April 2014

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

Foreword

I am pleased to enclose the April 2014 issue of FICCI's Tax Updates**.** This contains recent case laws, circulars and notifications pertaining to direct and indirect taxes.

Finance Ministry has released the Direct Taxes Code, 2013 (DTC 2013) for public discussion and comments. DTC 2013 has been revised after considering suggestions given by the Standing Committee on Finance (SCF). Some of the key recommendations accepted include exemption to taxation of income from indirect transfer for shareholders having small shareholdings (up to 5 per cent), and modification of the definition of place of effective management. Provisions relating to General Anti-avoidance Rules (GAAR) have been completely revamped to align with the GAAR provisions introduced in the Income Tax Act, 1961 vide the Finance Act, 2013.

A meeting was convened by the Finance Ministry on 21st March, 2014, to discuss issues related to Customs, Central Excise and Service Tax specifically relevant for the MSME sector. FICCI has submitted a note on the subject and we also participated in the discussions. The Ministry proposes to hold similar meetings for other sectors.

On the taxation regime, the Bangalore Tribunal in the case of Telco Construction Equipment Co Ltd. has held that liability to withhold TDS under section 194H of the Act is attracted only when commission payments are made to agents/credited to respective agent's account, not when credited to provision account. The Tribunal observed that agents got vested right to receive the commission only when obligations under commission agreement were fulfilled, therefore, amounts were credited to provision account and not respective agent's account and hence, there is no requirement to withhold tax when amount credited to provision account and consequently disallowance under section 40(a)(ia) of the Act is not triggered.

In a matter involving Value Added Tax (VAT), the Karnataka High Court observed that Karnataka VAT Act 2003 and the Rules made there under specifically require that a tax invoice should specify the description, quantity and value of goods and

the rate and amount of tax apart from the total sale price. The High Court held that the taxpayer could claim deduction of tax from the total amount only if the bifurcation of value of goods and tax amount was disclosed in the required format. Merely affixing a seal at the bottom indicating that the sale price included VAT was not sufficient.

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

Supreme Court Decisions

The division bench of the Supreme Court sets aside the Order of High Court allowing 'interest on interest' under Section 244A

The taxpayer had entered into a technical collaboration agreement with a non-resident entity based in the USA. In 1987, the taxpayer sought permission from the tax department for 'No Objection Certificate'. The tax department informed the taxpayer to deduct tax at the rate of 30 percent under Section 195 and accordingly the taxpayer paid taxes after grossing-up. Subsequently, due to the favourable amendment to Section 10(6A) of the Act, since no grossing of tax was required to be made on payment to the non-resident company under the agreement approved by the Government of India, the taxpayer claimed refund. The refund of tax was granted to the taxpayer in November 1990. The taxpayer thereafter requested for interest on the TDS refund. The taxpayer made applications seeking interest before the AO, CIT, CCIT and thereafter to CBDT, during the period 1991 to 1993. The tax department's key ground for rejecting the interest claim was that the tax refund had not been issued in pursuance of either an order of assessment or a penalty and, therefore, provisions of Section 244(1A) of the Act were not attracted. Allowing writ petition, Gujarat High Court directed payment of interest at the rate of 9 per cent per annum on tax refund for the period from 1987 to 1990. The High Court relied on the Supreme Court's ruling in Sandvik Asia Ltd. v. CIT [2006] 280 ITR 643 (SC). Additionally, the High Court directed to make further payment of 'running interest' at the rate of 9 per cent per annum on interest accrued on aforesaid amounts.

The aforesaid decision of the Supreme Court was doubted by the division bench and the case was referred to the larger bench [CIT v. Gujarat Flouro Chemicals (TS-491-SC-2013)]. The larger bench of the Supreme Court held that the Sandvik Asia'a ruling was misquoted and misinterpreted by the taxpayer and also by the tax department. The taxpayer and the tax department interpreted the Sandvik Asia ruling in a way that the tax department was obliged to pay interest on interest in the event of its failure to refund the interest payable within the statutory period. On the facts of the case of Sandvik Asia, it was held that since there was an inordinate delay on the part of the tax department in refunding a certain amount which included the statutory interest, the tax department was directed to pay compensation for the same and not an interest on interest. The larger bench also held that Section 244A, which was inserted with effect from 1 April 1989, covers only such interest, which is provided for under the statute and not any other interest on such statutory interest.

The division bench of the Supreme Court in the instant case observed that Gujarat HC primarily relied on the Sandvik Asia judgment and directed the Revenue to pay interest on the amounts refunded as provided for under the provisions of Section 244(1A). Hence the division bench set aside the judgment and order passed by the High Court and remanded the matter back to the High Court for reconsideration of the writ petition filed by the respondent, keeping in

view the observations made by the larger bench in CIT v. Gujarat Flouro Chemicals. The SC division bench specifically stated that the contentions of both the parties were kept open.

CIT v. Gujarat Fluoro Chemicals [TS-165-SC-2014]

High Court Decisions

Pre-operative interest income cannot be adjusted against pre-operative expenses and is taxable as 'income from other sources'

The taxpayer was incorporated in 1989 with the object of manufacturing human vaccines based on the technology developed by Pasteur Merieux Serumset Vaccines (PMSV), Lyon, France. Under an agreement, dated 2 December 1988, entered into between France and India, the taxpayer received a substantial financial grant. Such grant was to be utilised for payments to PMSV for obtaining technology, equipment, technical services and personnel training for vaccine manufacturing. Indian Petrochemicals Corporation Ltd., one of the promoters of the taxpayer assumed the responsibility for project implementation and granted a loan of INR 5 million. Funds of INR 178.8 million were also brought in by the promoters as share capital. These funds were invested with banks under the 'portfolio management scheme' under which the banks gave an assured earning guarantee. The taxpayer in its return of income for AY 1992-93 adjusted the interest income of INR 9 million against its pre-operative expenses.

The AO rejected the claim for adjustment and, relying on the Supreme Court's decision in the case of Tuticorn Alkali Chemicals and Fertilizers Ltd. v. CIT [1997] 227 ITR 172 (SC), held that the interest was separately assessable under the head 'income from other sources'. The Tribunal relied on the decision of the Supreme Court in the case of CIT v. Bokaro Steel Ltd. [1999] 236 ITR 315 (SC) and held that the interest could not be separately brought to tax, but had to be adjusted against the pre-operative expenses relating to the project.

The Delhi High Court observed that the utilisation of fund is important and not the source of fund to determine the taxability of interest income. Thus the High Court held that the interest income of the taxpayer could not be adjusted against its pre-operative expenses and had to be taxed under 'income from other sources'. The High Court inter alia relied on the decision of Supreme Court in the case of Tutitcorn Alkali. The High Court also distinguished the decision of Supreme Court in the case of Bokaro Steels, which had been relied upon by the taxpayer. The Court held that the facts of the case were not same with the facts of Bokaro Steels. Herein the investment of the funds had nothing to do and was not inextricably linked with the construction of the project. Relying on the decision in the case of Tuticorin Alkali Chemicals and Fertilisers Ltd., the High Court held that it was a conscious act of investment of funds by the taxpayer and if such investment results in income, the same must be brought to tax under the residual head, even if the company has not commenced its business.

