February 2013

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

Foreword

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

Union Budget 2013-2014 is round the corner and FICCI is continuing with its endeavour of advocating the concerns of its members earnestly before the Government. Ms. Naina Lal Kidwai, President-FICCI participated in the pre budget consultations with the Hon'ble Finance Minister on 16th January, 2013 and strongly urged for stability and clarity in tax laws and introduction of tax reforms for effective dispute resolution mechanism in India. A FICCI delegation led by Mr Sidharth Birla, Senior Vice President also met the officials in the Prime Minister's Office on 4th February, 2013 for Pre-Budget consultations.

On the taxation front, the Supreme Court in the case of I.C.D.S Ltd. vs. CIT, has laid down that in a leasing transaction, the lessor is the owner of the asset and hence, entitled to depreciation under section 32 of the Income Tax Act, 1961 ('the Act'). The SC in its judgment has also clarified that the legal title in a vehicle for claim of depreciation under the Act cannot be decided in favour of the lessee merely because vehicles were registered in the name of lessees, as required under the provisions of the Motor Vehicles Act, 1988. It also laid down that section 32 of the Act does not postulate any requirement as to the usage of the asset by the assessee itself. As long as the asset is utilized for the purpose of the business of the assessee, the requirement under section 32 of the Act stands fulfilled.

In a Service Tax case in respect of a public sector undertaking providing tour operators' service, the tribunal (CESTAT) has held that amounts collected towards 'darshan' ticket charges, entry fees, hill transportation charges etc. (supplementary charges) would form part of the taxable value and that taxpayer was entitled to abatement on such value.

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

Supreme Court lays down law on lease depreciation, lessor eligible for deprecation at the higher rate

The taxpayer was engaged in the business of hire purchase, leasing and real estate etc. The taxpayer leased out vehicles to third parties who were registered as the owners of those vehicles, according to the certificate of registration issued under the Motor Vehicle Act, 1988 (MV Act). The taxpayer claimed depreciation in relation to such vehicles which were financed by it but registered in the name of third parties. The depreciation was claimed at a higher rate on the basis that the vehicles were used in the business of running them on hire. The AO disallowed the claim for depreciation altogether on the basis that the taxpayer had only financed the purchase of the vehicles and was neither the owner nor the user of such vehicles.

The Supreme Court held that a lessor leasing vehicles to customers is the 'owner' as well as the 'user' for the purpose of claiming depreciation under Section 32 of the Act. The Supreme Court observed that the use of an asset 'for the purpose of business' as prescribed under Section 32 of the Act does not mean usage by the taxpayer itself, as lease of vehicles for earning rental income is an asset used in the course of business by the lessor.

Further, it was held that the lessor is the owner of business even though the vehicles are registered in the lessee's name under the provisions of the MV Act. As long as taxpayer has the right to retain legal title of the vehicle against rest of the world, it would be the owner of the vehicle in the eyes of the law. Ownership provisions under the MV Act are deeming provisions and not statements of law on ownership in general. No inference could be drawn from the registration certificate as to ownership of the legal title of the vehicle. The Supreme Court also noted the fact that the lessee made no claim for depreciation and had claimed the lease rentals as revenue expenditure in their books. This made it clear that the taxpayer was the real owner of the assets as envisaged under Section 32 of the Act. Thus, it was held that the lessor was eligible for higher rate of depreciation.

I.C.D.S. Ltd. v. CIT [Civil Appeal No. 3282 of 2008 dated 14 January 2013]

High Court Decisions

India-Germany tax treaty is applicable to a limited partnership in Germany

The taxpayer, a limited partnership in Germany, filed its return of income in India, claiming the beneficial tax rate of 10 percent specified in Article 12(2) of the India-Germany tax treaty in respect of royalty and FTS received by it in India. The Assessing Officer (AO) did not concur with the taxpayer's contention of claiming the tax treaty benefit on the basis that the

taxpayer, being a limited partnership, was not liable to tax in Germany.

The issue for consideration before the Bombay High Court, inter alia, was whether the taxpayer could be considered to be a tax resident of Germany and accordingly would it be eligible to claim the treaty benefits.

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

- The taxpayer is paying trade tax in Germany, which is one of the taxes to which the tax treaty applies
- Under Article 3(d) of the tax treaty, 'person' includes any entity treated as a taxable unit in Germany. The term 'resident' in terms of Article 4 of the tax treaty means 'any person who, under the laws of Germany is liable to tax therein by reason of his domicile, residence, place of management or any criterion of a similar nature'
- The trade tax returns filed by the taxpayer and the TRC issued by the German authorities provide evidence that the taxpayer is considered a taxable unit under the taxation laws of Germany
- Accordingly, the tax treaty is applicable to the taxpayer and in particular the benefit of Article 12(2) of the tax treaty cannot be denied.

DIT v. Chiron Bearing Gmbh & Co. [ITA No. 2273 of 2010 dated 8 January 2013]

Provision for warranty cannot be treated as a provision for diminution in the value of any asset so as to be covered by Explanation 1(i) to Section 115JB(2) of the Act and thus, no additions to book profit can be made

The taxpayer was engaged in the business of manufacture and trading of medical consumable devices and diagnostic equipment for use by health care professionals, medical research institutions, industry and general public etc. It claimed 4 percent of the total sale value of its products as 'provision for warranty'. Warranty provision was claimed by it as deduction from its computation of the 'book profit' which was disallowed by the AO. The Tribunal held that the provision made for warranty claims in respect of sales which are affected could not be treated as a provision for diminution in the value of an asset. Further, even in terms of Explanation 1(c) to Section 115JB(2) of the Act, it could not be an amount or provision for meeting liabilities other than ascertained liabilities.

The Delhi High Court held that the reasoning adopted by the Tribunal cannot be found fault with. The High Court, relying on the Supreme Court's decision in the case of Rotork Controls India (P) Ltd. v. CIT [2009] 314 ITR 62 (SC), held that such warranty provision was not a contingent liability and that such provision was not made for diminution in the value of any asset, so as to be covered by Explanation 1(i) to Section 115JB of the Act.

