April 2013

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

Foreword

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

Based on the suggestions received from our constituents, we have finalized our post budget memorandum 2013-14 and the same has been submitted to the Hon'ble Finance Minister and other officials of the Ministry on April 4, 2013.

FICCI has also prepared a discussion paper on 'Dispute Resolution in Tax Matters'. The document analyses the existing system of dispute resolution, identifies the deficiencies and shortcomings and suggests measures to address them. The paper has been submitted to the Hon'ble Finance Minister and other officials of the Finance Ministry on 9th April, 2013. The paper is available on the FICCI website.

On April 12, 2013, FICCI participated in the Central Direct Taxes Advisory Committee meeting under the Chairmanship of the Hon'ble Finance Minister. The Committee has been set up to discuss, examine and resolve issues of administrative and procedural nature and aims to develop and encourage mutual understanding and cooperation between tax payers and the Tax department.

FICCI is organizing an 'Interactive Session on Goods and Service Tax (GST)' with Shri Sushil Kumar Modi, Hon'ble Deputy Chief Minister, Government of Bihar and Chairman, Empowered Committee of State Finance Ministers on 22nd April, 2013, at Hotel Sofitel, Mumbai. We look forward to your presence in this important session.

Under the taxation regime, the Delhi High Court dismissed the petition filed by the tax department against the order of the Authority for Advance Rulings in the case of Goodyear Tyre and Rubber Company and held that the transfer of shares of an Indian company without consideration in the course of group reorganization was not liable to tax in India. The High Court also specifically rejected the argument of the tax department that the transaction in question was entered to avoid capital gains liability in India, by taking note of exemption under Section 10(38) of the Income-tax Act, 1961 (the Act).

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 TAXES

High Court Decisions

Transfer of shares of a listed Indian company by a nonresident without consideration is not liable to tax in India

The Delhi High Court in the case of taxpayer has dismissed the petition filed by the tax department against the order of the AAR. In its ruling, the AAR, based on the facts, had held that the transfer of shares of a listed Indian company by a non-resident without consideration in the course of group restructuring did not trigger income-tax liability in India.

DIT v. Goodyear Tire and Rubber Company [W. P. (C) 8295 of 2011]

Sale of shares in unlisted company to holding company taxable as capital gains and not business income

The taxpayer sold shares in L&T Crossroads P Ltd (L Co) to its holding company for a consideration of INR 120 million during Assessment Year (AY) 2005-06. The income earned on sale of shares of INR 25.2 million was reported as long term capital gains and the taxpayer company claimed exemption under Section 47(v) of the Act which provides for exemption on capital gains arising from transfer of capital assets by 100 percent subsidiary to its holding company.

However, the Assessing Officer (AO) rejected the taxpayer's contention and held that profit on sale of shares was taxable as business income by observing that the shares were held for only 8 months by the taxpayer. On first appeal, the Commissioner of Income-tax (Appeal) [CIT(A)] upheld the decision of the AO that the profit was taxable as business income. However, the CIT(A) observed that the shares were held for 4 years. On further appeal by revenue the Mumbai bench of the Tribunal held that the profit on sale of shares of L Co is taxable under the head capital gains and not as business income by observing that the shares of a private limited company are not tradeable in the market like any other normal trading asset and consequently, such shares cannot be considered to be stock in trade. The Mumbai Tribunal interalia relied on the decision of Supreme Court in case of Ramnarain & Sons Pvt. Ltd. vs. CIT (41 ITR 534) to conclude that even if the shares were acquired for the purposes of acquiring control of a company, it cannot be treated as stock in trade.

The Bombay High Court held that the transaction was not an adventure in the nature of trade and hence was in the nature of capital gains. The High Court also specifically considered Tribunal's conclusion that the shares sold by the taxpayer to its holding company was not tradeable in the market like any other normal trading asset. Accordingly, High Court upheld the taxpayer's contention that the gain was in the nature of capital gains and not business income.

CIT v. Renato Finance & Investment Ltd [TS–87–HC–2013(Bom)]

Non-mentioning of assessment year in reasons recorded only technical defect, doesn't invalidate reassessment

For AY 2002-03, the AO initiated reassessment proceedings against the taxpayer, after recording reasons under Section 147 of the Act. The taxpayer participated in the reassessment proceedings which were completed after making certain additions. The taxpayer appealed before the CIT(A), who partly allowed the appeal. Before the Tribunal, taxpayer challenged the validity of the notice issued for initiation of proceedings under Section 147 of the Act. The taxpayer contended that the AO had failed to mention the AY in the reasons recorded. Thus the entire proceedings were invalid. The Tribunal upheld the taxpayer's contention and set aside the reassessment proceedings.

A division bench of Allahabad High Court observed that Section 292B was enacted with a view to overcome purely technical objections coming in the way of validity of assessment proceedings. The provision deals with curable defects in the proceedings. It further observed that the section is intended to ensure that an inconsequential technicality does not defeat justice. Ruling in favour of Revenue, High Court held that Section 292B was applicable to the present case. The High Court rejected the taxpayer's argument that mere participation in the proceedings will not validate them, if the notice itself was invalid. The High Court held that the validity of the notice under Section 148 of the Act, which is a condition precedent for reassessment, was not in question. The only defect which could be pointed out was that the AY was not mentioned in the reasons recorded by the AO. Thus, the High Court concluded that unless it was shown that the taxpayer was misled by not mentioning the AY in the reasons recorded and the taxpayer participated in the reassessment proceeding without raising any objection, then, such an objection could not be raised by the taxpayer at a subsequent stage of the proceeding. Accordingly, High Court restored the matter back to Tribunal for examining the case on merits.

CIT v. Shyam Cold Storage [TS-70-HC-2013(ALL)]

High Court upholds constitutional validity of retrospective amendment providing addition of 'provision for diminution in the value of any asset' in computing book profits under Section 115JB

The taxpayer is a public limited company and is engaged in the business of manufacture and trading/export of consumer items such as refrigerators, washing machines, etc. For the AY 2002-03, 2003-04 and 2009-10, the taxpayer was assessed to income tax on the 'book profit' computed in accordance with the provisions of Section 115JB of the Act. The Supreme Court, in HCL Comnet Systems & Services Ltd. [TS-53-SC-2008] held that any provision made towards irrecoverability of the debt could not be said to be a provision for liability. The Supreme Court held that such provisions could not be added to the book profits under Section 115JB of the Act. Subsequent to Supreme

Court ruling in HCL Comnet (supra), Section 115JB was retrospectively amended by Finance Act (No 2), 2009 w.e.f. April 1, 2001. The amendment to Section 115JB required the taxpayer to add to the taxable book profits, 'the amount or amounts set aside as provision for diminution in the value of any asset'.

The taxpayer, challenged by way of a writ petition, the retrospectivity of the amendment. It was argued on behalf of the taxpayer that the retrospective amendment was unreasonable, discriminatory and therefore, unconstitutional. Ruling in favour of the Revenue, the division bench of Delhi High Court held that the amendment made to Section 115JB by the Finance (No.2) Act, 2009 with retrospective effect from 1 April 2001 was not ultra vires or unconstitutional. The High Court held that it is not unusual for Legislature to make retro amendments to cure lacuna pointed by judicial decisions. Such amendment seeks to achieve a larger public interest by removing the inequalities in the tax regime. Further it also held that nothing prevents legislature from giving effect to its intention at earliest point of time so that there is certainty and clarity in law. Absence of any justification while introducing amendment cannot invalidate an amendment.

