taxpayer procured DG sets from its branch unit in Goa which supplied the goods directly to customer in Mangalore and also raised an invoice directly in the name of customer.

The taxpayer being registered in Goa as well, deposited sales tax in Goa under the Goa Sales Tax Act and did not include the value of such goods in its KST returns. The assessing authority in Karnataka, not satisfied by the contentions of taxpayer, included the value of such goods for assessment under KST.

In an appeal filed by the taxpayer before the Karnataka HC, it was held that the present contract was executed in Karnataka for which payment is also made in Karnataka. Movement of goods from Goa to Karnataka was under an independent contract and the present contract did not occasion movement of goods from outside the state. Accordingly, such a transaction would not be deemed as an inter-state sale and would be subject to levy of tax under KST.

Ghatge Karkera Power Industries v Additional Commissioner of Commercial taxes, Zone I, Bangalore and Others [2013-57-VST-255 (KARN)]

VAT registration cannot be denied on the basis of absence of sufficient area under the Tamil Nadu Value Added Tax Act, 2006 as there is no provision under the Act specifying the requisite area for conducting business

The taxpayer made an application for registration under the Tamil Nadu Value Added Tax Act, 2006 (the 'TVAT Act') for doing business in stainless steel pipes, ferrous and

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non- ferrous metals. The registration application was rejected by the relevant authorities on the grounds that the place of business consisted of 80 sq. ft and it was not possible to do business in such a small area. Aggrieved by the same, the writ petition was filed by the taxpayer before the Madras HC.

The HC held that that taxpayer has satisfied all provisions relating to application for registration as stipulated under the TVAT Act as there is no such condition under the TVAT Act prescribing the area for conducting business.

The HC also relied on Circular No 11/2011 dated March 25, 2011 which clarified that prior inspection was not necessary for granting registration except in relation to evasion prone commodities (including iron and steel). However, the HC clarified that the guidelines or instructions issued to authorities were for the purpose of inspection and it did not enable the authorities to determine the extent of land for carrying the business. It was for the taxpayer to decide the space required for the business.

Accordingly, the order of the assessing authority rejecting the taxpayer's application being untenable under law was set aside by the Court.

Sri Sundha Metals v CCE [2013-57-VST-73-HC-MAD]

Benefits provided under an exemption notification issued prior to reorganization of a state shall continue even after the reorganization

The taxpayer, a trader of cement, cement colours etc was a registered dealer under the provisions of the Madhya Pradesh Commercial Tax Act, 1944 under the erstwhile state of Madhya Pradesh prior to November 1, 2000 before its reorganization.

The taxpayer made some purchases from M/s L & T Limited, Raipur ('L&T') located in the state of Madhya Pradesh claiming exemption granted under the erstwhile State before its reorganization.

After the reorganization, the taxpayer was located in the newly formed state of Chhattisgarh and continued the supply from L&T for the financial year 2002-03. However, the Revenue Authorities denied the benefit of exemption granted prior to reorganization.

The HC in the writ preferred before it relied on the judgment of the Supreme Court in the case of Commissioner of Commercial Tax v Swaran Rekha Cokes and Coals Pvt Ltd [2004-6-SCC-689] wherein in an identical case for the state of Bihar, the Supreme Court had held the benefit which was available to an exempted unit prior to reorganization shall continue to the unit even after reorganization.

Accordingly, the HC while allowing the petitions in favour of the taxpayer directed the Revenue Authority to re-decide the matter in accordance with the aforecited judgment of the Supreme Court.

Fairdeal Traders v Assistant Commissioner, Commercial Tax [2012- 56- VST- 503-HC-MP]

Consideration received by a works contractor opting for a composition scheme towards independent pure labour contracts shall not be included in the value of taxable turnover; however, labour charges for services included in the works contract shall be includible

The taxpayer is engaged in the activity of fabrication and erection of structural works qualifying as 'works contracts' and had opted for composition of tax under Section 17(6) of the KST. While arriving at his taxable turnover, the taxpayer claimed an exemption towards labour and other like charges involved in the execution of works contract. The assessing authority denied the exemption on the basis that the taxpayer had opted for composition rate of tax under which the total consideration is the criteria for levy of tax.