CIT v. Becton Dickinson India (P.) Ltd. [2013] 29 taxmann.com 80 (Del) (HC)

Reassessment citing subsequent contrary AAR ruling invalid

The taxpayer is a non-resident foreign company. The taxpayer had approached the Authority for Advance Ruling (AAR) on 30 April 2001, wherein the AAR held that profits arising to the taxpayer from realization of portfolio investments in India would be treated as part of its business profits. In Assessment Year (AY) 2003-04, the taxpayer had claimed a loss of INR 488 million on account of loss in sale of shares under the head 'profits & gains of business or profession'. This was accepted by the AO vide an order under Section 143(3) of the Act. Subsequently, the taxpayer received notice under Section 148 of the Act reopening the assessment for AY 2003-04. The ground for reopening, as stated in the notice, was that, the AAR ruling in the taxpayer's own case was incorrect due to the view taken in a subsequent AAR ruling in the case of Fidelity Northstar Fund. As per the said notice, the AO believed that the taxpayer's income had escaped Assessment as the earnings from sale of shares should have been taxed as capital gains instead of profits & gains of business or profession. The AO, accordingly, passed the reassessment order.

The Bombay High Court held that the ruling of the AAR in the taxpayer's own case could not be overruled by a subsequent decision of the AAR in the case of another taxpayer. The High Court upheld the Tribunal's finding that the AAR ruling in the taxpayer's own case will continue to govern the taxpayer's assessments, particularly as there had been no change in the law.

DIT (IT) v. Prudential Assurance Company Limited [ITA (L) No.1193 of 2012 dated 10 January 2013]

If there is complete uniformity in the act of the taxpayer in not charging interest from both the AE and non-AEs and the delay in realization of the export proceeds in both the cases is the same, then no notional interest is to be charged on the export proceeds received belatedly

The taxpayer had made sales to both its AEs and non-AEs. The credit period allowed to its AEs was 180 days, but the amount remained outstanding for more than a year. The TPO treated such outstanding balances from AEs as a separate international transaction and determined the interest receivable by the taxpayer on such outstanding balances, taking the rate of interest at 10 percent.

The CIT(A) held that the profit of one AE is negligible and the other AE has incurred losses and therefore it cannot be said that the taxpayer had transferred any profit to the AEs outside India by not charging interest on the outstanding payment which has been realized after the due date and accordingly deleted the interest charged on late realization of the export proceeds.

The Tribunal upheld the order of the CIT(A) and held that interest income is associated only with the lending or borrowing of money and not with sale. When the international transaction is that of sale, the interest aspect is embedded in it. There can be no separate international transaction of 'interest' in the international transaction of

'sale'. It was further held that there was complete uniformity in the act of the taxpayer in not charging interest from both the AE and non-AE debtors for almost equal delay in the realization.

The High Court order mentioned that the judges are expressing no opinion on the ruling of the Tribunal that interest income is associated only with the lending or borrowing of money and not in the case of sale. The High Court noted that the specific finding of the Tribunal is that there is complete uniformity in the act of the taxpayer in not charging interest from both the AEs and non-AEs debtors and the delay in realization of the export proceeds is the same. The High Court held that in the aforesaid circumstances, the decision of the Tribunal in deleting the notional interest on outstanding amount of export proceeds realized belatedly cannot be faulted.

CIT v. Indo American Jewellery Ltd (ITA No. 1053 of 2012)

Tribunal Decisions

Revision under Section 263 of the Act for examining claim for deduction under Section 80-IB(9) of the Act is valid, despite the AO seeking explanation in the original assessment

The taxpayer was incorporated in Australia as a subsidiary of Cairn Energy Plc., UK. The taxpayer was engaged in the business of exploration and production of oil and gas in India. In its return of income for AY 2004-05, the taxpayer claimed deduction under Section 80-IB(9) of the Act. During assessment proceedings, the AO sought a justification for claim for deduction under Section 80-IB(9) of the Act, but no disallowance was made in that respect. Subsequently, the DIT(International Taxation) invoked the provisions under Section 263 claiming that the orders passed by the AO was erroneous and prejudicial to the interest of the Revenue on the basis that there was a failure on the part of the AO to examine the claim of the taxpayer of deduction under Section 80-IB(9) in depth. Hence, he directed the AO to examine the claim and recompute the deduction under the law. The taxpayer filed an appeal before the Tribunal challenging the revision under Section 263 of the Act.

The Chennai Tribunal held that the revision under Section 263 of the Act for examining claim for deduction under Section 80-IB(9) was valid, despite the AO seeking explanation in the original assessment. The Tribunal observed that the issues like whether undertakings were independent units, allocation of expenses among units, date of commencement of commercial production, etc. were not examined by the AO during the original assessment and hence there was failure on the part of the AO to apply mind, which renders the order erroneous and prejudicial to the interest of the Revenue.

Cairn Energy India Pvt. Ltd. v. DIT(IT) [ITA No. 714/Mds/2009 dated 20 December 2009]

AO not correct in denying deduction under Section 80IA treating the

taxpayer as a mere contractor according to agreements with Government bodies

The taxpayer was engaged in the construction of rail bridges and road bridges for certain Government authorities/bodies/ organizations such as Railways, Irrigation Department, etc. For AYs 2005-06 to 2007-08, the taxpayer claimed deduction under Section 80IA of the Act (with respect to profits derived by industrial undertakings or enterprises engaged in infrastructure development). The AO however, denied the deduction, taking the view that the taxpayer was not a 'developer' but only a 'work contractor' in respect of the infrastructure developed. The AO also contended that the infrastructure which was constructed was not owned by the taxpayer. The Commissioner of Income-tax (Appeals) [CIT(A)] upheld the AO's action, holding that the investment was not made by the taxpayer, nor was the design and planning for development of the infrastructure project, nor even did the financial risk belong to the taxpayer.

The Ahmedabad Tribunal held that based on the nature of work carried out by the taxpayer, it was a developer. The Tribunal inter alia made following observation:

- The taxpayer has undertaken the responsibility of execution of the work.
- The taxpayer has developed its own design and on getting approval applied the technology for completion of the infrastructure facility.
- The terms and conditions of the agreement executed with certain Government Departments have also Established that the risk in execution of work has also been undertaken by the taxpayer.
- The taxpayer was held responsible for any damage or loss to the property.