Whirpool of India Ltd & Anr v. Union of India & Ors [TS-101-HC-2013(DEL)]

Stay of demand can be granted even if there is no financial hardship to the taxpayer

The AO raised a demand on the taxpayer on the same lines as had been done in the preceding year. Though in the preceding year, the taxpayer had obtained a stay from the High Court, the AO refused to follow that for the present year. The taxpayer filed a Writ Petition to challenge the refusal to grant stay. To oppose the grant of stay, the department relied on CIT vs. IBM India Pvt. Ltd (ITA 31 of 2013 dated 4 February 2013) where the Karnataka High Court had held that in matters involving large amounts due to the department, an interim order of stay would be granted only in case of genuine financial hardship of the taxpayer and not otherwise. The department argued that as the taxpayer did not have any financial hardship, the stay should be rejected.

The High Court rejecting the department's plea and granting stay of the demand held that the order of the Karnataka High Court in CIT v. IBM India Pvt. Ltd cannot be read to mean that consideration of whether a taxpayer has made out a strong prima facie case for stay of enforcement of a demand is irrelevant. Nor is the law to the effect that absent a case of financial hardship, no stay on the recovery of a demand can be granted even though a strong prima facie case is made out. In considering whether a stay of demand should be granted, the Court is duty bound to consider not merely the issue of financial hardship if any, but also whether a strong prima facie raising a serious triable issue has been raised would warrant a grant of stay. That is a settled position in the jurisprudence of our revenue legislation. Where a strong prima facie case has been made out, calling upon the taxpayer to deposit taxes would itself occasion undue hardship. Also the manner in which the department has sought to brush aside

a binding decision of the Court in the case of the taxpayer on the issue of a stay on enforcement for the previous year has to be seriously disapproved. The rule of law has an abiding value in our legal regime. No public authority, including the department, can ignore the principle of precedent. Certainty in tax administration is of cardinal importance and its absence undermines public confidence.

UTI Mutual Fund v. ITO [WP (Lodg) No.523 of 2013]

Debts of the transferor company which are transferred pursuant to a Scheme of Amalgamation are available as deduction to the transferee company when the same are written off

The taxpayer is engaged in the business of printing of newspaper. For the AY 2004-05, the taxpayer claimed certain debts, which were received on amalgamation of Abhiyan Press, as bad debts. The AO held that the taxpayer did not fit into the definition of the term 'industrial undertaking' under Section 72A(7)(aa) and could not claim the deduction for bad debts.

The High Court observed that once the amalgamation took place, there could hardly be a matter of dispute that such debts of the company passed on to the transferee company and after the amalgamation, it needed to be allowed in the year it as written off in the books. The High Court further held that the transferee company could be allowed a deduction for bad debts of the transferor company, where such bad debts were written off in the books of the taxpayer after amalgamation. The High Court held that the AO had wrongly placed reliance on Sec 72A which pertained to carry forward and set-off of accumulated loss and unabsorbed depreciation allowance on amalgamation of a company and not to deductibility of bad debts. Therefore, the question whether the taxpayer was an industrial undertaking or not was immaterial.

CIT v. Sambhav Media Ltd [Tax Appeal No. 652 of 2012]

Family settlement not a 'transfer' and compensation received not taxable as 'income'

During pendency of dispute between two groups of a family, the parties agreed to divide the assets and the business of the family into two lots. The division resulted into Group B paying INR 240 million to Group A. The AO considered the family settlement and found that INR 240 million of compensation is the share of the taxpayer and consequently levied capital gain tax on the said amount.

The taxpayer, relying upon the 'principle of owelty', contented that the compensation was received to equalize the inequalities in the partition and, thus, such amount was nothing but an immovable property. Further, such amount received was not income, but a share in the immovable property though paid in cash, as it is the cash value to settle inequalities in partition. Therefore, such amount cannot be treated as income liable to capital gain tax.

The High Court held that adjustment of shares and crystallization of the respective rights in the family properties cannot be construed as a transfer in the eye of law. The payment made to the taxpayer is to equalize the inequalities in partition of the assets. Thus, the amount of "owelty" i.e. compensation deposited by Group B is to equalize the partition, represents immovable property and will not attract capital gain tax.

CIT v. Ashwani Chopra [ITA No. 353 of 2011] [P&H]

The Bombay High Court dismissed the admission of appeal by the tax department against the Tribunal ruling in taxpayer's case wherein the Tribunal had held that investment/ merchant banking activities are not comparable to investment advisory/support services

The taxpayer provided investment advisory related support services to its Associated Enterprise (AE) and adopted Transactional Net Margin Method (TNMM) as the most appropriate method. The Transfer Pricing Officer (TPO) applied his own set of comparables to benchmark the international transaction of the taxpayer with its AE and did not provide any reasons for rejecting the comparables selected by the taxpayer. The Tribunal ruled that the companies selected by the TPO were functionally not comparable with the taxpayer. The tax department lodged an appeal at the High Court.

Issues before the High Court were:

- Whether the Tribunal was correct in holding that the comparables selected by the TPO were not functionally comparable while determining Arm's Length Price (ALP)?
- Whether the Tribunal was correct in allowing safe harbour margin of (+/- 5 percent variation) to the taxpayer?

The High Court observed that with regard to the eight comparables which the Tribunal had held were not functionally comparable with the taxpayer, the Tribunal had in a detailed manner, pointed out why the selected comparables were not proper. Further with regard to the question on allowance of the safe harbour margin to the taxpayer, the High Court observed that since the comparables selected by the TPO were not found to be functionally comparable therefore the difference between the operating margin of the taxpayer as against the comparable companies was within the range of +/5 percent.

CIT v. Carlyle India Advisors Private Limited (ITA (L) No.1286 of 2012)

The term 'residential house' examined for the purpose of exemption from taxation of capital gains

The Punjab and Haryana High Court rejected the claim made for exemption in respect of re-investment of long term capital gains on sale of residential property, in the construction of a one-room makeshift structure, which did not even have any basic amenities.

The tax law permit an exemption in respect of the reinvestment of the long-term capital gains arising from the transfer of a residential house, in the acquisition/ construction of a 'residential house', within the time stipulated. It may be noted that the term 'residential house' is not defined in the tax law and the High Court has interpreted the meaning of this term in this judgment.

Ashok Syal v. CIT [2012] (ITA No. 566)(P&H HC)

The Delhi High Court held that several independent units can constitute a residential house for claiming exemption under Section 54 of the Act

The Delhi High Court in the case of Ms. Gita Duggal held that two independent houses within the same building can constitute 'a residential house' and accordingly, exemption under Sections 54 or 54F of the Act can be claimed.

CIT v. Gita Duggal (ITA 1237/2011, dated 21 February 2013, AY 2007-08)

Tribunal Decisions

Taxability in one country is not sine qua non for availing relief under the tax treaty

The taxpayer, an Indian entity, had made payments to an individual in Dubai (individual) for professional services Provided by the said individual. The payments were made without deduction of tax at source on the basis that the said payments were not taxable in India as per Article 14-Independent Personal Services of the India-UAE tax treaty.

The AO disallowed the payments in the hands of the taxpayer under section 40(a)(i) of the Act on the basis that tax was required to be deducted from the payments to the individual, as recourse to the India-UAE tax treaty was not possible (due to the fact that the individual was not paying taxes in UAE).

Further, the AO also disallowed certain other payments to tax residents of USA and UK, for providing training and professional services to the taxpayer.

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

- Relying on the decision of the Supreme Court in the case of Union of India v. Azadi Bachao Andolan [2003] 263 ITR 706 (SC) and the Mumbai Tribunal's decision in the case of ADIT v. Green Emirate Shipping & Travels [2006] 100 ITD 203 (Mum), the Tribunal held that:
    - Taxability in one country is not a sine qua non for availing relief under the treaty from taxability in other country and
    - It is sufficient that a person by reason of domicile, resident, place of management, place of incorporation or any other similar criterion should be liable to tax in the

contracting state [As per Article 4(1) of the India-UAE tax treaty].