CIT v. Indian Vaccines Corporation Ltd. [TS-130-HC-2014(DEL)]

Tribunal Decisions

Supervisory fees are taxable as FTS and not as business profits since such fees are not effectively connected with a PE in India

The taxpayer, a Japanese company, was engaged in supplying equipment to various companies in India. The taxpayer established an LO in India to act as a communication channel between the Head Office (HO) of the taxpayer and the Indian companies. The taxpayer had also established three Project Offices (PO), inter alia, for supply/ installation of equipment.

Under some contracts, the taxpayer was also responsible for supervising the installation of the equipment. The terms and condition of each of the contract was different and was not linked to each other.

The Assessing Officer (AO), inter alia, held that the supervision fees were effectively connected to the LO and therefore, were liable to be taxed as business profits under Article 7(3) of the India-Japan tax treaty. Further, the AO held that the aggregate period of supervisory activities in India for all the projects taken together was more than 180 days and thus the taxpayer also had a supervisory PE.

The issue reached the Delhi High Court, which remanded back again it to the Tribunal to determine whether the supervision fees received from the Indian Company were taxable under Article 12(2) or under Article 12(5) read with Article 7(3) (as business profit) of the tax treaty.

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

- In order to apply Article 12(5) of the tax treaty, the beneficial owner of the FTS should carry on business in India, in which the fees arises through a PE and the contract in respect of which the fees are paid should be effectively connected with the PE in India. When these two conditions are satisfied, provisions of Article 7 of the tax treaty will apply.

- The LO was only facilitating the communication of the HO with the Indian company and was nowhere involved in the supervisory activities. Hence, the mere existence of the LO could not be a basis for the claim that the taxpayer had a PE in India.

- On the issue of the supervisory PE, the Tribunal held that where there are several projects where supervision work was done, the test of minimum period of 180 days should be determined for each project individually. In the instant case, since the period of supervision activities in India under each project was less than the minimum period of 180 days, the test of supervisory PE was not satisfied.

- The Tribunal held that income was taxable as FTS as per Article 12(2) of the tax treaty.

Sumitomo Corporation v. DCIT [2014] 43 taxmann.com 2 (Del)

Delhi Tribunal rules on the issues of royalty, Service PE and services effectively connected with PE

The taxpayer, a tax resident company of UK, is a part of the JCB group and owns, develops and manufactures excavators, sold under the JCB brand name. The taxpayer, entered into a Technology

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Transfer Agreement (TTA) and International Personnel Assignment Agreement (IPAA) with its wholly owned subsidiary JCB India Ltd.

As per the TTA, the taxpayer (Licensor) granted to JCB India (Licensee) a license to manufacture, assemble, use and sell Licensed products and for that purpose permitted the taxpayer to use its know-how, the inventions and any confidential information ('IP Rights').

The taxpayer was required to conduct random testing of licensed products as and when desired for which it used to send it employees. Further as per agreement the taxpayer required to provide technical assistance to employees of Indian company through its employees. For technical assistance the taxpayer and Indian company entered into International Personal Agreement. The taxpayer sent its employees who occupied key managerial positions of the Indian company.

During the relevant year, the taxpayer received a sum as royalties/Fees for technical services (FTS) from JCB India in consideration for grant of exclusive rights to manufacture and market 'Excavator Loader'.

Based on the facts of the case the Tribunal ruled as follows:

- The taxpayer granted to JCB India the technical know-how, patent rights and confidential information for manufacture, assembly, use and sale the licensed products. The consideration for it falls within the scope of 'royalties' as per Article 13(2) of the tax treaty.

- Activities of occasional visitors i.e. testing and inspection were carried out to ensure that the licensed products adhered to the global standards of quality. Such activities were required by and in the interest of the taxpayer and amounted to stewardship activities and therefore cannot be constitute PE in India.

- Employees of the taxpayer managing the overall operations of the Indian company hence rendered managerial services. Duration of stay of such employees was more than 90 days within the period of 12 months. Accordingly, Services rendered by the taxpayers through its employees constituted Service PE in India.

- Further FTS arising out of such transactions was effectively connected with the Service PE and therefore taxable as business income.

DDIT v. JC Bamford Excavators Limited (ITA No. 540/Del/2011, AY 2006-07]

Disallowance under Section 40(a)(i) of the Act applies only to the amount 'payable' at the year end

The taxpayer was a manufacturer of rubber tubes, tyres and rubber products. In the assessment order for the year under consideration the AO made certain disallowances including disallowances under Section 40(a)(i) of the Act for non-withholding of tax from payments to non-residents for professional and consultancy services. The CIT(A) deleted the disallowance made by the AO. Aggrieved by the Order of CIT(A), the tax department filed an appeal before the Chennai bench of the Tribunal.

The Chennai Tribunal observed that entire payments for services were made and nothing was outstanding. The question under consideration was that whether Section 40(a)(i) applies only to amounts outstanding at the end of the year or on entire amount of expenditure. The Tribunal also observed that the Allahabad High Court in the case of CIT vs. Vector Shipping Services (P) Ltd. [TS-352- HC-2013(ALL)] had upheld Special Bench ruling in Merilyn Shipping and Transport vs. ACIT [TS-220-ITAT-2012(VIZ)] as good law. It was held in Merilyn Shipping ruling that Sec 40(a)(i) did not apply to those amounts which had already been paid by the taxpayer before the close of the relevant previous year. On the other hand, it was also observed that Calcutta High Court in the case of CIT v. Crescent Export Syndicate [TS-199-HC-2013(CAL)] and Gujarat High Court in the case of CIT vs. Sikandarkhan N. Tunvar [TS-186-HC-2013(GUJ)]

had disapproved the ratio of Merilyn Shipping and Transport. Thus there was contradictory view of the different High Courts on the issue under consideration. Relying on the decision of Supreme Court in the case of CIT v. Vegetable Products Ltd. [1973] 88 ITR 192 (SC) the Tribunal held that the view in favour of taxpayer should be adopted and hence disallowance under Section 40(a)(i) applied only to the amounts 'payable' and not to those amounts which were already 'paid' during the year.

DCIT v. MRF Limited [TS-137-ITAT-2014(CHNY)]

TDS liability under Section 194H is attracted only when commission payments made to agents/ credited to respective agent's account, not when amount is credited to provision account

The taxpayer was engaged in the business of manufacturing, purchase and sale of excavators, loaders, cranes, dumpers and spare parts etc. During the course of assessment proceedings for AY 2007-08, the AO observed that the taxpayer had debited a sum of INR 140 million as sales commission out of which INR 0.6 million related to year end provision made towards commission. No tax was deducted at source (TDS) from the provision amount; however, as and when the commission payments were made in the subsequent year, TDS was made and remitted to the Government account. The AO came to the conclusion that the taxpayer was required to withhold tax under Section 194H at the time of making provision and in the absence of such withholding, commission was not allowable under Section 40(a)(ia) of the Act. The AO accordingly disallowed the sum of INR 0.6 million.