It was also held by the Tribunal that the term 'owned' had been wrongly interpreted by the tax department. Section 80IA(4) applies to 'any enterprise' carrying out the business of developing, operating and maintaining any infrastructure facility which is owned by a company registered in India or by a consortium of such companies. There is no requirement under Section 80IA that an infrastructure facility should be owned by the person claiming deduction under Section 80IA, as no one other than Government can own such facilities.

Sugam Construction Pvt. Ltd. v. ITO [TS-912-ITAT-2012(Ahd)

Advance for purchase of property from substantial shareholder not deemed dividend

The taxpayer is a director, holding substantial interest in the Company. The director purchased a land for INR 4 million and sold it to company for INR 15 million. The director received an advance of INR 5 million, including INR 2.5 million paid directly to the land owners, as advance from the Company. The reserves of the Company were higher than the advance amount. The AO made an addition of INR 2.5 million as deemed dividend under Section 2(22)(e) of the Act in the hands of the taxpayer.

The Tribunal held that the advance was for the purchase of agricultural land and was not a loan or advance to circumvent the deemed dividend provisions and deleted the addition. The Tribunal also accepted the taxpayer's contention that the land was purchased in his name as due to a restriction, companies were not allowed to purchase agricultural land in Karnataka. The value of the land increased significantly once it had been converted into non-agricultural land before sale to the company.

ACIT v. Shri C.V. Reddy [ITA No.447/Bang/ 2012]

'NIL' acqusition cost fiction under Section 55(2) of the Act cannot be applied to leasehold land

The taxpayer had leased a plot of land in 1966 for a period of 98 years for NIL consideration. The said land was sold in 2006. For Computation of capital gain on sale of land, the taxpayer deducted the indexed cost of acquisition based on the fair market value of land as on 1 April 1981. The AO applying the provisions of Section 55(2)(a)(ii) of the considered the cost of acquisition as NIL.

The Tribunal held that irrespective of NIL cost of acquisition, fair value as on 1 April 1981 is to be treated as 'cost of acquisition' for leasehold land acquired in 1966. It further held that provisions of Section 55(2)(a) of the Act providing 'NIL' cost of acquisition for intangible assets contains exhaustive list of capital assets to which it applies and any other capital asset such as land etc. could not be included for the purpose of valuation of 'cost of acquisition'.

Natraj v. DCIT (ITA No.3063/Ahd/2010)

DCF Method is preferable over CCI Guidelines for determining the ALP for sale of shares

The taxpayer and L&T Infocity Limited (LTIL) entered into an agreement with Ascendas Property Fund India (AFPI), an Associated Enterprise (AE), for selling their respective stake in L&T Infocity Ascendas Limited (LTIAL). The taxpayer was also involved in another transaction pertaining to sale of shares held in Ascendas IT Park Ltd (AITPL) to AFPI. For sale of shares in LTIAL, the taxpayer adopted the Comparable Uncontrolled Price (CUP) Method by comparing the price at which LTIL sold its shares to AFPI. For the transaction of sale of shares in AITPL, the sale price of AITPL shares was supported by a valuation certificate provided by a Chartered Accountant in accordance with the previous CCI Guidelines

LTIL's sale price as CUP for taxpayer's sale of LTIAL shares

The Transfer Pricing Officer (TPO) rejected the argument that the sale price of shares by LTIL constituted a CUP for the purpose of determining the ALP for sale of shares by the taxpayer, as the sale of shares by LTIL is an intimate connection and it is an AE by virtue of common participation.
The Tribunal held that the sale of shares by LTIL and the taxpayer is through a single agreement and treatment of one part of the agreement as an uncontrolled transaction and another as a controlled transaction is not acceptable. Hence

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the transactions cannot be considered a CUP for sale of shares in LTIAL.

CCI Guidelines v. DCF Method

The TPO rejected the valuation based on the CCI Guidelines and adopted the DCF method for valuation of shares for both the companies. The Tribunal held that difficulty may arise in ascertaining the Fair Market Value (FMV), but such difficulties should not be a reason for not adopting the rules and method prescribed. Subtle adjustment can be made in the methodology prescribed for evaluation. The Tribunal observed that CCI Guidelines were for a totally different purpose and could not be used for pricing methodology prescribed for ALP. Further, Rules prescribed for determination of the FMV under Section 56 of the Act cannot be taken as a basis for valuation in a transfer pricing matter.

Valuation of shares based on DCF Method

The Tribunal held that in the taxpayer's case, where market value of the investment is not readily ascertainable, the DCF was the most appropriate valuation method. Observing some mistakes in the workings of the TPO, the Tribunal restored the matter to the TPO for working out the value afresh as per standard practices. With regard to illiquidity risk, the Tribunal rejected any adjustment for the same by observing that the discounting factor (adopted for ascertaining the present value of future cash flows) takes into account all related risks.

Ascendas (India) Private Limited v. DCIT (ITA No.1736/Mds/2011)

Salary received by a non-resident in India, for services rendered outside India, not taxable in India, if treaty conditions met

The Delhi Tribunal has upheld the exemption sought by an employee in respect of the salary received by him in India for rendering services in Philippines, under the provisions of the India-Philippines tax treaty.

The taxpayer was an employee of an Indian Company who was seconded to the Philippines on a long-term international assignment during the tax year 2007-08, and was rendering services in the Philippines for the entire tax year, save for 17 days when he was present in India. The taxpayer qualified as a tax resident of Philippines, had paid taxes in Philippines on the salary he received in India and was a non-resident for Indian tax purposes. Therefore, the exemption claimed in his tax return in India under the provisions of the tax treaty, in respect of the salary received by him in India for services rendered in Philippines, was allowed.