- As the fiscal domicile of the individual was in UAE, the individual is to be treated as 'Resident' of UAE irrespective of whether or not that person is actually paying taxes in UAE.

- Therefore, in view of the beneficial provisions of the tax treaty, the payments were not taxable in India and there was no requirement for the taxpayer to deduct tax at source

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- Further, in case of payments to the tax residents of USA and UK, the services provided by the parties did not make available any technical knowledge, experience, skill, etc. to the taxpayer, and the payments did not therefore qualify as fees for technical services. Hence, tax was not required to be deducted from the payments.

KPMG v. Jt. Commissioner of Income-tax [ITA No. 1820/Mum/2009]

Service Tax being statutory liability, does not contain any element of profit, not to be included in the total receipts for computing presumptive income under Section 44B of the Act

The taxpayer, a foreign company and tax resident of South Korea is engaged in the business of operation of ships in international traffic. The taxpayer while filing its return of income excluded the component of service tax while computing presumptive income at the rate of 7.5 percent under Section 44B of the Act.

During the course of assessment proceedings, the AO made an addition of service tax component which was included in the total revenue for computation of presumptive income at the rate of 7.5 percent under Section 44B of the Act.

The Mumbai Tribunal relying on its earlier decision in the case of Islamic Republic of Iran Shipping Lines v. DCIT [2011] 11Taxman.com.349 (Mum) held that the service tax is a statutory liability which does not involve any element of profit and a service provider is collecting the same from its customers on behalf of the Government and accordingly, same cannot be included in the total receipts for determining the presumptive income.

DDIT v. Hanjin Shipping Company Limited [TS-72-ITAT-2013(Mum)]

Adjustment of tax refund against the dues of a group company is not permitted under the Act

The taxpayer is a company registered under the Companies Act, 1956. During the year under consideration the taxpayer filed its income-tax return declaring income and deposited the self assessment tax. The AO assessed the income of the taxpayer and raised a demand. Subsequently, the taxpayer deposited the said demand amount. In pursuance of the said demand raised by the AO, the taxpayer preferred an appeal before the CIT(A). However, the CIT(A) dismissed the appeal of the taxpayer.

The Tribunal deleted the demand raised by the AO on the taxpayer. Pursuant to the order of the Tribunal, the AO passed

the consequential order, assessed taxable income of the taxpayer and issued certain amount of refund. The taxpayer filed representation before the AO bringing to his notice about the various amounts deposited, recovered and adjusted and claimed a refund. However, the Chief Commissioner of Income-tax (CCIT) held that the refund of the taxpayer has been adjusted towards the demand of Narain Properties Ltd, a group company of the taxpayer.

In writ petition filed before the Allahabad High Court it was observed that Section 245 of the Act provides that where any refund is due to any person, the income-tax authorities may set off the amount to be refunded against any sum remaining payable under the Act by the person to whom refund is due, after giving him intimation. Thus, Section 245 of the Act authorises set off of the refund against the dues of the same person that too after giving notice to him which is mandatory. There is no provision which authorises the income-tax authorities to set off the refund of a person against the dues of another person. Further, the taxpayer was not given any notice nor he ever gave his consent for set off against the dues of Narain Properties Ltd. The action of the tax department in avoiding the refund of the taxpayer is arbitrary. The step of setting off the refund towards dues of another person without giving intimation to the taxpayer is illegal and without jurisdiction. Accordingly, the tax department was directed to refund the amount along with interest at the rate given under Section 244A(1)(a) of the Act to the taxpayer.

Usha Polytex Ltd v. CCIT and Others [Writ (tax) No - 433 of 2007]

Tolerance band not provided in statute cannot be interpreted nor introduced by judiciary

There was a slight difference between consideration for the commercial premises and the stamp duty valuation of the same. It was contended that where difference in the stamp duty valuation vis-a-vis stated sales consideration is less than 10 percent of the stamp duty valuation, the difference should be ignored and since the difference is less than 15 percent, the provisions of Section 50C cannot be invoked at all. It was further contended that every valuation is at best an estimate and therefore under valuation cannot be presumed when there is only a marginal difference between such an estimate and the sale consideration. However, the Tribunal held that when the provision for tolerance band is not prescribed in the statute, it cannot be open to us to read the same into the statutory provisions of Section 50C of the Act. The provisions of Section 50C require that when the stated sales consideration is less than stamp duty valuation for the purposes of transfer, the stamp duty value will be, subject to the safeguards built in the provision itself, taken as the sales consideration for the purposes of computing capital gains.

Heilgers Development & Construction Co. Pvt. Ltd. v. DCIT [ITA No. 1681/Kol/2011]

Mumbai Tribunal reaffirms allowability of hypothetical tax as a deduction from taxable income

The Mumbai Tribunal, relying on the recent decision in case of Jaydev H. Raja by the Bombay High Court, confirmed that hypothetical tax deducted from employee's salary in home country is deductible from the income which is offered to tax in India. Thus, Indian income tax, paid by the employer, after reducing the hypothetical tax withheld from employee's salary may be considered taxable in India as a perquisite in the hands of the employee.

DCIT v. Shri Bikram Sen (ITA No.810/Mum/2012, AY 1996-97)

No penalty for concealment of income where there is voluntary disclosure and a bonafide reason for underreporting of salary which is later added to taxable income

The Pune Tribunal recently deleted the penalty that was levied on several expatriate employees of a foreign company deputed to the Indian group entity in a batch of appeals filed before it. These employees had originally filed their tax returns without reporting the overseas salary received by them from Tetra Pak International S. A. (TPISA), their home country employer. The employees subsequently revised their tax returns to include such overseas income, after the receipt of a notice issued by the tax authorities. The Tribunal held that a levy of penalty is not an automatic consequence of an addition to income and penalty is not leviable where the taxpayer is able to provide a reasonable explanation that is not found to be false by the tax authorities.

Emilio Ruiz Berdejo [TS-547-ITAT-2012(PUN)]

Remuneration paid to consultant doctors by hospital may be classified as salary based on actual contractual Relationship

The Hyderabad Tribunal in the case of Wockhardt Hospitals Limited held that tax ought to have been deducted at source on the fee paid to the consultant doctors by treating these payments as 'salaries' and not as a 'professional fee'.

The identification and application of the appropriate withholding tax provisions is important to ensure that the payer is not held responsible for deducting tax at source incorrectly. Whether a payment constitutes 'salary' or 'fees for professional services', has been a matter of dispute.

Tax is required to be deducted at a specified rate in respect of payment of 'professional fees'. The person receiving the income is thereafter obligated, in any case, to pay his actual differential tax liability based on his computation of income.

On the other hand, an employer is required to withhold the total taxes due by the employee on the estimated salary income, after taking into account the deductions permitted to salaried employees.

Wockhardt Hospitals Ltd v. DIT (ITA No 985 and 986/Hyd/2011)

The Mumbai Tribunal reaffirms that in case of bequeathed assets, the

cost of acquisition and indexation to be determined with reference to previous owner's period of Holding

The Mumbai Tribunal in the taxpayer's case held that the cost of the gifted assets has to be determined with reference to the cost to the previous owner and indexation has to be provided for the total period for which asset was held by the taxpayer and the previous owner.

The tax law provides for taking the cost of acquisition to the previous owner. However as per the plain reading of the law, the benefit of indexation is available only for the period for which the asset is held by the taxpayer and no benefit is provided for the period for which the asset was held by the previous owner.