The Tribunal observed that the payment was not made to the agents as the amount was credited to the provision account and not the respective agent's account. The Tribunal, ruling in favour of the taxpayer, held that the TDS liability under Section 194H was attracted only when commission payments were made to agents/credited to their account and not when the amount was credited to a provision account. In the facts of the case, the agents received a vested right to receive the commission only when obligations under the commission agreement were fulfilled. Hence, there would be no requirement to deduct tax at source when the amount credited to provision account and consequently disallowance under Section 40(a)(ia) of the Act was not triggered.

DCIT v. Telco Construction Equipment Co Ltd. [TS-135-ITAT-2014(Bang)]

No power to Tribunal to grant stay beyond 365 days in light of third proviso to Section 254(2A) inserted by Finance Act, 2008

In this case the Tribunal extended the stay beyond 365 days as the taxpayer was not responsible for the delay in disposal of the appeal. The department challenged the decision

of the Tribunal by way of a writ petition to the High Court on the ground that after the insertion of the third Proviso to Section 254(2A), the Tribunal had no power to extend stay beyond 365 days even if the taxpayer was not at fault. The Delhi High Court, allowing the writ petition, held as under:

- In view of the third proviso to Section 254(2A) of the Act substituted by the Finance Act, 2008 with effect from 1 October 2008, the Tribunal could not extend stay beyond the period of 365 days from the date of first order of stay;
- When default and delay was due to a lapse on the part of the tax department, the Tribunal was at liberty to conclude hearings and decide appeals, if there was a likelihood that the third proviso to Section 254(2A) would come into operation;
- The third proviso to Section 254(2A) does not bar or prohibit the tax department or departmental representative from making a statement that they would not take coercive steps to recover the impugned demand and, on such a statement being made, it will be open to the Tribunal to adjourn the matter at the request of the Revenue;
- The taxpayer can file a writ petition in the High Court pleading and asking for stay and the High Court has power and jurisdiction to grant stay and issue directions to the Tribunal as may be required;
- Section 254(2A) does not prohibit/bar the High Court from issuing appropriate directions, including granting stay of recovery;
- The constitutional validity of the provisos to Section 254(2A) of the Act had not been examined and the issue was left open.

The Uttarakhand High Court in the case of Seacor Offshore Dubai LLC [TS-159-HC-2014(UTT)] had also taken a similar view. Also, Delhi HC recently admitted Mitsubishi Corporation's writ petition challenging the constitutional validity of third proviso to Section 254(2A) of the Act.

CIT v. Maruti Suzuki (India) Limited [TS-103-HC-2014(DEL)]

R&D related weighted deduction under Section 35(2AB) should be available even if approval in the prescribed format is signed by Nodal Officer and not by Secretary, DSIR

The taxpayer, a company, was engaged in the business of manufacturing, marketing and processing of drug intermediates pharmaceuticals, chemicals and bulk drugs. The taxpayer was claiming deduction under Section 35(2AB) of the Act in respect of scientific research expenditure incurred on R&D facility. In response to a show cause notice, the taxpayer filed a copy of renewal of recognition of in-house R&D facility issued and signed by Scientist-G, DSIR, New Delhi. The AO passed an order under Section 143(3) of the Act and disallowed the deduction claimed under Section 35(2AB) of the Act on the ground that the approval had to be issued by the Secretary, DSIR and not by the Scientist. The CIT(A) upheld the contention of the AO.

The Mumbai Tribunal observed that the letter issued by DSIR was only for renewal of recognition of the in-house R&D facility. There was no formal order or approval for such in-house R&D facility in prescribed form i.e. Form 3CM. The Tribunal noted that Section 35(2AB)(4) of the Act read with Rule 6 of the Income-tax Rules, 1962 (Rules) provides the procedure for making application in Form 3CK before the prescribed authority, which was

required to grant approval in Form 3CM. The Tribunal, on principle, held that deduction under Section 35(2AB) of the Act could not be denied to the taxpayer, even though the order of approval in Form 3CM was not granted by the Secretary, DSIR, but by some Nodal Officer on/or on behalf of the Secretary, DSIR, provided all other conditions for approval are fulfilled by the taxpayer. The Tribunal observed that in the present case, the taxpayer could not show whether any approval of the in-house R&D facility was issued in the prescribed form (i.e. Form 3CM) for relevant assessment year by DSIR even if it is signed by any authority like Scientist-G for on/or behalf of the Secretary, DSIR. Accordingly, the matter was restored to the file of the AO with a direction to verify whether any order for approval of in-house R&D facility had been issued by DSIR in the prescribed form (viz. Form 3CM) for the relevant assessment year, even though such order could be signed by 'Scientist-G'.

Fermet Biotech Limited v. ACIT [ITA No. 4341/Mum/2012, dated 12 February 2014]

The Mumbai Tribunal upholds use of internal CUP with appropriate adjustments for broking transactions

The taxpayer was engaged in the provision of two types of broking services, namely Delivery Verses Payment (DVP) and Direct Custodian Settlement (DCS). It provided DVP services to its Associated Enterprises (AEs) and unrelated parties at an average brokerage rate of 0.35 percent and 0.56 percent respectively and DCS services at an average brokerage rate of 0.36 percent and 0.40 percent respectively. The taxpayer aggregated the activities and adopted the transactional net margin method (TNMM) as the most appropriate method for determining the arm's length price (ALP). The Transfer Pricing Officer (TPO) rejected TNMM and held that as internal comparables were available, ALP should be computed using the CUP method.

The taxpayer contended that the brokerage rates charged to AEs and third parties could not be compared due to significant differences in functions performed, assets employed, risks assumed, marketing efforts, research efforts etc. The taxpayer further contended that it incurred lower costs in providing brokering services to AEs and the difference in costs would have to be reduced from the costs incurred on unrelated transactions to arrive at the adjusted comparable brokerage rate. The taxpayer further demonstrated that for the DVP activities, the cost incurred was higher by 0.29 per cent (as a ratio of turnover), in case of transactions with unrelated parties as compared to transactions with AEs. After adjusting this additional cost difference, its transactions with AEs were at arm's length even under CUP method.

TPO observed that the only adjustment for differences to be considered was the difference in the brokerage rates for DCS transactions with AEs and unrelated parties, i.e. 0.36 per cent and 0.40 per cent respectively. Accordingly, the TPO concluded that the brokerage rate to be charged on DVP transactions should be 0.50697 per cent [i.e. 0.5633% x (0.36/0.40%)]. Adopting this adjusted rate, the TPO computed an adjustment to the DVP transactions with AEs.

The CIT(A) upheld the use of CUP as the most appropriate method and allowed the adjustments for differences on account of services rendered to AEs and unrelated parties.

The Tribunal confirmed the CIT(A)'s order in upholding the use of CUP as the most appropriate method with appropriate adjustments, and thereby deleted the TP adjustment on provision of broking services to AEs on the following grounds:

- TNMM should not be applied when internal CUPs were available.

- The taxpayer should be allowed the relief on account of differences in activities performed in case of transactions with AEs and unrelated parties. Accordingly, the adjustment for additional cost of 0.29 per cent incurred

by the taxpayer in provision of services to unrelated parties had been rightly allowed by the CIT(A).