ITO v. Arjun Bhowmik [ITA No 3484/ Del/2012]

Non-resident purchaser liable to withhold taxes from the sale proceeds of the property before making payment to non-resident seller of property

The Bangalore Tribunal has held that a non-resident individual is liable to withhold tax at the specified rates on the sale consideration payable in respect of a

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residential flat situated in India that was purchased from another non-resident. Pleading ignorance of Indian tax laws or non-awareness of the nonresident status of the seller, cannot absolve the purchaser from the consequences of non-deduction of tax at source. On failing to deduct such tax at source, the purchaser was held to be liable to be treated as an assessee in default and was also liable to interest arising from such default.

Syed Aslam Hashmi v. ITO [2012] 26 Taxmann.com 6 (Bang)

Notifications/Circulars/ Press releases

India notifies protocol amending the tax treaty with the Netherlands

India has notified the protocol amending the tax treaty with the Netherlands which was signed on 10 May 2012. The amended protocol shall be effective in India from 2 November 2012. The protocol replaces Article 26 concerning the 'Exchange of Information' in the existing tax treaty and also allows exchange of banking information. It also allows the use of information for non-tax purposes if allowed under the domestic laws of both the countries, after the approval of the supplying state.

Notification No. 2/2013 dated 14 January 2013

CBDT circular grants tax exemption to Onsite Software Development, deputation of personnel abroad, R&D activity, etc.

The CBDT vide its Circular No. 1/2013 dated 17 January 2013 clarified following issues related to tax incentives under Section 10A/10AA/10B of the Act:

- Onsite development of software is eligible for deduction under Section 10A/10B benefits as long as there is a direct/intimate nexus of software development with eligible units in India.
- Deputation of 'technical manpower' abroad for the purpose of software development is also eligible for deduction under Section 10A/10AA/10B of the Act.
- Tax benefits under Section 10A/10AA/10B not to be denied merely because of lack of a Master Service Agreement (MSA) for each individual Statement of Work (SOW); SOW to prevail over a MSA unless the AO can establish there is reconstruction/ splitting up of an existing business.
- R&D development activities pertaining to software development are covered under the definition of 'computer software' stipulated under Explanation 2 to Section 10A/10B of the Act.
- Separate books of account are not mandated under law but the AO may seek details pertaining to different units.
- Tax benefit under Section 10A/10AA/10B of the Act would continue to remain available in the case of slump sale of a unit/undertaking.

- Tax benefit not to be denied in the case of relocation of an eligible Special Economic Zone (SEZ) unit to another SEZ

- Setting up of a fresh unit in an existing undertaking would itself not make the unit ineligible for the tax benefit in so far as the unit is formed after obtaining necessary approval from the competent authority and has not been formed by splitting up or reconstruction of an existing unit.

Circular No. 1/2013 [F. No. 178/84/2012-ITA.I], dated 17-1-2013

India signs Social Security Agreement with Canada

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

The SSA envisages the following benefits, subject to conditions:

- Exemption from Social Security Contribution in the host country in the case of employees posted on short term contracts of up to five years;

- Totalisation of contributory periods to determine eligibility to social security benefits; and

- Export of benefits.

Source: www.moia.gov.in

II. SERVICE TAX

High Court Decisions

Rule 5(1) of the Service Tax (Determination of Value) Rules, 2006 is ultra vires the Finance Act, 1994 to the extent it provides for inclusion in the taxable value, expenditure or costs incurred by the service provider in the course of provision of output services

The tax payers are a company engaged in rendering consultancy services to the National Highway Authority of India (NHAI) in respect of highway projects. The tax payers received payments for their consultancy service as well as reimbursements for the expenses incurred such as air travel, hotel stay, etc in relation to providing such services. However, service tax was paid only on the fee received for providing consultancy services (excluding the value of reimbursements).

A show cause notice was issued on basis of Rule 5(1) of the Service Tax (Determination of Value Rules), 2006 ('Valuation Rules'). The tax payers submitted that Rule 5(1) of the Valuation Rules, in as much as it provides for including all expenditure or costs incurred by the service provider in the course of providing the taxable service in the taxable value of services, travels beyond the mandate of Section 67 of Finance Act, 1994 (the 'Act'). Accordingly, the tax payers submitted that it is only the value of service, that is, the value of the consulting engineering service rendered by the tax payers to NHAI that can be brought to charge and nothing more and thus, Rule 5(1) of the Valuation Rules is ultra vires Section 67 of the Act.

On analysing relevant provisions of service tax laws and after going through the above submissions, High Court held that:

- On a combined reading of Section 66 and Section 67 it is clear that in determining the taxable value only consideration actually paid as quid pro quo for the service, can be brought to charge. The expenditure or costs incurred by the service provider in the course of providing the taxable service cannot be considered as the gross amount charged by the service provider "for such service" provided by him

- Therefore, the provisions of Rule 5(1) to the extent it seeks to include expenses incurred for providing a taxable service in the value of taxable service, exceeds the mandate of Section 67

- While the Central Government has powers under Section 94 of the Act to make rules, such power to make rules cannot exceed the scope of levy envisaged under the Act/ charging section

- Therefore, Rule 5(1) of the Valuation Rules, to the extent it provides for inclusion of expenditure incurred in the course of provision of taxable service, in the value of taxable ser-

vice, is ultra vires the provisions of Section 66 and 67 of the Act

Intercontinental Consultants and Technocrats Private Limited v Union of India [2012-TIOL-966-HC-DEL-ST]

Back office activities like preparation of tax returns, co-sourcing services, analyzing client data and calculating estimates of tax amount would not qualify as Information Technology services even though they are performed by using computer programs

The tax payers are a private limited company registered with the Software Technology Park of India ('STPI') providing various back office services to their overseas group entity such as lead tax services, international assignment services, etc. The tax payers got registered under the categories of "business auxiliary service" and "management consultancy service".

On March 31, 2006, they applied for a refund under Rule 5 of the Cenvat Credit Rules, 2004 of various input services such as equipment hiring charges, professional consultation service, recruitment service, security service, etc used in relation to export of their output services.

According to Revenue authorities, the tax payers were in fact engaged in 'export of software' which is a non-taxable service against which no CENVAT credit shall be available. Also, as per the Revenue authorities, the input services declared by the tax payers did not appear to have any nexus with the output services provided by them and therefore the tax payers are ineligible to avail input service credit. Accordingly, the claim of the tax payers for refund was rejected.