ITO v. Ms. Noella P. Perry (ITA No. 8655/Mum/2010, AY 2006-07)

Notifications/Circulars/ Press releases

India signs tax treaty with Bhutan

GOI has signed a tax treaty with the Government of Bhutan on 4 March 2013 for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income. The tax treaty is expected to provide tax stability to the residents of India and Bhutan and facilitate mutual economic cooperation as well as stimulate the flow of investment, technology and services between India and Bhutan.

Key highlights of the tax treaty are as follows:

- Business profits will be taxed in the Source State, if the activities of an enterprise constitute a Permanent Establishment (PE) in the Source State;
- Profits derived by an enterprise from the operation of aircraft in international traffic shall be taxable in the country of 'place of effective management' of the enterprise;
- Dividends, interest, royalty income and fees for technical and professional services will be taxed both in the country of Residence and in the country of Source. However, the maximum rate of tax to be charged in the Source State will not exceed ten percent;
- Capital gains from the sale of shares to be taxed in the Source State;
- Provisions for effective exchange of information including exchange of banking information have been incorporated; and
- Anti-abuse provisions have been incorporated to ensure that the benefits of the tax treaty are availed of by genuine residents of the two countries.

Press release dated 4 March 2013 – www.pib.nic.in

CBDT Notification to amend TDS Rules and Forms

The CBDT issued a Notification amending the Income-tax Rules, 1962 referring to Statement of deduction of tax and Statement of Collection of Tax. The Rules introduced vide Income-tax (Eleventh amendment Rules 2012), regarding furnishing of Certificate from an accountant has also been amended.

Notification No. 11/2013, F.No. 142/31/2012-SO(TPL)

India and Portugal sign Social Security Agreement

India has recently signed a Social Security Agreement (SSA) with Portugal. India has also signed SSAs with Belgium, Germany, Switzerland, France, Luxembourg, Netherlands, Hungary, Denmark, Czech Republic, Republic of Korea, Norway, Finland, Canada, Japan, Sweden and Austria. Such SSAs generally help employers and their mobile employees in avoiding double social security contributions.

The SSA's envisage the following key benefits:

- Exemption from Social Security Contribution in the host country
- Export of Benefits
- Totalization of contributory periods

Source: www.pib.nic.in

II. SERVICE TAX

High Court Decisions

Services provided and invoices issued before change in effective rate of tax but payment received afterwards– rate of tax would be the one prevailing earlier as provided by Rule 4 (a) (ii) of the Point of Taxation Rules, 2011

The taxpayer is an association of Chartered Accountants, registered as a society in Delhi. They filed a writ petition on the following 2 issues:

a) Taxable event for the purpose of levy of service tax where the Chartered Accountants rendered services and invoices were issued before April 01, 2012, but the payment is received after April 01, 2012

b) Quashing of the Circular No 158/9/2012-ST dated May 08, 2012 and Circular No 154/5/2012-ST dated March 28, 2012

The taxpayer relying on Rule 4(a) (ii) of the Point of Taxation Rules, 2011 (the 'POTR'), contended that the point of taxation shall be the date of issuing of invoice.

The revenue on the contrary relied on the Circular No 158/9/2012-ST dated May 08, 2012 wherein it was clarified that for the 8 specified services mentioned in Rule 7 (including Chartered Accountant services), for invoices issued on or before March 31, 2012, the point of taxation shall be the date on which payment is received or made, as the case may be. Also it relied on Circular No 154/5/2012-ST dated March 28, 2012 wherein it was clarified that if the payment is received or made, on or after April 01, 2012, the service tax needs to be paid at the rate of 12 percent.

The High Court allowed taxpayer's writ petition relying on Rule 4 (a) (ii) of the POTR Rules and held that where the services of Chartered Accountants were actually rendered and the invoice was issued before April 01, 2012, but the payment is received after April 01, 2012, then the date of issuance of invoice shall be deemed to be the date on which the service was rendered. Thus, the rate of tax will be 10 percent and not 12 percent.

High Court also held that since Rule 7 was substituted by a new rule w.e.f. April 01, 2012 which does not apply to services rendered by Chartered Accountants, the applicability of both the Circulars becomes redundant. Therefore, the Circulars being contrary to the Finance Act, 1994 and the POTR were quashed.

Delhi Chartered Accountants Society (Regd) v UOI [2013-TIOL-81-HC-DEL-ST]

Taxable event under the erstwhile service tax regime is the date of providing of taxable service and not the date of receipt of payment

The issue in consideration before the High Court was which rate would be applicable for services rendered prior to date of rate

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change in respect of which payments were received after the rate change.

Tribunal relied on the decision given by the Gujarat High Court in the case of Commissioner of Central Excise & Customs v. Reliance Industries Ltd [2010 (19) STR 807 (GUJ)] wherein it was held that the effective rate of service tax would be based on the date on which the service is provided and not the date of billing and decided the issue in favour of the taxpayer.

Revenue contended that the view taken by the Gujarat High Court is not binding on this Court and placed reliance on the Service Tax Rules, 1994, the Point of Taxation Rules, 2011 along with Section 67A of the Finance Act, 1994.

It was held that since the relevant period here is April, 2003 to September, 2003 and none of the provisions relied upon by Revenue are in effect during the above period therefore, the taxable event has to be considered in the light of provision of the Finance Act, 1994. Accordingly, the date of providing the taxable services is the taxable event and not the date of receipt of payment.

CST v Consulting Engineering Services India Pvt Ltd [2013-TIOL-60-HC-DEL-ST]

Rate of service tax prevailing at time of providing service is relevant under the erstwhile regime, not on the date of receipt of payment – TRU Instruction dated April 28, 2008 clarifying to the contrary quashed

The taxpayers were engaged in rendering works contract services which were taxable at the rate of 2 percent which was enhanced to 4 percent with effect from March 01, 2008. The issue for consideration before the Court was what will be the effective rate of service tax on the works contract services rendered prior to March 01, 2008 for which the payment was received post March 01, 2008.

The revenue relied on TRU Instruction F No 545/6/2007-TRU, dated April 28, 2008 ('TRU Instruction') to contend that the date of receipt of payment by the taxpayers was relevant in determining the correct rate of service tax applicable on the services rendered by the taxpayers and therefore, service tax would be payable at the rate of 4 percent. The TRU Instruction specifically clarified that the service tax was chargeable on receipt basis and on the amount so received for the service provided or to be provided, whether or not services were preformed.

The High Court relied on the Supreme Court judgement in the case of Association of Leasing and Financial Service Companies v UOI [2010 (20) STR 417 (SC)] and its own judgment in the case of Commissioner of Service Tax v Consulting Engineering Services India Pvt Ltd in Service tax Application 76/2012 decided on March 14, 2013. The Court held that since there were no provisions under the law to the contrary during the relevant period, date of rendering the service is the taxable event.

The Court quashed the TRU Instruction and held that services in the present case were taxable at the rate applicable on date of rendering such services i.e. 2 percent.

Vistar Construction Pvt Ltd v UOI [2013-TIOL-73-HC-DEL-ST]

Tribunal Decisions

Service tax not applicable on transfer of employees to hotels run by subsidiaries/ associate companies under man-power recruitment or supply agency service

The taxpayers are owners of several hotels. Some hotels are owned and managed by their subsidiaries/associate companies. The manager/employees of the taxpayers are sent on deputation to hotels owned and managed by subsidiaries/associate companies and in turn reimbursement is made for actual expenses incurred in relation to such employees without adding any mark-up.

Revenue's contention was that taxpayers are providing taxable services under the category of 'manpower recruitment or supply services'.

Tribunal in the instant case granted stay from recovery of service tax on the ground that taxpayers are not running any manpower recruitment or supply agency. Taxpayers are managing hotels and some employees were sent to other hotels managed by the subsidiaries/associate companies on deputation and cost was recovered on the basis of actual expenses. Therefore, it cannot be said that the taxpayers are engaged in supply of manpower or as an agency and prima facie case exists in favour of taxpayers.