- The TPO had not pointed out any defect in the computation of the additional costs (i.e. 0.29 per cent) submitted by the taxpayer during the TP assessment proceedings.

J. P. Morgan India Private Limited v. ACIT [ITA No. 670/MUM/2006 & ITA No. 618/MUM/2006]

The Mumbai Tribunal deletes addition on export related advertisement reimbursement.

The taxpayer was engaged in the business of exporting home and personal care products and had entered into international transactions with its AEs for export of these products, and for a advertising expenses paid to AEs and others. The taxpayer applied the TNMM as the most appropriate method. The TPO noted that the taxpayer had reimbursed advertisement expenditure for its two products to its AEs to the extent of 20 per cent of the advertisement expenses incurred by them. The taxpayer contended that its export business was highly profitable, largely due to the equity and market position enjoyed by its brand. These expenses were paid by the taxpayer so that the products were promoted and did not lose out in the market place, in view of the severe competitive pressure and interest of the business. However, the TPO rejected the contentions of the taxpayer stating that the taxpayer had failed to provide fixed basis on which the advertisement expenditure were to be reimbursed. Further, the TPO stated that the advertisement expenditure incurred by the taxpayer was on a principal to principal basis and the AEs were responsible for their own business.

The CIT(A) held that additions were made on ad hoc basis by the TPO without adoption of prescribed methods and advertisement expense incurred by the taxpayer for the launch of two new products was the strategy to develop the business. Hence, sharing of the said advertisement expenses could not be isolated or seen as an incidental phenomenon.

The Tribunal confirmed the CIT(A)'s order in deleting the TP adjustment on advertisement expenses reimbursed to the AEs on the following grounds:

- Reimbursement of advertisement expenditure, though being an independent transaction, related to the export activities.

- Huge export sales were made to the AEs to whom such expenses were reimbursed.

- The Tribunal seconded the view of the taxpayer that even if the advertisement expenditure was reduced from the operating margin of export, the operating margin was much more than the operating margin of the comparables. Therefore the operating margin of the taxpayer was held to be at ALP.

Lever India Exports Limited v. ACIT [ITA No. 7089/MUM/2010 & ITA No. 7090/MUM/2010]

The Delhi Tribunal held that a corporate guarantee issued for AEs benefit, which did not cost anything to the taxpayer, does not constitute international transaction. The Tribunal also rejected the notional interest adjustment on the share application money advanced to AE

Issue of corporate guarantee – The taxpayer issued a corporate guarantee to a lender bank on behalf of its AE. The taxpayer issued the corporate guarantee at nil consideration; however, based on a

market quote, the taxpayer in its transfer pricing study determined the arm's length commission for issuing such guarantee at the rate of 0.65 percent per annum of the guaranteed amount. The TPO determined the ALP of the guarantee commission income at 2.68 percent plus a mark-up of 200 basis points. The DRP rejected the arguments of the taxpayer.

Notional interest on share application money - The taxpayer during the relevant previous year had made payments towards share application money to its foreign subsidiaries. The TPO noticed that the amounts were not converted into equity for a long time and so treated the amounts as interest-free loans extended to its AE and made adjustment for interest thereon, considering the transaction as an international transaction of 'lending or borrowing money' under the provisions of Section 92B of the Act. The DRP agreed with the TPO on this issue.

Issue of corporate guarantee

- In order to be covered as an 'international transaction' under clause (c)1 and clause (e)2 of the Explanation to Section 92B, the transactions should be such as to have bearing on profits, incomes, losses or assets of such enterprise. The clause (c) includes transactions related to capital financing including guarantee transactions. Situations wherein a transaction has no bearing on profits, incomes, losses or assets of taxpayer, such transaction will be outside the ambit of expression 'international transaction'.

- The Tribunal observed that the Explanation to Section 92B, which was inserted with retrospective effect from 1st April 2002 vide the Finance Act, 2012, does not alter the basic character of definition of 'international transaction' under Section 92B and the Explanation was to be read in conjunction with the main provisions. Therefore, the precondition about impact on profits, income, losses or assets of such enterprises is a precondition embedded in Section 2B(1) itself. It was held that this precondition would not get satisfied if the impact was only 'contingent'. The important distinction between the two categories - 'contingent' and 'future' – is that while the latter is a certainty, and only its crystallization may take place on a future date, there is no such certainty in the former case.

- For the present case, the Tribunal held that it was an undisputed position that corporate guarantees issued by the taxpayer to the lender bank did not even have any impact on profits, income, losses or assets because no borrowings were resorted to by the AE from this bank.

- The Tribunal observed that there could be a number of situations in which an item might fall within the description set out in the clause (c) of Explanation to Section 92B, and yet it might not constitute an international transaction because the condition precedent with regard to the 'bearing on profit, income, losses or assets set out in Section 92B(1) might not be fulfilled. The Tribunal mentioned that the common theme of such situation would be when the

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taxpayer extends an assistance to the AE, which does not cost anything to the taxpayer and particularly for which the taxpayer could not have realized money by giving it to someone else during the course of its normal business, such an assistance or accommodation does not have any bearing on its profits, income, losses or assets, and, therefore, it is outside the ambit of international transaction under Section 92B (1) of the Act.

- The Tribunal held that the issue of the corporate guarantees in question, which did not involve any costs to the taxpayer and did not have any bearing on profits, income, losses or assets of the taxpayer, was outside the ambit of 'international transaction'.

Notional interest on share application money

- The Tribunal observed that the TPO had not made any adjustment with regard to the ALP of the capital contribution but had treated these transactions partly as interest-free loans, for the period between the dates of payment till the date on which the shares had actually been allotted, and partly as a capital contribution, i.e. after the subscribed shares were allotted by the subsidiaries. The Tribunal held that there was no finding about the permissible time period for allotment of shares, and even if one were to assume that there was an unreasonable delay in allotment of shares, the capital contribution could have, at best, been treated as an interest free loan for such a period of 'inordinate delay' and not the entire period between the date of making the payment and date of allotment of shares. Further, even if the ALP determination was to be done in respect of such deemed interest free loan on allotment of shares under the CUP method, it was to be done on the basis as to what would have been the interest payable to an unrelated share applicant if, despite having made the payment of share application money, the applicant is not allotted the shares. It was not open to the revenue authorities to re-characterise the transaction unless it was found to be a sham or bogus transaction. In the present case, the subscribed share capital had indeed been allotted to the taxpayer and the transaction was thus accepted to be genuine in effect.

The Tribunal holds that salary received in an Indian bank account by a non-resident, employed outside India, is not taxable

Recently, the Agra Tribunal in the case of Arvind Singh Chauhan held that the salary income received by a non-resident, in his Indian bank account, for services rendered outside India was not taxable in India.

In its judgement, the Tribunal placed reliance on the Bombay High Court ruling in the case of Avtar Singh Wadhwan and the Madras High Court ruling in the case of AP Kalyankrishnan.