The matter finally reached the Andhra Pradesh High Court. Besides the above contentions, the Revenue authorities relied upon the decision of Bangalore Tribunal in the case of Gandhi and Gandhi Chartered Accountants v Commissioner [2010-17-STR-25 (TRI-Bangalore)] which was confirmed by the Supreme Court wherein it was held that the activity of computerized data processing for filing and accounts management qualifies as 'Information Technology Service' and is excluded from 'Business Auxiliary Service'.

The Andhra Pradesh High Court held that activities performed by the tax payers are not in relation to computer systems, which is also supported by the SOFTEX forms submitted by them to STPI wherein they have mentioned that they export "services" only and not "software" and they have declared their exports as "others-Back Office Services". The High Court further held that reliance may not be placed on the decision in Gandhi and Gandhi's case, wherein it appears that the Tribunal did not consider the words "primarily in relation to computer systems/programming" while giving its decision. The fact that the said decision was confirmed by a non-speaking order by the Supreme Court does not mean that the reasoning in the order of the Tribunal was approved by the Supreme Court. Accordingly, the position of the tax payers was upheld.

CC&E v Deloitte Tax Service India Pvt Ltd [2012-TIOL-954-HC-AP-ST]

Tribunal Decisions

Supplementary services provided by tour operator such as organizing local events/ trips are includible in the taxable value of the tour operator's service and abatement allowed on such value

The tax payer is a public sector undertaking engaged in providing tour operator's service and deposited service tax after availing the benefits under abatement Notification Nos. 39/97 –ST dated August 22, 1997 and 1/2006-ST dated March 1, 2006. The issues that arose were:

a) Whether any amount collected for local events/ trips such as amount collected towards train charges, darshan ticket charges, entry fees, hill transportation charges and water fleet charges (supplementary charges) would form part of the taxable value of tour operator's service; and

b) Whether abatement could be claimed on such amount

The tax payer contended that only the amount charged for the journey can be included in the taxable value and not for the amounts charged for supplementary services. Supplementary charges paid by the tax payer and reimbursed by their customers are not his expenditure and therefore are not to be included. Also, abatement should be allowed without including such charges/ fees in the taxable value. The Revenue contended that local small trips undertaken by a tourist in a particular place are covered by the definition of 'tour' and the distance of such 'tour' is immaterial. Also the abatement could only be claimed on the gross taxable value.

The Tribunal held that the term 'journey' in the definition of 'tour' is neither defined in the Finance Act, 1994 nor in the Service Tax Rules, 1994. Accordingly, it has to be understood in common parlance to include local sight-seeing / trips organized by tour operator for the tourists. Further, from September 10, 2004, the business of a tour operator includes arrangements for accommodating, sight-seeing or other similar services and thus, local events or trips can reasonably be brought within the ambit of the expression 'other similar services' by applying principle of ejusdem generis.

With respect to the tax payer's claim for 60 per cent abatement, it was held that the benefit is available only to a 'package tour' and on the gross amount charged. This gross amount is the taxable value and includes the amounts collected towards the cost of supplementary services. In view of finding that supplementary services are rendered in relation to package tour, the collections for the same from tourists cannot be typified as 'reimbursements'.

Hence, the amount collected from customers for these supplementary services would form part of taxable value and tax payer was entitled to abatement to extent of 60% on gross taxable value under the aforementioned notifications.

Andhra Pradesh Tourism Development Corporation Ltd. v CCE [2012 (28) STR 595 (Tri.-Bang)]

Service tax is not payable on the sale proceeds realised from auction of abandoned / uncleared cargo by the custodian of goods

The tax payer was running a container freight station and was functioning as a custodian of the bonded warehouses under the provisions of the Customs Act, 1962 (the 'Customs Act'). In the course of undertaking the business operations, the tax payer sold some uncleared cargo by way of auction. The revenue authorities demanded service tax from the tax payers on income earned from such sale contending that the sale proceeds attract service tax under the taxable category of 'cargo handling services' and 'storage and warehousing services'.

The tax payer relied upon Board's Circular No. 11/1/2002- TRU, dated August 1, 2002 wherein it has been clarified that service tax is not leviable on the activities of the custodian when he auctions abandoned cargo and VAT / Sales Tax is paid. The tax payer further relied on earlier judgments wherein the Tribunal has taken a view that no service tax is leviable on auction of uncleared cargo.

Based on the above submissions, the Mumbai Tribunal held that no service tax was payable by the tax payer on the sale consideration received from auction of uncleared cargo.

Maersk India (P) Ltd. v CCE&C, Raigad [2012-37-STT-685 (Mumbai-CESTAT)]

III. VAT/ CST

High Court Decisions

Kora Maal (brass ware) after polishing and engraving continues to be same commodity and there is no change in the identity of goods

The tax payer was engaged in purchase of kora maal (brass ware) from manufacturer and after engraving and polishing, selling the same to a dealer outside state who is stated to have exported the same. The Revenue authorities raised demand of purchase tax under Section 3AAAA of the U.P Trade Tax Act, 1948 against the tax payer on the basis that engraving and polishing changes the identity of goods after its purchase. Aggrieved by it, the tax payer filed an appeal before the first appellate authority.

The matter finally reached the High Court where the Revenue authorities contended that the inextricable link of purchase with the exports required for claiming the exemption has not been demonstrated in the present case and hence the matter should be remanded back to the Sales Tax Tribunal for examination of this aspect.

The High Court held that even if the sale was not inextricably linked to export and the sale of polished kora maal was an independent sale of goods to a dealer outside state, the same would qualify as a sale in the course of inter-state trade or commerce and would be exempt from payment of purchase tax (Proviso (iii) to Section 3AAAA of the U.P Trade Tax Act, 1948 inter alia ex-

empts the levy of purchase tax on goods which the purchasing dealer resells in the same form and condition in the course of inter-state trade) . Accordingly, the High Court dismissed the revision petition.