ITC Ltd v CST [2013-29-STR-387-TRI-DEL]

Services of transportation of export cargo is performed substantially outside India and thus, qualify as export of service under the erstwhile provisions – taxpayer cannot be made liable to pay service tax on the ground that export cargo was handed over to the airlines in India

The taxpayers were engaged in the business of transportation of cargo by air. Taxpayers received cargo from their customers in India and transported the same outside India. For providing the aforesaid services, taxpayers charged a fee from its customers and received the same in Indian currency. The revenue authorities demanded service tax from the taxpayers on the services provided by them during the period March 15, 2005 to June 23, 2005 on the ground that services were not export.

On March 15, 2005, Export of Service Rules, 2005 (the 'Export Rules') were introduced and all the taxable services were classified under three baskets namely 'services relating to immovable property', 'performance based services' and 'recipient based services'.

Transportation of goods by air ('TGA') services as provided by taxpayers were classified under second basket i.e. 'performance based services' and accordingly such services were considered as export if they were either wholly or partly performed outside India. In light of Export Rules, Tribunal held that since TGA services involved taking of goods outside India which is a service substantially performed outside India, taxpayers were not liable to pay any tax. The Tribunal rejected the argument of the Revenue that such services cannot qualify as export since the cargo was handed over to the airlines in India.

From June 16, 2005 Exports Rules were amended to include receipt of convertible foreign exchange as a pre condition for a service to qualify as exports. Since the taxpayers were not receiving payment for TGA services in convertible foreign exchange from their clients, they became liable to pay service tax on TGA services provided by them from June 16, 2005. However, exemption to this effect was provided to airlines from July 15, 2005. Thus, for the period June 16, 2005 to July 15, 2005, taxpayers were liable to deposit service tax. The taxpayers started collecting tax from their customers only from June 23, 2005 onwards.

The Tribunal thus held that for a short period from June 16, 2005 to June 23, 2006, there was no provision which waived service tax liability on TGA services provided by the taxpayers and they were liable for payment of service tax on the same. The Tribunal also upheld invocation of extended period of limitation since the taxpayers were aware of the changes in law and knowingly evaded payment of service tax and inability to collect service tax from customers cannot be a ground for pleading bona fide belief. However, the Tribunal waived off the penalty considering the peculiar nature of circumstances.

Sirlankan Airlines v Commissioner of Service Tax, Chennai [2013-29-STR-365-TRI-CHENNAI)]

Consideration received towards goodwill on transfer of running business by taxpayer to another company is not taxable under Business Auxiliary Services

The taxpayers entered into two agreements with their client M/s Dirk India Ltd. ('Dirk India'). One agreement was for transfer of goodwill wherein the consideration was calculated at a rate per ton of output produced by Dirk India. Other agreement was for providing services of collection, delivery and handling of fly ash produced by taxpayers to Dirk India on which taxpayers were paying service tax classifying the same as 'business auxiliary services'.

The revenue authorities sought to levy tax on royalty received by taxpayers for transfer of goodwill by including the same in the value of 'business auxiliary services' on the ground that such income was also towards commission only.

The Tribunal held that there were two separate agreements entered by the respondents - one for transfer of business goodwill and other for collection, delivery and handling of fly ash on which service tax liability has been discharged. The Tribunal held that by no stretch of imagination, payment of goodwill on transfer of business can come under the category of 'business auxiliary services' thereby rejected the appeal made by the Revenue.

CCE v S S Engineers & Contractors [2013-38-STT-312]

Collection of toll charges by the concessionaire under an assignment agreement does not amount to Business Auxiliary Services

A Concession Agreement was executed between National Highways Authority of India ('NHAI') and a Malaysian company CIDBI on Build, Operate and Transfer ('BOT') basis,

wherein NHAI granted to CIDBI ('Primary Concessionaire') the exclusive right, license and authority to implement the project and the concession in respect of the Project Highways i.e. NH-5 and NH-9 in Andhra Pradesh.

Under a separate Assignment Agreement, NHAI agreed to the assignment of concession by CIDBI in favour of Swarna Tollway Pvt Ltd ('taxpayer') pursuant to which taxpayers were deemed to be Concessionaire under the Concession Agreement. Under the said Assignment Agreement, the taxpayers were made responsible for completion of the project and later on collection of appropriate fees from the users of the Project Highways at the prescribed rate.

Revenue authorities contended that CIDBI was only the authorized Concessionaire as per the Concession Agreement and was not entitled to transfer the concession rights allotted to them under the Concession Agreement. Accordingly, taxpayers were collecting toll from users on behalf of CIDBI and were acting in the capacity of an agent of CIDBI. Consequently, Revenue sought to recover service tax on toll charges collected by taxpayers under the taxable category of Business Auxiliary services.

The Tribunal while relying on the various clauses of the aforementioned agreements held that pursuant to the Assignment Agreement (approved by NHAI), taxpayers had stepped into the shoes of CIDBI and were collecting toll in the capacity of 'Concessionaire' and not as an agent of CIDBI. Hence, taxpayers were not liable to deposit service tax on toll charges under Business Auxiliary services and appeal was allowed in the favour of taxpayers.

Swarna Tollway Pvt Ltd v CCE, Guntur [2011-5-TMI-192-CESTAT-BANGALORE]

Activity of providing transportation from one of its establishments to another establishment for facilitating provision of ropeway services does not fall within the ambit of tour operator services

The taxpayer provides ropeway services between its two establishments, both situated in Haridwar, one at Mansa Devi Temple and other at Chandi Devi Temple upon payment of fees which is not chargeable to service tax. For facilitating such service, the taxpayer also provides transportation of passengers between the two establishments upon payment of a separate fee.

Revenue contended that such transportation services would fall under the scope of 'tour operator services' leviable to service tax.

The Tribunal held that the taxpayer cannot be said to be a 'tour operator' because the service of providing transportation is not his main activity and is only ancillary to the main business of providing ropeway service. Hence, the Appeal was dismissed

CCE, Meerut-I v Usha Breco Ltd Hardwar (Uttarkhand) [2013-TIOL-20-HC-UKHAND-ST]

Stay granted in relation to renting of immovable property on the view that meaning of term "renting" will not cover long term leasing. Further, developing a township according to a plan conducive to the society at large has to be prima facie consid-

ered as a sovereign function and not a commercial activity

The taxpayer, Greater Noida Industrial Development Authority ('GNIDA') is a body established under Uttar Pradesh Industrial Development Act, 1976 which empowers GNIDA to allocate and transfer whether by way of lease or sale or otherwise plots of land for industrial, commercial and residential purposes. The taxpayers charge both onetime lease charges at the time of initial handling over of the land and also annual fees charges at different rates for land given for different purposes.

Service tax was sought to be recovered on the lease charges received under the category of 'renting of immovable property'.

The taxpayers contended that they are undertaking statutory sovereign functions and not a service and that long term lease is like a 'sale' not akin to renting, taxable under the Finance Act, 1994 (the 'Act') which only includes short term renting.

Opposing the taxpayers, the Revenue contended that the all the properties leased out by taxpayers continue to belong to them. The property is given on lease basis and not on free hold basis. Further, the fact that taxpayers also collect annual rent in addition to onetime payment shows that property is not sold at all.

The Tribunal held that with new types of 'transfer of rights' emerging, the ordinary meaning of 'renting' will not cover long term leasing. The term 'leasing' used in the inclusive definition of renting under the Act does not cover long term leasing where a property is given to a person with rights to transfer, assign and mortgage the rights. Such transfers are more akin to sale and less to renting of property.

Further, developing a township according to a plan conducive to the society at large has to be prima facie considered as a sovereign function and not a commercial activity of the Government. Accordingly, based on the prima facie view that the taxpayer is not liable for payment of service tax, stay was granted.