Arvind Singh Chauhan v. ITO [2014] 42 Taxmann.com 285 (Agra)

II. SERVICE TAX

High Court Decisions

Questions relating to rate of duty not maintainable before the HC

The taxpayer was registered with service tax department for rendering management consultancy/ manpower recruitment and consultancy engineering services. During the course of audit, it was found that the taxpayer had not paid service tax on some of the services rendered which should have been classified as 'management consultancy services'. The taxpayer contested the allegation of the Revenue Authorities and contended that it had provided 'regulatory services' which included compliance in filing of income tax, sales tax returns etc and the same were not taxable (in the pre negative list regime). Further the taxpayer contended that the services provided by it were not in the nature of management consultancy services as these only relate to the management of any company.

The matter reached before the Delhi HC in an appeal preferred by the Revenue Authorities where it was contended by the taxpayer that the present question was not maintainable before the HC. The HC held that the issue at hand relates to determination of rate of duty i.e. NIL rate and flat rate of service tax. As per section 83 of the Finance Act, 1994 read with section 35G of the CEA, the question pertaining to rate of duty was not maintainable before the HC. The HC further held that on a conjunctive reading of the said sections and as per section 35L of the CEA, the appropriate forum for determination of above question was SC and not HC. Accordingly, the appeal of the Revenue Authorities was rejected.

Commissioner of Service Tax v Ernst and Young [2014 TIOL 263 Del HC]

Tribunal Decisions

If service tax accepted from service provider, no service tax can be demanded from the service recipient under the reverse charge mechanism

The taxpayer had availed services of a GTA. The GTA service provider paid service tax on such transportation services rendered to the tax payer. The Revenue Authorities, however, demanded service tax from the taxpayer, being the service recipient, under reverse charge mechanism. The taxpayer contended that as per the decision of the CESTAT Ahmedabad in the case of Navyug Alloys Private Limited v Commissioner of Central Excise [2008 (17) STT 362], if the service tax has been paid by the service provider, the same cannot be demanded by the service recipient. The Revenue Authorities were of the opinion that if the service tax was paid by the service provider mistakenly, it should claim a refund of the same.

The matter came up for consideration before the Mumbai bench of CESTAT which held that once the service tax has been paid by the service provider and the same has been accepted by the Revenue department, it could not be again demanded from the service recipient. Accordingly, the appeal of the taxpayer was allowed.

Umasons Auto Compo Private Limited v Commissioner of Central Excise [2014 (43) GST 672]

Services not to be deemed to be received in India just because they are performed in India

The taxpayer was a subsidiary of GAP International Sourcing Inc, USA, the latter being a prominent retailer in the United States of America. The taxpayer was rendering services to its said offshore parent entity in relation to merchandising, product integrity, vendor compliance, quality assurance, fabric outsourcing and other logistical support. The taxpayer contended that these services qualified for export under rule 3(1)(iii) of Export of Service Rules, 2005 ("Rules"). The Revenue Authorities contended that since the condition of delivery and use outside India was not satisfied, the services rendered did not qualify for export.

The matter came up before the Delhi bench of CESTAT which held that services rendered by the taxpayers qualified as export. The CESTAT reasoned that the offshore parent entity was the beneficiary of the services rendered and these were in relation to the business of such offshore entity. Thus, only the offshore parent entity could be termed as recipient of service. The CESTAT further held that it would be absolutely wrong to contend that only because the services are performed in India they were also delivered and received in India. Since the services were received by the offshore entity and were used in its business located abroad, the services will be considered to have been consumed outside India. Accordingly, in terms of the law laid down by Delhi bench of CESTAT in the case of Paul Merchants Limited v Commissioner of Service Tax [2012 TIOL 1877], the appeal of the taxpayer was allowed.

GAP International Sourcing India Private Limited v Commissioner of Service Tax, Delhi [Service Tax Appeal no 819 of 2008]

Service tax paid erroneously should be refunded and not retained by the department

The taxpayers had purchased residential flats from the purchasers and service tax on the same was erroneously paid by them to the builders and was deposited by the builders to the Government treasury. As per notification no 108 / 29 / 09-ST dated January 29, 2009, no service tax was payable on sale of residential flats. Consequently, the taxpayers filed a refund claim to recover the service tax amount deposited. The Revenue Authorities contended that the service tax was not refundable as the refund claim was hit by limitation.

The matter came up for consideration before the Mumbai bench of CESTAT wherein the refund claim of the taxpayers was allowed. The CESTAT reasoned that as per the said circular, the department was not legally allowed to calculate service tax and if they did, their action was unconstitutional. If the payment has been paid erroneously by the taxpayer, the same cannot be retained by the department and section 11B of the CEA is not applicable. Thus, in accordance with the decision of the Karnataka HC in the case of Commissioner of Central Excise v KVR Construction [2012

(26) STR 195], the appeal of the taxpayer was allowed

Shravan Banarasilal Jejani vs. Commissioner of Central Excise [Appeal No ST/ 745, 746, 747/ 10- Mum]

CENVAT credit available to manufacturer for services used for setting up labour huts, kisan sheds etc as the same is a statutory condition

The taxpayer was a manufacturer of sugar, molasses, special denatured spirit and denatured ethyl alcohol. The taxpayer availed CENVAT credit of service tax paid in respect of various services received by it for construction of labour hutments, kisan sheds, vastu consultancy and dismantling of building structure of sugar house. The Revenue Authorities denied such credit on the ground that such services were not procured for construction of factory and thus credit was inadmissible.

The matter reached before the Delhi bench of CESTAT that construction of sheds was a statutory requirement and if the shelter, drinking water facilities were not adequate at sugar factories, the taxpayer could be criminally prosecuted. The CESTAT relied on the decision of CESTAT, Mumbai in the case of Manikgarh Cement v Commissioner of Central Excise, Nagpur [2008 (9) STR 554], wherein the construction of residential colony for working staff was held to be in relation to manufacture. Accordingly, the CESTAT allowed credit availed in respect of construction services of hutments and sheds. As regards vastu consultancy services, the CESTAT held that the construction activity could be carried out even without availing vastu service; but the taxpayer had actually availed such service and paid service tax on it and hence the same could not be disallowed. It was further noted that while allowing the credit, it is not to be seen whether the services availed were necessary for the construction activity or not; if the services were actually availed in relation to the construction activity, the credit had to be allowed. Accordingly, the CESTAT allowed the appeal of the taxpayers.

Bajaj Hindusthan Limited vs. Commissioner of Central Excise [2014 (33) STR 305]

CENVAT credit can be taken at a factory premises which is not registered with service tax authorities

The taxpayer was a manufacturer of transformer cores and owned 2 factories. The Revenue Authorities found that the taxpayer had availed CENVAT credit in factory-1 in respect of works contract and consultancy fee of Civil Engineer services actually used by factory-2. Consequently, the Revenue Authorities denied the CENVAT credit availed.