Commissioner Trade Tax U.P., Lucknow v Pioneer India [2012-56-VST-323 (All)]

"Inkjet cartridges" and "Tonor cartridges" are covered by entry 4 of Part B of the Second Schedule to the Assam Value Added Tax Act, 2003 as parts and accessories of computer system and peripherals

The tax payers are engaged in sale of Information Technology products including "inkjet and tonor cartridges". The tax payers have claimed that these items are covered by entry 4 of Part B of the Second Schedule ('parts and accessories of computer system and peripherals') to the Assam Value Added Tax Act, 2003 (the 'Assam VAT Act') which lists items taxable at the concessional rate of 4% (during the disputed period).

However, the plea of the tax payers was rejected by the Revenue authorities contending that such goods are consumables and not parts or accessories of computer systems and are thus, taxable at the higher rate under the residual entry.

Tax payers' plea was accepted by the Guahati High Court holding that such goods form an integral part of printers which is undisputedly covered under the entry 'computer system and peripherals'. Reliance was placed on the judgment of Delhi High Court in the case of Commissioner of Trade and Taxes v HP India Sales Private Limited [2007-VIL-18-HC-Delhi] wherein it was held that tonors and cartridges are parts and accessories of computer systems.

Hewlett Packard India Sales Pvt. Ltd. v State of Assam and Others [2012-56-VST-472 (Gau)]

"Dettol" falls under the category of drug and medicine and not a toilet preparation; "Lizol and Harpic" having the primary quality of disinfectant to be treated as pesticides

The tax payers are engaged in manufacturing, selling and marketing of household products including disinfectants like 'Harpic' and 'Lizol' and antiseptic liquid, 'Dettol'. The tax payers had been paying tax at the rate of 4% on sale of these goods in Assam based on the following grounds:

- 'Lizol' and 'Harpic', containing active ingredients like hydrochloric acid are disinfectants. Hence, they are covered under the specific entry no. 19 of Part A of the Second Schedule to the Assam Value Added Tax Act, 2003 (the 'Assam VAT Act') including pesticides, insecticides etc. taxable at 4% during the disputed period

- Dettol, having therapeutic and prophylactic properties, is a drug/ medicine, covered under the specific entry no. 21 of the Fourth Schedule of the Assam VAT Act including drugs and medicines, also taxable at 4% during the disputed period

Contrary to the claims of the tax payers, the Revenue authority contended that the above products, 'Lizol', 'Harpic' and 'Dettol'

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being floor cleaner, toilet cleaner and a toilet preparation are not covered by any of the specific entries, and should be classified under residuary entry no.1 of the Fifth Schedule of the Assam VAT Act, leviable to tax at the higher rate of 12.5% during the disputed period.

The Gauhati High Court while examining the issue placed reliance on the decision of Supreme Court in the case of Bombay Chemical Private limited [1995 99 STC 339 (SC)] which held that the disinfectants having the capability to kill bacteria would be considered as 'pesticides'. Accordingly, the Gauhati High Court held that 'Lizol' and 'Harpic' being disinfectants having the capability to kill germs can be considered as 'pesticides', covered under the specific entry taxable at 4% during the disputed period.

Further, analyzing the definition of 'drug' as defined under the Drugs and Cosmetics Act, 1940 as well as Medicinal and Toilet Preparations (Excise Duty) Act, 1955 the Court held that if the purpose of a substance is to prevent disease, unless otherwise provided, it can be considered a drug. The main purpose for the use of 'Dettol' is to prevent infections. Thus, by applying the 'users test', it would squarely fall under the definition of 'drug'. Further, from the users point of view, it cannot be considered to be 'cosmetic' or a 'toilet preparation' (requiring the main characteristics of cleansing, beautifying, promoting attractiveness etc.) which are not present in 'Dettol'. Accordingly, 'Dettol' being a drug would get covered under the specific entry no. 21 of the Fourth Schedule of the Assam VAT Act taxable at 4% during the disputed period.

Reckitt Benckiser v State of Assam [2012-56-VST-452 (Gau)]

IV. CUSTOMS

Tribunal Decisions

Once the end use condition stipulated under the Project Import Scheme with respect to the goods imported has been fulfilled, the benefit under the said scheme cannot be denied in case of non-compliance with the procedural requirements under the said scheme in time

The tax payer had imported Heat Recovery Steam Generators under Chapter 98.01 of the Customs Tariff Act, 1975 ("Tariff Act"). The tax payer had furnished a certificate from a Chartered Engineer certifying that the said goods have been installed as per the provisions of the Project Import Regulations, 1986 ("Import Regulations"). Additionally, the Assistant Commissioner of Central Excise, Kakinada had furnished a letter certifying that the goods imported had been installed as per the contract. The tax payer had submitted the reconciliation statement in terms of Regulation 7 of the Import Regulation after nearly two years of the last consignment

The Assistant Commissioner of Customs, Kakinada finalized the assessments for the bills of entries after denying the benefit of concessional rate of customs duty under the Import Regulation on the ground that the tax payer had violated Regulation 7 of the Import Regulations. Subsequently, the said order was affirmed by the Commis-

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sioner (Appeals) and held that the tax payer had failed to satisfy a substantial condition of submitting the reconciliation statement within 3 months of import or extended time provided by the authority.

The tax payer in the appeal to the Tribunal, amongst other decisions, relied on the decision of the Apex Court in the case of Mangalore Chemicals and Fertilizers Ltd v Deputy Commissioner [1991 (55) ELT 437 SC], and pressed on the fact that it was a settled law that a substantial benefit could not be denied for violation of procedure.

The Tribunal held that since the Assistant Commissioner of Central Excise, Kakinada had already certified that the goods under question have been installed in the factory premises, the demand of differential duty could not have been raised validly on the ground of non-compliance of a procedural requirement specified under the Import Regulations.

Alstom Projects India Ltd v CC, Visakhapatnam [2012 (286) ELT 235 (Tribunal – Bangalore)]

Notification & Circulars

Concessional import tariff rates in respect of items imported from Singapore, notified

Government has amended the Notification No.10/2008-Customs, dated 15/1/2008, so as to further deepen the tariff Concessions in respect of goods imported from Singapore under Comprehensive Economic Cooperation Agreement between India and Singapore

Notification No.61/2012, dated December 18, 2012

Incremental Exports Incentivisation Scheme, introduced

Notification and Public Notice from DGFT has introduced the ‘Incremental Exports Incentivization Scheme’. The objective of the scheme is to incentivize incremental exports achieved by an Importer Exporter Code (‘IEC’) holder by providing an additional duty credit scrip @ 2 percent of the FOB value of incremental exports done during the period January to March 2013 as compared to period January 2012 to March 2012.