The matter reached the Karnataka HC which held that the taxpayer would not be entitled to any exemption in respect of the labour charges included in the works contract once he opts for a composition scheme. However, if he enters into independent pure labour contracts where no aspect of sale is involved, consideration received towards such contracts shall not be included in his taxable turnover for works contract.

Accordingly, the HC remanded the matter for fresh assessment giving ample opportunity to taxpayer to produce necessary contracts to substantiate his claim and directed the Revenue Authorities to pass an order keeping in mind the observations made by the Court and in accordance with the law.

H S Chandra Shekar Hande v State Of Karnataka [2013-57-VST-234-HC-KAR]

IV. CUSTOMS

High Court Decisions

Sending of imported raw material purchased on high sea sales basis to job worker for conversion does not amount to transfer

The taxpayer purchased billets by executing a sale on the high seas. Subsequently, the said goods were cleared without payment of customs duty by availing the benefit under Notification No 51/2000 – Customs dated April 27, 2000 and Notification No 43/ 2002 – Customs dated April 19, 2002.

The Revenue Authorities objected on the ground that the taxpayer had transferred the imported billets to a job-worker thereby violating the condition (vii) of both the notifications which provides that materials imported shall not be transferred or sold. The question whether sending the imported goods to a job worker for conversion into angles is to be construed as 'transfer' reached the Bombay HC.

The Bombay HC held that sending of imported raw material purchased on high sea sales basis to job worker for conversion prima facie, does not constitute transfer of the imported raw materials, because, firstly there is no bar to get the imported raw materials converted through a job-worker and

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thereafter sell the converted goods and secondly, the taxpayer has sold the goods after its conversion and not before its conversion.

Sanvijay Rolling & Engineering Ltd v CC (Export), Mumbai, 2013 (287) ELT 33 (BOM)

Tribunal Decisions

Benefit of exemption from ACD to goods intended for retail sale under Notification No 29/2010 – Customs exemption cannot be denied on the ground that taxpayer has already availed exemption under Notification No 6/2006 – CE

The taxpayer had imported microprocessors meant for fitment inside a CPU / Laptop after availing the benefit of exemption under Notification No 6/2006 – CE dated March 1, 2006 ('CVD Exemption') and Notification No 29/2010- Customs dated February 27, 2010 ('ACD Exemption').

The Revenue Authorities rejected the claim of the taxpayer on the ground that the benefit under the ACD Exemption is available in respect of pre-packaged goods which are intended for retail sale - considering that the taxpayer had availed the benefit under the CVD Exemption notification, the intention of the taxpayer is not to sell the goods in retail form thereby disentitling them to the benefit under the ACD Exemption notification.

The Tribunal granted an unconditional stay basis the prima facie view that since the goods in question are pre-packaged goods and since as per Notification No 44(RE-2000)/1997-2002 dated November 24, 2000 all pre-packaged commodities are required to be affixed with an MRP, the benefit of the ACD Exemption notification cannot be denied on the ground that they are not intended for retail sale.

Esys Information Technologies Pvt Ltd v Commissioner of Customs, (Acc & Import), Mumbai [2012-TIOL-1864-CESTAT-MUM]

Notification & Circulars

Fixed Deposit Receipts furnished in respect of provisional Mega or Ultra Mega Power Projects can be replaced with Bank Guarantees.

Vide a customs circular, Fixed Deposit Receipts ('FDR's) submitted as security for obtaining provisional Mega Power Project and consequent exemptions status may now be replaced with Bank Guarantees.

Circular No 967/01/2013-CX, dated January 01, 2013

V. CENTRAL EXCISE

High Court Decisions

Having obtained separate excise registration, the taxpayer was entitled to take credit on eligible inputs utilized in generation of electricity to

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the extent it is utilized in generation of electricity within its factory but not to the extent it was supplied to another excise registered factory albeit located in the same premises

The taxpayer was a manufacturer of cotton yarn, processed cotton fabric, processed man made fabric etc and had two divisions namely textile division and plastic division. Both these divisions had separate central excise registration, common PAN number and were located on common ground surrounded by common wall and adjoining to each other.