The matter came up before the Ahmedabad bench of CESTAT which allowed availment of such credit. The CESTAT reasoned that a taxpayer was allowed to take credit of service tax paid on input services used by the manufacturer in or in relation to manufacture of finished products and the definition of 'input service' included services used in relation to setting up, modernization, renovation or repairs of the factory. This clearly meant that a taxpayer could utilize services and claim credit of the tax paid on them, which are required in setting up another factory, without

registering the factory. That is to say that, had the taxpayer not registered factory-2, it would still be eligible to take credit in factory-1, as a taxpayer having one factory and setting up another. Since it was not a requirement stipulated in law that CENVAT credit could be availed only in that factory / unit in which the services were received, there was no ground to deny such credit. Accordingly, the appeal was allowed.

Chintamani Lamination v Commissioner of Service Tax [2014 (33) STR 327]

Abatement for payment of service tax on Goods Transport Agency Service ("GTA") available even in the absence of an endorsement that the transporter has not availed credit

The taxpayer paid service tax as per rule 2(1)(d) of the Service Tax Rules, 1994 ("STR") on GTA service as the service recipient under the reverse charge mechanism. The taxpayer claimed an abatement of 75 percent as per notification no 32 / 2004, which provided a condition that abatement is available only if the transporter has not availed CENVAT credit of inputs or input services availed by him. As there was no endorsement on the consignment / transport document to the effect that transporter had not availed any CENVAT credit, the Revenue Authorities denied such abatement claimed by the taxpayer.

The matter reached before the Mumbai bench of CESTAT which held that although there was no endorsement on the consignment note of the transporter having not availed CENVAT credit; it was implied more so from the fact that when the transporter did not pay any service tax. Given this, the question of availment of input / input service tax credit by the transporter did not arise. Accordingly, the availment of abatement on GTA service was allowed.

Sandoz Private Limited vs. Commissioner of Central Excise, Raigad [2014 (33) STR 424]

No tax, interest and penalty payable if CENVAT credit availed for non- taxable input services

The taxpayer used warehousing facility for its export goods in the United States of America, prior to distribution of the same to the ultimate buyers. The taxpayer paid service tax on such warehousing facilities used and availed credit of the same. The Revenue Authorities denied such credit on the ground that warehousing service could not be considered as input service for manufacture of export goods. They further demanded interest and penalty for such credit wrongly availed.

The matter came up before the Chennai bench of CESTAT, wherein it was held that the demand of service tax along with interest and penalty was bad in law. It was reasoned that since the warehouses were hired in the United States of America, the same was beyond the taxable territory of India; hence no service tax was payable on the hire of such services received and rendered abroad. Accordingly, since the taxpayers were not liable to pay service tax in the first instance and that tax payer had merely taken credit of what was not payable by it. Consequently, the demand was unjustified and struck down.

Sundaram Clayton Limited vs. Commissioner of Central Excise, Chennai [2014 (33) STR 414]

III. VAT/ CST

Supreme Court Decision

Generalia specializes non derogate: Specific provisions of law will override general provisions

The taxpayer was a new cement manufacturing unit situated within Rajasthan. It had a Fixed Capital Investment ("FCI") of over INR 500 crore and more than 250 employees. It had applied for an eligibility certificate for exemption from the payment of Central Sales Tax and Rajasthan Sales Tax under the Sales Tax New Incentive Scheme for Industries, 1989 ("scheme"). As per the said scheme, all industrial units with more than INR 25 crore FCI were regarded as prestigious units and were allowed 75 percent sales tax exemptions. However, cement units with more than INR 5 crore FCI were allowed only 25 percent sales tax exemption. The taxpayer sought to avail 75 percent sales tax exemption since it qualified as a prestigious unit according to the scheme. The taxpayer further contended that the interpretation which is beneficial to the taxpayer should be adopted and since the taxpayer satisfied the definition of a prestigious unit, 75 percent tax exemption should be granted and the interpretation which allowed lower benefit of only 25 percent exemption should not be adopted. The Rajasthan HC granted the taxpayer an exemption of 75 percent under the said scheme.

The matter came up before the SC which reversed the HC ruling. The SC held that when there are two interpretations possible, the one which is more specific to the case of the taxpayer should be adopted. In the instant case, 75 percent exemption was available for all industries and only 25 percent was available specifically for cement industries. Therefore, the rate of exemption available for cement industries had to be adopted over the general rate which was applicable to all industries. Further, the SC held that effect should be given to the legislature's intent which was to restrict the benefit to 25 percent for cement industries. Thus, if the general rule was to be adopted, the specific entry would become redundant. Therefore, to avoid an absurd interpretation, the taxpayer was denied the benefit of 75 percent exemption under the scheme. Accordingly, the appeal of the Revenue was allowed

Commercial Tax Officer v Binani Cements Limited [Civil Appeal No 336 of 2003 (SC)]

High Court Decisions

Dominant intention of the parties to determine the divisibility of a service contract

The taxpayer had set-up a super specialty hospital in which several heart related surgical procedures were conducted. During one such procedure, a valve / stent is implanted in the patient by the hospital. The Revenue Authorities sought to impose

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VAT on this particular transaction contending that the implant of the stent / valve falls within the purview of 'deemed sale' as envisaged in article 366(29-A) of the Indian Constitution and explained by the SC in BSNL v union of India [2006 (3) SCC 1].

The taxpayer preferred a writ before the Allahabad HC and the same was allowed. The HC reasoned that in an indivisible Works Contract, the parties always have an intention to transfer goods during its execution; unlike in a Service Contract, where even though there is a transfer of underlying goods, there is no consensus ad idem to transfer them in the course of its execution. The contract to perform a critical heart surgery that involves rendering of medical service is a Service Contract. The HC applied the 'dominant intention' test (applicable to Service Contracts) and held that when the hospital and the patient enter into a contract for delivery of medical service, there is no 'meeting of minds' / consensus ad idem that there will be a sale of stent / valve, used in the course of the surgical procedure. Further, it was held that the essence of the contract is to perform medical procedure and not execute sale of stent / valve. Accordingly, the writ petition was allowed

International Hospital Private Limited v State of Uttar Pradesh [Writ Tax no 68/ 2014 Allahabad HC

Benefit of deduction of tax from taxable turnover not available in absence of bifurcation shown of value of goods and tax on the invoices

The taxpayer was a proprietary concern which dealt in cigarettes, supari, gutkha, confectionary etc and filed monthly tax returns as per the Karnataka VAT Act, 2003 ("KVAT"). The taxpayer made certain local purchases of aforesaid items from registered dealers, claimed Input Tax Credit ("ITC") on such purchases and sold the same in local market. It was found by the Revenue Authorities that the taxpayer had not collected VAT separately in the tax invoices raised by them as per the KVAT and rules made thereunder.

In the absence of disclosure of bifurcation of value of goods and VAT on the invoice, the Revenue Authorities sought to tax the entire turnover without allowing deduction of tax collected on sales. The taxpayer contended that while filing returns and also in its accounts, it bifurcated the entire sales amount in taxable turnover and tax, however it merely failed to bifurcate disclosing such amount on the invoices. The taxpayer also argued that there was a specific mention on its sales invoice that its sale price included VAT at 12.5 percent. The taxpayer further argued that it was in compliance with the law and not allowing tax deduction would mean taxing tax which was not permissible under law.