Notification No. 27 (RE-2012) / 2009-2014 and Public Notice No. 41/2009-2014 (RE-2012), dated December 28, 2012

V. CENTRAL EXCISE

Supreme Court Decisions

'Soft Serve' served at McDonalds is classifiable as 'Ice Cream' under Tariff Heading 2105 of the Central Excise Tariff Act, 1985 and will attract applicable excise duty. The Supreme Court also observed that in the absence of definition of the term 'Ice Cream' or 'Soft Serve', classification is to be determined on the touchstone of common parlance test

The tax payer was engaged in the business of selling burgers, nuggets shakes, soft-

serve etc. through its fast food chain of restaurants, 'McDonalds'. The tax payer was of the view that 'soft-serve' was classifiable either under heading 04.04 or 2108.91 of the Central Excise Tariff Act ("Tariff Act") for which applicable excise duty is 'Nil'

For the periods from April 1997 to March 2000 ("Relevant Period"), show cause notices were issued to tax payer alleging that the 'soft serve' ice-cream was classifiable as "Miscellaneous Edible Preparations" of the Tariff Act, attracting 16% duty under heading 2105.00 -"Ice-cream and other edible ice, whether or not containing cocoa"

The matter reached the Supreme Court in due course. The Supreme Court ("SC") held that in the absence of a technical or scientific meaning or definition of the term "ice-cream" or 'soft serve', the issue would have to be examined on the touchstone of the common parlance test. SC observed that headings 04.04 and 21.05 have been couched in non-technical terms. Heading 04.04 reads "other dairy produce; edible products of animal origin, not elsewhere specified or included" whereas heading 21.05 reads "ice-cream and other edible ice". Neither the headings nor the chapter notes/section notes explicitly define the entries in a scientific or technical sense. Further, there was no mention of any specifications in respect of either of the entries. On that basis, the argument that since 'soft serve' is distinct from "ice-cream" due to a difference in its milk fat content, was rejected.

Further rejecting the tax payer's argument that 'soft serve' cannot be regarded as "ice-cream" since the former is marketed and sold around the world as 'soft serve', the SC held that the manner in which a product may be marketed by a manufacturer, does not necessarily play a decisive role in affecting the commercial understanding of such a product. What matters is the way in which the consumer perceives the product at the end of the day notwithstanding marketing strategies.

It was also held that it is a settled principle in excise classification that the definition of one statute having a different object, purpose and scheme cannot be applied mechanically to another statute. Accordingly the tax payers' submission that the common parlance understanding of "ice-cream" can be inferred by its definition as appearing under the Prevention of Food Adulteration Act, 1955 ("PFA") can't be adopted

In view of above, the SC held that 'soft serve' marketed by the tax payer, during the relevant period, is to be classified under tariff sub-heading 2105.00 as "ice-cream" and was liable to excise duty.

CCE, New Delhi V. Connaught Plaza Restaurant Pvt. Ltd, New Delhi [2012 TIOL 114 SC – CX]

High Court Decisions

Section 11AC of the Central Excise Act, 1994 allows a tax payer the option to pay only 25 percent of the demand as penalty if the entire demand along with interest and reduced penalty is paid within 30 days from the date of communication of Central Excise Officer's order. The said time limit cannot be modified by any authority whatsoever

The tax payer, a manufacturer of excisable goods, had availed excess input credit which was subsequently reversed after it was pointed out by the Revenue Authorities. Penalty under Section 11AC of the Central Excise Act, 1944 was confirmed against which an appeal was filed before the Tribunal. The Tribunal observed that the adjudication order did not provide the tax payer the option to pay reduced penalty of 25 percent under Section 11AC and held that the benefit of reduced penalty would be available if 25 percent penalty is paid within 30 days of communication of its order. The Revenue authorities seeking to recover 100 percent penalty preferred an appeal before the Bombay HC against the decision of the Tribunal.

The Revenue authorities contended that once demand was confirmed by invoking larger period of limitation, penalty under Section 11AC was to be compulsorily levied and the benefit of 25 percent penalty would be available only if the demand along with interest and reduced penalty is paid within 30 days of the communication of Central Excise Officer's order as provided under the Central Excise Act.

The tax payer argued that CESTAT's order is perfectly valid as the operative part of the adjudication order did not explicitly clarify the option of reduced penalty available with the tax payer.

The Bombay HC disregarded the tax payer's arguments by stating that it was not obligatory to include the above explained option in the adjudication order's operating part. The tax payers' plea that Section 11AC should be read liberally was rejected as the Section imposed punishment on those who evaded taxes. The appeal was allowed and it was held that when the legislature specifically fixed a time limit to avail an incentive, it was not open for any authority to modify the time limit so fixed.

CCE v Castrol India Ltd [2012 (286) ELT 194 (Bom)]

The liability to pay excise duty in case of job work arrangements falls on the person who gets the goods manufactured on job work basis

Diwan Saheb Fashions, the tax payers, were engaged in stitching garments out of fabric bought by customers from their shop (stitching to take place after sale of fabric) or from outside. For purchases made by the customers from the tax payers, it was not compulsory for customers to also get their fabric stitched. No excise duty was being paid by the tax payers in respect of the stitching activity.

The Revenue Authorities contended that the tax payers, being the job workers, should be liable to pay excise duty. The tax payers defended by placing reliance on Rule 7AA of the Central Excise Rules, 1944 and the corresponding successor rules, Rule 4(1) and Rule 4(3) of the Central Excise Rules, 2001 and 2002. It was pointed out that the liability to pay excise duty was that of those who supply the materials as these rules specified that in cases of job work, excise duty was to be paid by the person for whom goods were being manufactured on job work basis as if such person was the manufacturer of the goods. Further, exemption from excise duty was available on garments got stitched from one's own fabric

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and based on measurements in terms of Notification No 7/2003 – CE dated March 1, 2003.