Greater Noida Industrial Development Authority v CCE, Noida [2013-TIOL-44-CESTAT-DEL]

Notification & Circulars

Revised service tax return form issued

The Service Tax Rules, 1994 has been amended to introduce the revised service tax return form applicable under the new service tax regime.

Notification No 01/2013 dated February 22, 2013

III. VAT/ CST

High Court Decisions

Input Tax Credit cannot be denied to a purchasing dealer on the

grounds that no output turnover has been declared by selling dealer

The taxpayer is a partnership firm engaged in the business of gold and jewellery (bullion). During the tax period in question, the taxpayer purchased bullion from a local registered dealer, M/s Karat 24 ('selling dealer') and paid Value Added Tax ('VAT') on such a purchase made by them and claiming input tax credit ('ITC') of the same.

On verification by the revenue authorities, it was found that the selling dealer's registration was cancelled with effect from February 28, 2010 and no output turnovers were disclosed by him during the period for which the taxpayer was claiming ITC. Consequently, the revenue authorities sought to deny the benefit of ITC to taxpayers.

The High Court, relying on earlier judgments in this regard, held that since the provisions of the Andhra Pradesh Value Added Tax Act, 2005 entitle credit to taxpayers for tax charged in respect of purchase of taxable goods, failure on the part of selling dealer to file returns or remit tax component cannot be a ground to deny ITC.

Harsh Jewellers v Commercial Tax Officer, Panjagutta Circle, Hyderabad [2013-057-VST-0538]

Tax paid on purchase of vehicles for use in providing leasing of cars/ motor vehicles is eligible for Input Tax Credit under the Delhi Value Added Tax Act, 2004('DVAT Act'), as the word 'resale' should be construed according to the definition of 'sale' which includes transfer of right to use goods

The taxpayers were engaged in the business of leasing cars/motor vehicles which included transfer of right to use, control and possession of the vehicles to their customers. The taxpayers' claim for refund of input tax credit ('ITC') claimed on purchase of motor vehicles was rejected on the grounds that motor vehicles belong to list of non-creditable goods on which ITC is available only when such goods are meant for 'resale' in an unmodified form.

The Tribunal decided in favour of the taxpayer on the ground that the word 'resale' should be construed according to the definition of 'sale' which includes transfer of right to use goods. Thus, leasing of vehicles would qualify as resale in which case ITC should be available on purchase of motor vehicles.

The Tribunal also referred to Section 12(4) of the DVAT Act read with Rule 4(b) of the corresponding Rules (which provided the manner of determining turnover of purchase for specified transactions including transfer of right to use) basis which it held that in case of transfer of right to use, ITC should be availed in proportion to the sale price due during the taxable period.

Finally, the matter reached before the High Court which agreed with the Tribunal with respect to availability of ITC. However, the Court disagreed with the Tribunal's view regarding proportionate availability of ITC. The Court held that when a taxpayer involved in leasing business purchases cars, entire credit can be claimed in the tax period of purchase in which the taxpayer is obliged to declare his total lease rental turnover.

The High Court also relied upon the fact that the concept of proportionate availability of credit has been recognized in the DVAT Act only under Section 9(9) which specifically relates to capital goods and thus, cannot apply for any other category of goods. Thus, full ITC was allowed to the taxpayers.

Commissioner Of Value Added Tax v Carzonrent India Pvt Ltd [2013-VIL-07-DEL]

Input Tax Credit under Section 9(1) of Delhi Value Added Tax Act, 2004 cannot be denied to a purchasing dealer because of the non-payment or less payment of tax by the selling agent in the absence of any mechanism which would enable him to determine whether the tax is fully deposited by the selling agent

The taxpayer traded in electrical goods as a registered dealer under the Delhi Value Added Tax Act, 2004 ('DVAT Act'). Taxpayers purchased goods from registered dealers on payment of VAT at applicable rates. Tax invoices were issued by the selling dealers' basis which taxpayer claimed the Input Tax Credit ('ITC') of tax paid.

The issue relates to the period April 1, 2007 to March 31, 2008 wherein the VAT Officer sought to disallow the benefit of ITC to taxpayers on the grounds that certain identified selling dealers had deposited proportionately lesser tax with the authorities despite having a high turnover.

The Tribunal also decided against the taxpayer placing its reliance on Section 9(1) of the DVAT Act which permitted tax credit to a purchasing dealer only to the extent of the tax actually deposited by the selling dealer. It also took into consideration amendment in Section 9(2) of the DVAT Act with effect from April 1, 2010 vide which it was clarified that ITC is admissible to purchasing dealer only when tax is actually deposited by the selling dealer.

The High Court decided the matter in favour of the taxpayer on the ground that the words 'actually paid' used in Section 9(1) of the DVAT Act only signify that a claim for set off cannot be in excess of the tax in respect of which set-off is claimed. Further, the relevant amendment in Section 9(2) came into effect only in 2010, whereas the matter related to a prior period. Thus, such amendment shall not be applicable in the present case. The High Court was held that in the absence of any mechanism enabling the purchasing dealer to ascertain that a dealer's registration is cancelled, the benefit of ITC cannot be denied under Section 9(1) of the DVAT Act.

Furthermore, it was observed by the Court that the cancellation of registration of selling dealers took place after the transactions with the taxpayer. Thus, the taxpayer was allowed the ITC benefit.

Shanti Kiran India Pvt Ltd v CTT Department [2013-VIL-04-DEL]

Benefit of remission of tax cannot be denied to an expanded unit on the grounds that the original unit has been closed down

The taxpayer started its first production of goods in a new factory at Salt Lake (Unit 1) and obtained eligibility certificate under the

Bengal Finance (Sales Tax) Act, 1941 for deferment of tax for a period of seven years. The taxpayer subsequently expanded the factory by setting up a new unit in the self same plot of land (Unit 2) and a second expanded unit in Salt Lake itself (Unit 3). The taxpayer obtained eligibility certificate for its expanded units under the West Bengal Sales Tax Act, 1994 for deferment of tax for a period of seven years which could be extended over a period of time.

The taxpayer made an application for renewal of eligibility certificate for its Unit 3 which was rejected by the Joint Commissioner and a show cause notice was issued to show cause as to why the exemption certificate should be renewed for Unit 3 when the taxpayer had closed Unit 1 and 2 and shifted usable plant and machinery outside the state of West Bengal. The Joint Commissioner held that if there is no existing industrial unit, there can be no expanded unit. Hence, Unit 3 has lost its status as the 'expanded unit' for the purpose of renewal of eligibility certificate.

Aggrieved by the same, the taxpayer filed an application before the Tribunal which set aside the order by the Joint Commissioner and allowed the renewal of eligibility certificate.

In the present writ petition filed before the High Court, the Court held that the taxpayer satisfied all provisions of the relevant Act and Rules thereof and has also not violated any such condition in relation to expanded unit. Thus, once the benefit of remission has been given to an expanded unit, its continuance depends on the fulfillment of conditions of eligibility and the same cannot be denied on the grounds that the original unit has been closed down.

Accordingly, the order of the assessing authority rejecting the taxpayer's application was set aside.

State of West Bengal v Supreme Industries Limited [2013-58-VST-0117-HC-CAL]

The competent authority cannot curtail the statutory period of exemption once eligibility certificate has been granted on the grounds that the unit was registered under the Factories Act after grant of eligibility certificate

The taxpayer established a new unit for processing of rice from paddy in the state of Uttar Pradesh ('UP') and an eligibility certificate under Section 4A of UP Trade Tax Act was granted to the taxpayer by the competent authority for a period of six years.