The matter reached before the Karnataka HC which held in favour of the Revenue. The HC held that the KVAT and the rules made thereunder specifically require that a tax invoice should specify the description of goods, quantity of goods, value of goods, rate and amount of tax and total sale price. The HC further stated that only if the bifurcation of value of goods and tax amount was disclosed in the required format, the taxpayer could claim deduction of tax from the total amount. Merely

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affixing a seal at the bottom indicating that the sale price included VAT amount was not sufficient. Accordingly, the appeal of the taxpayer was rejected.

Mahadevi Stores v Additional Commissioner of Commercial Taxes [STA no 506 &507/ 2011 Karnataka HC]

No sales tax or TDS applicable on Build, Own, Operate, Transfer ("BOOT") contract until the parts / equipment are transferred to the end user

The taxpayer was engaged in providing consultancy services to its clients in the field of information and technology. The Meghalaya Information Technology Society ("MITS") was engaged in implementing e-governance in the state of Meghalaya awarded a BOOT contract to implement Meghalaya State Wide Area Network Project ("MSWAN") in Meghalaya.

Under the BOOT contract, the taxpayer was required to provide network services throughout the state of Meghalaya. The implementation of the MSWAN on BOOT basis was required to be done in five years and in this period, the taxpayer was required to provide data connectivity and voice video services to various officers of Meghalaya Government. In connection with the above, the Meghalaya Government under the contract was required to pay the taxpayer a minimum guaranteed amount on quarterly basis. The Revenue Authorities instructed MITS to deduct tax at source under Meghalaya Value Added Tax Act, 2003 ("MVAT Act") on payments made to the taxpayer.

The Meghalaya HC while deciding the case placed its reliance on the following clauses of the BOOT contract:

- During the contract period, the taxpayer will not transfer ownership or possession of goods to MITS; and
- The taxpayer would transfer title / ownership of the goods / equipment at the end of the five years.

On reading the aforesaid clauses in the light of the facts in hand, it was established that the ownership or possession of goods till that date vested with the taxpayer and would be transferred only on completion of the five year period. Given the above, the HC held that deduction of tax at source under MVAT Act is unlawful and sales tax should be applicable only in case of transfer of goods under BOOT contract.

Tata Consultancy Services Limited vs. The State of Meghalaya and various other Respondents [2014-VIL-56 MEG]

Reasonable opportunity of being heard to be given by way of notice if special audit is proposed

The taxpayer had filed writ petition before the Delhi HC against VAT Commissioner's orders proposing to conduct special audit for the years 2011-12 and 2012-13 under section 58A of Delhi Value Added Tax Act, 2004 ("DVAT Act"). The taxpayer contended that no prior show cause notice was issued to conduct such audit and thus such order passed thereupon had adverse civil consequences. Reliance was placed on SC ruling in Rajesh Kumar vs. DCIT [2006 (287) ITR 91] wherein the

SC had spelt out requirements to give adequate opportunity in the context of section 142(2A) of the Act, alleging that considerations would be identical under DVAT Act.

The Revenue Authorities argued that amendment to section 58A(1) of DVAT Act dated January 1, 2013 enlarged the powers of VAT Commissioner to order for special audit even before initiation of any proceedings. It was argued that if the legislature had intended issuance of show cause notice prior to such audit, it would have so provided by a suitable amendment. It also argued that language of section 142(2A) of the Act differed from section 58A of the DVAT Act, hence SC ruling in Rajesh Kumar (Supra) would not apply.

Rejecting the contentions of the Revenue Authorities, the HC observed that post declaration of law in Rajesh Kumar (Supra); parliament inserted a proviso in section 142(2A) of the Act to the effect of giving reasonable opportunity to the taxpayer of being heard before audit. The HC further observed that section 142(2A) of the Act before amendment was cast in pari materia terms to section 58A of the DVAT Act. It held that SC in the case of Rajesh Kumar (Supra) was alive to the fact that the special audit order was likely to cause prejudice, hardship and even great deal of displacement to the taxpayer.

Therefore, SC read the requirement that Revenue Authorities ought to issue prior notice and grant reasonable opportunity into section 142(2A) of the Act. Given the pari materia between both the sections, HC ruled that the Commissioner ought to give an identical opportunity also in the case of special audit in DVAT Act through a notice on each occasion when special audit is proposed.

Larsen & Toubro Ltd v Commissioner of Value Added Tax [2014-TIOL-238-HC-DEL-VAT

IV. CUSTOMS

High Court Decisions

Refund of Terminal Excise Duty ("TED") available even under Foreign Trade Policy ("FTP"). Refund under CENVAT Credit Rules, 2004 ("CCR") is a different regime

The taxpayer was engaged in manufacture of metal powder and had supplied such goods to 100 percent Export Oriented Units ("EOU"). The said sale qualified for deemed export benefit under para 8 of the FTP and thus taxpayer applied for refund of TED. The Revenue Authorities denied such refund claim based on clarification given by Policy Interpretation Committee ("PIC") to the effect that 'refund of CENVAT credit provisions are available under excise regulations and CCR which should be availed of rather than claiming TED refund'.

Aggrieved, the taxpayer filed a writ before Delhi HC, contending that since its supplies to EOU qualified as 'deemed export' in terms of para 8.2(b), hence it was entitled to claim TED refund benefits stipulated thereby in terms of para 8.3(c) of FTP. The taxpayer also contended that effective April 2013, FTP was further relaxed to grant complete exemption to such units from payment of TED.

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The HC rejected the contention of the Revenue Authorities and held that CENVAT regime operates in its own terms and is independent of the rights and liabilities of the taxpayer and authorities under the import-export policies framed under the Foreign Trade (Development and Regulation) Act, 1992 ("FTDRA"). The HC held that in the instant case since there is no dispute that sale was made to 100 percent EOU (which qualified for deemed export benefit), the tax payer was eligible to claim benefit of TED refund. The HC also placed reliance on the decision of division bench of Calcutta HC in JDGFT vs. IFGL Refractories Limited [2002 (143) ELT 294], wherein it was held that once the supply of goods falls within the category of deemed export, the unit would be entitled to refund of TED.

Kandoi Metal Powders Manufacturing Company Private Limited vs. Union of India [2014-TIOL-230-HC-DEL-EXIM]

V. CENTRAL EXCISE

Supreme Court Decisions

Sales tax collected and retained under State Incentive Scheme liable to excise duty, post July 2000

The taxpayer was engaged in manufacture of yarn of manmade fibers chargeable to excise duty. The taxpayer was availing benefit under an incentive scheme operated by the Rajasthan Government, whereby 75 percent of the sales tax collected from the customer was allowed to be retained and balance 25 percent was to be paid to the Government. The Revenue Authorities sought to include such excess 75 percent tax collected but not paid to Government for excise duty purposes.

The Commissioner upheld the demand on the grounds that taxpayer was availing partial sales tax exemption under Sales Tax Incentive scheme and therefore the additional 75 percent amount collected under camouflage of incentive tax, should form part of value for levy of excise duty.