The taxpayer had installed DG sets / electricity generation plant to be used in factory. It has used furnace oil as fuel in the generation of electricity. The taxpayer had been availing CENVAT credit on the furnace oil, used in generation of electricity. Whenever there was underutilization of electricity in textile division and the plastic division required the electricity, the taxpayer supplied a part of electricity so generated to the plastic division.

The taxpayer contended that the credit of the duty paid on furnace oil used in the generation of electricity which is supplied to plastic division shall be available as it is used in factory of production and both the divisions i.e. plastic and textile division are, in substance, common factory. Separate central excise registrations do not make them separate factories as defined in Central Excise Act, 1944 ('CE Act').

The dispute reached the HC where it was held that basis the central excise rules, in case the taxpayer has more than one place of business, he shall obtain a separate licence in respect of each of such places of business. Further HC held that in this case, the taxpayer has itself described the factory of the plastic division as a separate place of business by applying and obtaining separate central excise registration. Therefore, the taxpayer is estopped from contending that the said plastic division factory is also within the factory of the present unit of the taxpayer simply because both the separately registered factories are situated within a common boundary wall. Further, the HC held that basis the facts of the present case the taxpayer is entitled to credit on eligible units utilized in generation of electricity to the extent to which it is using the produced electricity within its factory which is registered for that purpose but not to the extent supplied to a factory which is registered as different unit.

Sintex Industries Limited v CCE [2013 (287) ELT 261 (GUJ)]

Once the allegations raised in the Show Cause Notices are admitted by the taxpayers, it is not open for them to contend that the Settlement Commission ought to have passed a detailed order before imposing a penalty

Show Cause Notices were issued to the taxpayers consequent to a search, wherein it was alleged by the Revenue Authority that the taxpayers had cleared partially oriented yarn of higher grade by downgrading its quality in the invoices. It was also alleged that the taxpayers had given special discounts to certain select customers so as to reduce the value of goods, resulting in payment of duty on lower value and subse-

quently such discounts were received back by the taxpayers. The taxpayers decided to approach the Settlement Commission to settle the dispute, where allegations so raised were admitted and accepted by them. The Settlement Commission directed the Revenue Authorities to rework the amounts in the light of cum duty benefit, however penalty of 15 lacs was still imposed along with recovery of interest at 10 percent for the relevant period. The taxpayers filed a writ petition before the Bombay HC against the order of the Settlement Commission.

It was argued by the taxpayers that the breach of law on their part was not deliberate and the allegations were admitted only to sought settlement and thus avoid prolonged litigation. Further, the Settlement Commission is a statutory body obliged to pass reasonable orders. The Revenue Authorities called for no interference with the order passed as the taxpayers themselves opted to forgo the normal process of adjudication and seek settlement. Moreover, the penalty of 15 lacs imposed was less than the penalty proposed to be levied in the Show Cause Notice.

The Court held that the Settlement Commission had been constituted as an extra ordinary measure to enable a defaulting person to make a full and complete disclosure/ confession to have the matter settled; it was not a place where one can challenge the show cause notice on merits. After noting that the Settlement Commission had imposed penalty lesser than that proposed to be imposed in the Show Cause Notice, the Court dismissed the petition.

It was not examined by the Court whether it was open to challenge a part and accept the other part of the order of the Settlement Commission even when its order was in the nature of a package deal.

Indorama Synthetics India Ltd v UOI [2013-TIOL-08-HC-MUM-CX]

Where certain processes are carried out on goods brought into the factory and subsequently such processed goods are cleared on payment of excise duty which is more than input credit taken, the admissibility of credit cannot be questioned on the ground that processes undertaken do not amount to manufacture

The taxpayers were engaged in the manufacture of 'P D Pumps' and MODVAT credit was being availed by them on the purchase of such pumps. The credit so availed was asked to be reversed by Revenue Authority on the ground that no manufacturing activity was being carried out in respect of such goods. In this regard, it was argued by the taxpayers that excise duty was being paid by them in respect of processes carried out on pumps and had the processes not amounted to manufacture, the question of payment of excise duty would not have arisen.

The matter reached before the Gujarat HC where the Revenue Authorities contended that credit should not be allowed to the taxpayers since the pumps were cleared for home consumption without any manufacturing activity carried out on them.