Later, the competent authority found that the unit was registered under the Factories Act three years after the date of application of eligibility certificate. Accordingly, the authorities sought to curtail the exemption by a period of three years. The taxpayer, aggrieved by the same approached the Tribunal who also rejected the claim of the taxpayer.

The matter reached before the High Court which held that once the eligibility certificate was granted, authorities cannot curtail the benefit of exemption on the grounds that the unit was registered under the Factories Act on a date latter than the date of application under section 4A.

Accordingly, the Court held in favour of the taxpayer and set aside the impugned order for curtailment of the exemption period.

Parmshwar Quality Rice Mill v CTT, [2013-58- VST- 0090-HC-All]

IV. CUSTOMS

Supreme Court Decisions

Education Cess would not be leviable only on such portion of customs duty as is exempt under the Duty Entitlement Passbook Scheme

The taxpayer is engaged in manufacturing various goods and also exporting such goods to various countries. The taxpayers have been availing of the Duty Entitlement Passbook Scheme ('DEPB scheme') with respect to which, exemption from payment of import duty is granted at the specified rates for the specified commodities under Notification No 45/2002-Cus dated April 22, 2002 ('Notification No 45/2002').

The taxpayer adopted a position that when an importer imports any goods and avails the benefits under the DEPB scheme, in essence, he does not pay any customs duty and accordingly, is also not liable to pay education cess at the prescribed rate. This was based mainly on the premise that the goods imported under the DEPB scheme by virtue of Notification No 45/2002, carry 'nil' rate of customs duty and additional duty.

The taxpayers pointed out that the Government of India in the Circular No 5/2005 - Cus dated May 31, 2005 clarified that in case of the imports made under the DEPB scheme, the education cess at the rate of 2 percent would also be debited from the DEPB scrip.

The High Court held that education cess is to be collected on the customs duty levied and collected by the Central Government at the rate of 2 percent on such duty. Further, it observed that based on the nature of DEPB scheme and the exemption granted to imports made under such scheme, it can be seen that the very purpose is to neutralise the import duty component on the imported goods used for production of export items. Such object is achieved through the DEPB scheme under which the exporter is given the facility of utilising the credits in the DEPB scrip for the purpose of adjustment against the customs duty liability on the goods imported for the ultimate purpose of export on value addition

If goods are fully exempted from excise duty or customs duty or are chargeable to nil rate of duty or are cleared without payment of duty under specified procedure such as clearance bond, there is no collection of duty and, therefore, no education cess would be leviable on such clearances.

In view of the above, the HC held in favour of the taxpayer.

Gujarat Ambuja Exports Ltd v Gov of India Thr' Under Secretary, [(2012)-TIOL-546-HC-AHM-CUS]

The Supreme Court dismissed the Special Leave Petition filed against the above order of High Court.

Gujarat Ambuja Exports Ltd & 1 v Gov of India, [(2013)-TIOL-15-SC-CUS]

Notification & Circulars

Deemed export benefits for supply against ARO/Invalidation letter against Advance Authorisation, availability.

The DGFT has issued a clarification regarding deemed export benefits for supply against ARO/Invalidation letter against Advance Authorisation and clearly laid down the specific deemed exports benefits available vis a vis supplies against ARO as well as the specific benefits available vis a vis supplies against invalidation letter against Advance Authorisation.

Policy Circular No 15/2009-2014(RE 2012) dated February 22, 2013

V. CENTRAL EXCISE

Supreme Court Decisions

Whether sale of specified goods that do not physically bear a brand name from a branded sale outlet would amount to sale of banded goods and would disentitle the taxpayer from the benefit of SSI exemption notification

The taxpayer was engaged in the manufacturing and sale of cookies from the branded retails outlets of "Cookie Man". The Appellant had acquired this brand name from M/s Cookie Man Pvt Ltd, Australia. The taxpayer was selling some of these cookies in plastic pouches / container on which the brand name of Cookie Man was printed. No brand name was affixed or inscribed on the cookies. The taxpayer was paying excise duty on the cookie sold in the said pouches / container. However on the cookies sold loosely from the counter of the same retail outlet with plain plates and tissue paper excise duty was not paid.

Factually, no loose cookies were received in the outlet nor did the taxpayer manufacture the same. The taxpayer received all the cookies in sealed pouches / containers. Cookies which were sold separately were taken out of the container and displayed for sale separately.

The taxpayer argued that only specified goods bearing an affixed brand name of those goods which physically display the brand name would qualify as goods bearing brand name and hence won't be eligible for SSI exemption. In this case since no brand name was affixed on the cookies loosely sold he is entitled for SSI exemption.

The Supreme Court ('SC') observed that the same cookies when sold in containers do not become unbranded cookies. The invoices carry the name of the company and the cookies were sold from the counter of the store. The SC held that the store's decision to sell some cookies without the container stamped with its brand or trade name doesn't change the brand of the cookies. The SC held that cookies once sold even without inscription of the brand name, indicate a clear connection with the brand

name in the course of taxpayer's business of manufacture and sale of cookie under the brand name 'Cookie Man'. They continue to be the branded cookies of "Cookie Man" and hence SSI exemption is not available.

CCE, Chennai v Australian Foods India Pvt Ltd [2013 (287) ELT 385 (SC)]

High Court Decisions

Comptroller and Auditor General of India has no power to audit records of non-government companies which are not in receipt of any aid or assistance from any government or government entity; since conflicting decision was appeared to have been given in another case, matter was referred by the Single Judge to the Division Bench

The taxpayers were a company incorporated under the Companies Act, 1956 and were inter alia engaged in the business of trading in stocks and securities. No aids in the form of funds or loan were provided to the taxpayers by the Central or State Government or any other Government undertaking or organization. A notice was issued by the Office of the Principal Director of Audit (Central), Kolkata for getting the accounts, service tax records and other documents audited by the Central Excise Revenue Audit ('CERA') authorities. A writ application was filed by the taxpayers against the said notice.

In the present writ application, the question before the Calcutta High Court was whether Central Excise Revenue Audit authorities [an audit wing of the Principal Director of Audit (Central), Kolkata under the Comptroller and Auditor General of India ('CAG')] had the powers/ authority/ jurisdiction to audit the accounts, service tax records or other documents of the taxpayers.

During the course of hearing, it was observed by the Court that none of the relevant statutes like the Companies Act, 1956, the Income Tax Act, 1961, the Central Excise Act, 1944 or the Finance Act, 1994 contained any provision which would empower the CAG or any audit team subordinate to the CAG to conduct audit of any company incorporated under the Companies Act 1956, except a government company within the meaning of Section 619 of the Companies Act. The Court also observed that under Section 20(1) of the Comptroller and Audit General's (Duties, Powers and Conditions of Service) Act, 1971, accounts of a non-government company could be audited by the CAG only when the CAG is requested to do so by the President of India/ the Governor of a State/ the Administrator of Union Territory, which was not the situation in the present case.

In this writ petition, the taxpayers also challenged the vires of Rule 5A of the Service Tax Rules 1994 ('Service Tax Rules') contending inter alia that the said rule is in excess of the rule making power conferred under the Finance Act, 1994.

The Court held that there is no provision in the Finance Act, 1994 or the CAG Act which empowered the CAG to audit the accounts of a non-government company, which was

not receiving any aid or assistance from any government or government entity. Further Sub-section (2) of Section 94 also did not empower the Central Government to frame rules for audit of the accounts of a taxpayer by any audit team under the CAG. With respect to Rule 5A of the Service Tax Rules, it was held that the rule did not oblige a taxpayer to agree to an unauthorized audit of its accounts by an audit team from the CAG's office. It was further clarified that statutory rules framed in exercise of power conferred by a statute, cannot introduce something not contemplated in the statute, from which the rule making power is derived.