The Delhi HC agreed with the tax payers' submissions and held that the liability to pay excise duty would fall on the respective customers but at the same time they should be eligible for exemption given to SSI units.

CCE v Diwan Saheb Fashions Pvt Ltd & Ors [2012-TIOL-942-HC-DEL-CX]

Tribunal Decisions

Benefits provided under Exemption Notification No 56/2002 – CE will be available even though the Khasra numbers of the industrial areas where the units are located are different from those given under the relevant notification

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

In the present case, appeals were filed before the Tribunal by the Revenue authorities against the decision given by the Commissioner (Appeals) in favour of the tax payers under question on the ground that the units of tax payers were located in Khasra numbers other than those specified in the Notification No. 56/2002 – CE.

The Revenue authorities agreed to the fact that the goods and the industrial areas where the units were located were specified in the notification but argued that duty was still payable because the units were not located in Khasra numbers specified against the corresponding industrial area in the said Annexure. It was further argued that the provisions of the notification be construed strictly and interpreted only on their wordings.

The Tribunal observed that in some cases there were some typo-graphical mistakes and in other cases the relevant Khasra numbers were included in the Notification albeit they were wrongly specified against other industrial areas. After noting that the notification did not stipulate that the unit must also be located in the Khasra numbers mentioned against the each industrial area, the Tribunal held that just because of some typographical mistakes or just because a Khasra number is mentioned against a wrong industrial area, the benefits of the Notification could not be denied to the tax payers. Consequently, all the appeals of the Revenue were dismissed.

CCE v B.R. Agrotech Ltd [2012 (286) ELT 127 (Tri – Del)]

Subsequent investments in the plant and machinery and increase in commercial production after the cut-off date to start commercial production can't be a ground to deny the excise exemption under Notification No 39/2001 – CE where company has already obtained a certificate from the concern authority confirming ful-

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fillment of prescribed investment criteria

The tax payer set up the unit in the Kutch area of Gujarat and availed exemption from excise duty on clearance of its final product. This exemption was claimed by tax payer under the Notification No 39/2001 – C.E. dated July 31, 2001 (“Notification”) which provides for excise duty exemption on final product cleared by a unit meeting the criteria envisaged under the said notification subject to a certification condition.

The tax payer obtained the above certificate confirming that unit was set up after the date of publication of Notification and required Plant and Machinery has been installed. The tax payer commenced the commercial production, cleared the final products and availed the exemption under the Notification. During the period April 2005 to December 2005, the tax payer also filed the monthly excise returns and disclosed the average per month clearance of 5000 Ton of final product (ie MS Billets).

The Revenue authorities denied the excise duty exemption on clearance of final product on the ground that tax payer has done backward integration and installed various other plants in the project which became functional after December 31, 2005 and that the substantial investment made by them in the backward integrated plant was, in fact to be done for setting up of the plant as envisaged in the Notification. The Revenue authorities further alleged that factually the project commenced its commercial production only after completion of aforementioned backward integration ie only after December 31, 2005. As per Revenue authorities average clearance of 5000 tons of final product per month was not a substantial clearance so as to conclude that tax payer has commenced commercial production. Given this, the Revenue authorities alleged that the tax payer has not complied with the prescribed conditions of investment in plant and machinery by prescribed cut-off date and hence it was not eligible for excise duty exemption under the said notification.

The Tribunal held that there was no dispute that the tax payer’s unit at Kutch was a new industrial unit set up after the date of publication of notification and also it was undisputed that a certificate was given which categorically indicated that the tax payer had installed the machinery and had complied with the said condition as envisage in the notification. Also, in view of Tribunal, average clearance of 5000 tons of final product per month (as disclosed in monthly excise returns) can’t be considered as small production as was sought to be propagated by the Revenue authorities.

It was held that the tax payer has strong prima facie case for waiver of pre-deposit as it was undisputed that the tax payer’s unit was set up after the publication of Notification and subsequent investment made by the tax payer in the plant in the form of backward integration can’t be held against the tax payer to deny the benefit of said notification.

Electrotherm India Ltd. v. Commissioner of Central Excise, Rajkot [2012 (194) ECR 257 (Tri-Ahd)]

One time technical assistance fee charged for providing services such as putting up a restaurant in running condition, designing of food facilities and monthly fees for other services, right to use technical knowhow and brand name of franchisor cannot be said to be additional consideration for sale of confectionary, cakes etc. by franchisor to franchisee

The tax payer has a chain of restaurants and also manufactures confectionary items like cakes, pastries, cookies etc chargeable to central excise duty. The goods manufactured are cleared to their own restaurants and also to their franchisees. The tax payer, in terms of the agreement with the franchisees charged lump sum amount in the beginning as technical assistance fee, and thereafter a monthly amount as fixed percentage of the gross sales during the month.

According to Revenue authorities, such lump sum amount and the monthly amount should also be added to the assessable value of the goods for payment of excise duty. The tax payer submitted that there is no link between the price at which cookies, cakes and pastries etc manufactured are sold to their franchisees and the collection of one time technical assistance fee and monthly fee.

Further, the tax payer submitted that the technical fees and monthly fees is for providing certain technical assistance to the franchisees and for permitting them to operate by using the tax payer's brand name and business model, and the price charged is equal to the price adopted for clearance of same goods to the tax payer's own restaurants. Further, service tax has been discharged on said amounts under franchise services.

The Tribunal took note of Rule 6 of Central Excise Valuation Rules, 2000 and held that the same applies when there is some supply of goods or services either free or at reduced cost from the buyer (franchisees in this case) to the manufacturer (the tax payer in this case) for use in the manufacture of the goods which are to be sold to the buyer – thus, it was held to be inapplicable in this case.

The amounts in question were being received for certain services rendered by the tax payer to the franchisees. Further, as service tax had been paid on the said amounts, they couldn't qualify as additional consideration for sale.

Therefore, there is no question for rejecting the normal price/ transaction value on which the duty has been paid.

Nirulas Corner House Pvt. Ltd. v CCE, Delhi, [2012 (286) ELT 46 (Tri - Delhi)]

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