The HC ruled in favour of the taxpayer – it took note of the relevant rule (i.e. Rule 57F of Central Excise Rules, 1944), wherein it was said that inputs in respect of which credit is allowed may be removed under intimation to the specified authority for home consumption provided the duty payable on clearance in case of home consumption is not less than the input credit availed. The HC held that as the taxpayer paid output tax more than the credit availed, the denial of credit is unjustified.

CCE v Delta Corporation [2013 (287) ELT 15 (GUJ)]

Tribunal Decisions

Exemption is available to manufacture of more than one solar lantern as a part of solar panel under Notification No 6/ 2002 - CE dated March 2, 2002

The taxpayer is manufacturing and clearing solar lanterns under single pack. The taxpayer clears two lanterns and a solar panel as "solar lanterns" or "solar power generating system" in a common package.

The Revenue Authorities contended that benefit of Notification No 6/ 2002 - CE is available to one solar panel, one solar lantern and one battery and the benefit of notification is not available on the second solar lantern.

The Tribunal noted that Notification does not provide any condition that the exemption is available in respect of one lantern only; therefore the taxpayer has strong prima facie case in their favor. Accordingly, the Tribunal waived the requirement of pre-deposit for hearing the appeal, and stayed the recovery of demand imposed on the taxpayer.

Aura Solar Products Private Limited v CCE, 2012 [(286) ELT (703) (CESTAT– MUM)]

CENVAT credit of duty paid on Diesel Locomotive used within factory is admissible as accessory to capital goods if the same increases the effectiveness of handling process

The taxpayer is engaged in the manufacture of iron and steel products and is availing CENVAT credit of duty paid on inputs and capital goods including diesel locomotive. This was challenged by the Revenue Authorities on the ground that diesel locomotive is not capital goods since it is not covered under the definition of 'capital good' under the Credit Rules.

The taxpayer contended that they have set up an integrated steel plant having railway sliding within the factory premises and laid down railway lines within the factory connecting one plant to another plant for movement of raw material, semi finished and finished goods. The diesel locomotive acts as an accessory to the torpedo ladle car which increases the convenience of carrying molten metal from one place to another. The taxpayer also contended that there is need to have some mechanical force i.e. diesel locomotive in the present case for handling/ carrying the torpedo ladle car.

The Tribunal noted that although molten iron could have been handled manually, but it is not easy to carry 300 to 350 mega

tonne of molten metal manually. Further, it noted that diesel locomotives not only increases the effectiveness in carrying 300 to 350 mega tonne of molten metal, but without it the handling, and in turn production of finished goods would not be possible.

Accordingly, the diesel locomotive shall be treated as accessory of capital goods and credit should be available.

CCE v Bhusan Steel Limited [2012 (286) ELT 745 (CESTAT- KOL)]

Benefits provided under exemption Notification No 56/2002 – CE will be available even though the Khasra number of the industrial area where the unit is located is different from that given under the relevant Notification

The taxpayer, located in Jammu & Kashmir, was in the business of manufacture of goods which were exempt from excise duty as provided under Exemption Notification No 56/2002 – CE subject to the condition that the goods were being manufactured and cleared by units located in industrial growth centres, industrial estates, export promotion industrial parks, etc as given under Annexure II to the said Notification.

The Revenue Authorities objected to the availment of the above exemption on the ground that the unit was located in Khasra number other than that specified against the corresponding industrial area under the relevant Notification. At the Tribunal level the Revenue Authorities agreed to the fact that the goods and the industrial area where the unit was located were specified in the Notification but argued that duty was still payable because the units were not located in Khasra number specified against the corresponding industrial area in the said Annexure. It was further argued that the provisions of the Notification be construed strictly and interpreted only basis the language used.

The Tribunal observed that the relevant Khasra number was included in the Notification albeit it was wrongly specified against another industrial area, which was separated by a road from the industrial area where taxpayer's unit was located. After noting that the Notification did not stipulate that the unit must also be located in the Khasra number mentioned against each industrial area, the Tribunal dismissed the Revenue Authority's objection by stating that just because a Khasra number is mentioned against a wrong industrial area, the benefit of the Notification could not be denied to the taxpayer.

CCE v Jaycon Engineers [2013 (287) ELT 97(CESTAT – DEL)]

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