The Single Judge was of the opinion that the impugned notice could not be sustained and the same is liable to be set aside. However, in the light of a conflicting judgment given by a Co-ordinate bench in the case of Berger Paints India Limited and Others v Joint Commissioner (Audit) Central Excise, Calcutta – II Commissionerate, Calcutta & Ors., the Single Judge decided to refer the writ application to a Division Bench for adjudication on the grounds of judicial propriety.

SKP Securities Ltd v Deputy Director (RA-IDT) [2013 (29) STR 337 (CAL)]

Tribunal Decisions

Wheeled Tractor Loader Backhoe (WTLB) and Vibrating Compactor (VC) are construction machinery could not be termed as 'Automobile' by applying definition provided under Motor Vehicles Act - Parts of WTLB and VC would not be covered by the expression 'parts, components and assemblies of automobiles' appearing against Entry No. 100 of Third Schedule, thus, their packing and repacking would not amount to manufacture

The taxpayers are manufacturers of construction equipments namely Wheeled Tractor Loader Backhoe ('WTLB') and Vibrating Compactor ('VC') covered under HSN heading No 8429 and 8430. In addition they also trade in spare parts of WTLB and VC which are classifiable under CETH 8431 which covers 'parts suitable for use solely or principally with machinery of heading no 8425 to 8430'. The taxpayer was paying applicable excise duty on procurement of spare parts and was onward selling the same after re-packing. No excise duty was charged by the taxpayer as in their view no excise duty was applicable.

According to Section 2(f)(iii) of Central Excise Act, 1944 ('CEA') in respect of goods listed in Schedule III to Central Excise Act, 1944 ('Schedule III') inter-alia packing, repacking of goods to render the same marketable to the consumer amounts to manufacture. Schedule III inter-alia cover 'parts, components and assemblies of automobiles' falling under any chapter heading.

The Revenue contended that the word 'automobiles' would cover even the WTLB and VC in terms of definition as given in Section 2(28) of the Motor Vehicle Act, 1988 and Section 2(e) of the Air (Prevention and Control of Pollution Vehicle) Act, 1981. Therefore spare parts of WTLB and VC would be treated as parts, components and assem-

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blies of automobiles and their packing or repacking for retail sale would amount of manufacture.

The Tribunal observed that in the Central Excise Tariff Act, 1985 ('CETA'), WTLB and VC are covered under Heading No 8429 and 8430 and parts of these goods are covered under Heading No 8431. Tribunal noted that when in the CETA, the WTLB and VC are treated as construction machinery falling under Chapter 84 and not as 'vehicle other than railways or tram way' covered by Chapter 87 then for the purpose of interpreting the scope of term 'Automobiles' in Schedule III a different criteria based on the definition of the term 'vehicle' or 'automobiles' in Air (Prevention and Control of Pollution) Act, 1981 or Motor Vehicle Act 1988 cannot be adopted. Tribunal held that these two laws are for totally different purpose. Tribunal held the prima facie the word 'Automobiles' in the entry parts, components or assemblies of automobiles under Schedule III has to be understood in the context of CETA in which goods in question are treated as parts of construction machinery not as parts of automobiles.

New Holland Construction v CCE [2013 (287) ELT 447 (TRI- DEL)]

Section 4A of the Central Excise Act, 1944 is applicable only in respect of those goods for which there is a requirement of declaration of MRP under the provisions of the Standards of Weights and Measures Act, 1976 and the rules made thereunder

The taxpayers were engaged in the manufacture of motorcycle and parts thereof. The spare parts in loose condition were cleared by the taxpayers from their Daruhera factory in Haryana to a Spare Parts Division ('SPD') in Gurgaon on payment of duty on 110 percent of the cost of production (i.e. the value determined as per Rules 8 and 9 of the Central Excise Valuation Rules, 2000). SPD, Gurgaon packaged such loose motor parts for retail sale and cleared them on payment of duty on the value determined under Section 4A of the Central Excise Act, 1944.

The Revenue Authorities insisted that the taxpayers should also pay duty on clearances of spare parts from Daruhera unit to SPD, Gurgaon as per the value determined under Section 4A. The matter reached the Tribunal where the taxpayers contended that the motorcycle parts were cleared by Daruhera unit in bulk and the same were not packed for retail sale at that stage. Further, packaging for retail sale was done at SPD, Gurgaon where MRP tags are also affixed on packages. It was also argued by the taxpayers that the provisions of the Standards of Weight and Measures Act, 1976 ('SWM Act') and the Standards of Weight and Measures (Packaged Commodities) Rules, 1977 ('SWM Rules') were not applicable to the loose parts as such provisions were applicable only on those commodities which have been packed for retail sale.

The Tribunal observed that for Section 4A to apply, it was a pre-requisite that there must be a requirement under the SWM Act or the SWM Rules to declare the MRP of the goods on their packages. Such requirement was there only in respect of commodities packaged for retail sale. The Tribunal further observed that the goods

cleared in loose condition to SPD, Gurgaon were not packaged commodities, therefore the demand of duty in respect of such clearances was declared to be unsustainable.

Hero Motorcorp Ltd v CCE [2013 (288) ELT 82 (TRI-DEL)]

VI. Entry Tax

High Court decisions

Levy of entry tax under the Orissa Entry Tax Act, 1999 ('OET Act') on the value of goods imported from a place outside India held constitutional

M/s Tata Steel Limited, M/s Emami Paper Mills Limited and M/s Maheswari Coal Services Private Limited ('Taxpayers') imported goods from outside India within the State of Odisha for use or consumption within the State. On import of goods within the municipal limits of the State of Odisha, the Revenue Authorities ('RA') demanded entry tax at the applicable rates in terms of the OET Act. The Taxpayers contended that levy of entry tax on the goods that are imported from a place outside India is contravention of Article 286 of the Constitution of India ('Constitution') which places restriction on the imposition of taxes on the sale of goods where the sale takes place in the course of import of goods into India.

Further, the Taxpayers submitted that Entry 83 of List I of the 7th Schedule to the Constitution provides the power to levy duties of customs including export duty to the Central Government. Whereas Entry 52 of List II of the 7th Schedule to the Constitution empowers the State governments to levy tax on the entry of goods into local area for consumption, use or sale therein. Thus, in light of Article 246 of the Constitution, the Taxpayers urged that the State Legislature cannot infringe upon the legislative power of the Parliament and levy entry tax on the goods that are imported from a place outside India.

In this context, RA submitted that the restriction placed vide Article 286 of the Constitution is on authorizing imposition of tax on sale or purchase of goods which the State Legislature has a power, which is derived from entry 54 of List II of the 7th Schedule of the Constitution. However, the power to levy entry tax is derived from entry 52 of the said list. Thus, the two fields are distinct and separate.

Additionally, RA placed reliance on decision given by the High Court of Kerala in the case of FR William Fernandez v State of Kerala [1999 (115) STC 591 (KERALA)], wherein the Court upheld the constitutional validity of tax on the import of goods from outside India. Also, RA noted the ruling given by the Apex Court in the case of Kiran Spinning Mills v Collector of Customs [1999 (113) ELT 753 (SC)] and JV Gokal & Co Private Limited v Assistant Collector of Sales Tax (Inspection) [1960 (11) STC 186 (SC)], wherein it has been held that the incidence of import ends the moment the goods crosses the custom barriers and does not continue till

the time the goods reach their destination within the country.

The High Court rejected the contention of the Taxpayers and held that entry tax is levied on goods which cross the custom barriers by invoking the powers conferred on the State under Entry 52 of List II of the 7th Schedule of the Constitution and thus there is no encroachment of the powers of the Parliament.

Tata Steel and others v State of Odisha and others [2013 (57) VST 484 (ORISSA)]

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