The matter came up for consideration before the CESTAT, which referred to the circular no 378 / 11 / 98-CX dated March 12, 1998 ("Circular") issued by the Central Board of Excise and Customs ("CBEC") and held that sales tax was deductible from wholesale price for determination of assessable value under section 4 of the CEA. In the aforesaid circular three situations were envisaged, viz, (i) exemption from payment of sales tax for a particular period; (ii) deferment of payment of sales tax for a particular period; and (iii) grant of incentive equivalent to sales tax payable by the unit. CBEC opined that in case (i) while sales tax was not deductible, in cases (ii) and (iii) sales tax was deductible for determination of assessable value.

The matter came up before the SC for consideration, where the Revenue relied on the decision of Modipon Fibre Company, Modinagar, UP v Commissioner of Central Excise, Meerut [(2007) 10 SCC 3] wherein it was held that where duty is recovered at a higher rate but paid at a concessional rate, then part of unpaid excise duty should form part of taxable /

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assessable value. The taxpayer argued before the SC that there is difference between grant of incentive and extension of benefit of exemption. The tax payer argued that the sales tax amount retained should be treated as incentive granted by State Government since such sales tax retained is treated as deemed payment of sales tax to the State exchequer and for the said purpose reliance was placed on the CBEC Circular.

The SC while ruling on the issue, sought to draw a distinction between situations pre 2000 when there was no concept of 'transaction value' and post 2000, when section 4 of the CEA was amended to introduce concept of 'transaction value'. The Court while relying on the Circular held that in pursuance of the Scheme, 25 percent of sales tax amount was credited to the account of the State Government as payment towards sales tax by the manufacturer. There is no doubt that it is a pure and simple incentive scheme where 25 percent of sales tax is paid and the State Government, instead of giving certain amount towards industrial incentive, grants incentive to the tax payer by allowing him to retain 75 percent sales tax collected from customer.

However with effect from 2000, amounts paid to the State Government are excludible from the transaction value. Thus, what is not payable or to be paid as sales tax / Value Added Tax ("VAT"), should not be charged from the third party / customer, but if it is charged and is not payable or paid, it should not be included in the transaction value. As per the amended provision, the word 'transaction value' means payment made on actual basis or actually paid by the taxpayer. The words that gain significance are 'actually paid'. Accordingly, the SC held that the situation after July 1, 2000 does not cover a situation covered under the Circular.

Commissioner of Central Excise, Jaipur II vs. Super Synotex (India) Ltd [2014-TIOL-19-SC-CX]

Tribunal Decisions

Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008 ("RSP Determination Rules") merely procedural and directory in nature; however may have retrospective application for determination of RSP

The taxpayer was engaged in manufacture of switch gear articles which were chargeable to excise duty on maximum retail price ("MRP") vide notifications no 13 / 2002- CE (NT) and no 2 / 2006- CE (NT). The taxpayer contended that such goods were not chargeable to duty on MRP basis since the products were not covered by Standard of Weights and Measures (Packaged Commodities) Rules, 1977 ("Packaged Commodities Rules"). Further, the taxpayer contended that since goods were cleared under declaration that such goods were 'specially packed for exclusive use of any industry as raw material or for the purpose of any industry mine or quarry', such goods are not covered under section 4A of the CEA. The Revenue Authorities alleged that such goods are chargeable to excise duty under section 4A of CEA and not under section 4 of the CEA.

The matter came up for consideration before the Mumbai bench of CESTAT. The taxpayer contended that prior to 2008, there was no machinery provision for determination of MRP, hence duty cannot be levied on MRP basis. It was further contended that the list price also cannot be made basis for determination of MRP. The division bench of the CESTAT identified following issues for determination:

- Whether the taxpayer was required to affix MRP on their products under the Packaged Commodities Rules?
- Whether demand for duty is sustainable on MRP basis in absence of machinery provision?
- Whether list price can be adopted for determination of MRP as per rule 4 of the RSP Determination Rules?

The members of Division Bench of the CESTAT agreed that MRP was required to be affixed by the taxpayer on the goods manufactured by them. However, there was a difference of opinion on rest of the issues. Given this, reference was made to the third member. The third member confirmed excise duty assessment of switchgear products under section 4A of CEA, i.e. as per 'retail sale price' ("RSP") instead of section 4 (transaction value), prior to March 2008. The member held that once goods specified under section 4A with requirement to declare RSP as per Standard of Weights and Measures Act, 1976 ("SWM Act") or Rules thereunder triggers, application of section 4 does not arise at all.

It was held by Member (Technical) that in the absence of machinery provision for RSP ascertainment the Revenue may adopt a reasonable / best judgment assessment based on available material which should be consistent with section 4A provisions. This reasoning was upheld by the third Member, who reasoned that unlike Standard Weights Act, Central Excise law does not mandate declaration of RSP, hence cannot prescribe method to determine the same. Hence, the RSP Determination Rules notified with effect from March 1, 2008 merely provide for 'ascertainment' of RSP and not 'determination' in case of non-declaration by manufacturer.

Given this, the third Member held that RSP Determination Rules are a curative provision, procedural and directory in nature, having retrospective effect for determination of RSP for period prior to 2008. Further, the third Member allowed adoption of 'List Price' (with suitable VAT / local taxes adjustments), as MRP for pre-March 2008 period, vis-à-vis section 4A of CEA read with rule 6 of RSP Determination Rules for period after 2008.

Schneider Electrical India (P) Ltd vs. CCE, Nashik [2014-TIOL-337-CESTAT-MUM]

Notification & Circulars

Rule 7 of CCR amended to include multiple units instead of only one unit

The CBEC has amended rule 7 of the CCR to include multiple units instead of only one unit to determine the distribution of credit by input service provider

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Notification no 5 / 2014-Central Excise (NT) dated February 24, 2014

Conditions for refund under partial reverse charge mechanism notified

The CBEC has notified the conditions, safeguards and limitations basis which refund will be available to service providers of service tax paid under the partial reverse charge mechanism as envisaged under section 68(2) of the Finance Act, 1994.

Notification no 12 / 2014-Central Excise (NT) dated March 3, 2014

Mega Exemption Notification no 25 / 2012-Service Tax amended

The CBEC has amended the Mega Exemption List to include services provided by Cord Blood banks which preserve stem cells and services of loading, unloading, packing, storage or warehousing of rice.

Notification no 4 / 2014-Service Tax dated February 17, 2014

Importer to be mandatorily registered with the Central Excise authorities: Amendment in the procedure for registration of an importer

The Central Government has rescinded Notifications no 17 / 2014- CE and no 18 / 2014-CE, both dated December 31, 2013 which had earlier made changes in the CCR and Central Excise Rules, 2002 for allowing an importer to pass-on the credit by obtaining registration as a "first stage dealer" ("FSD"). The said notifications were to come in force from March 1, 2014. The Central Government has also issued notifications notifying certain procedural requirements for an importer to be able to pass on the credit of duties. The amended notifications will come into effect from April 1, 2014

Notification no 8 / 2014-CE (NT) dated February 28, 2014
Notification no 9 / 2014-CE (NT) dated February 28, 2014
Notification no 11 / 2014-CE (NT) dated February 28, 2014
Notification no 10 / 2014-CE (NT) dated February 28, 2014

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