July 2013

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

Foreword

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

FICCI had been invited for a meeting with Mr. Sushil Kumar Modi, the then Deputy Chief Minister, Bihar, and Chairman, Empowered Committee of State Finance Ministers (EC) on 7th June, 2013 to discuss issues relating to GST design, Revenue Neutral Rates, Dual administrative control and other related matters. During this meeting, the Secretariat of the Empowered Committee circulated a document listing out various issues arising under the proposed GST on which EC would like to have views of the trade and industry. FICCI is working on these issues and will shortly submit its inputs to the EC.

FICCI was also invited for an interaction with Member, Central Excise, in the Ministry of Finance on June 13, 2013, to discuss issues relating to Central Excise law and procedure concerning the trade and industry. An important issue which was raised by FICCI during this meeting pertained to impact of the judgment of the Supreme Court in case of Fiat India. FICCI suggested amendment of Section 4 of the Central Excise Act to clarify the true meaning of the term "transaction value". FICCI also requested for a review of the circular dated 1st January, 2013 regarding recovery of dues when the disposal of appeal is pending following grant of stay.

FICCI also attended the meeting convened by the Revenue Secretary on the Voluntary Compliance Encouragement Scheme, 2013 of Service Tax. FICCI requested the Ministry to publish a list of assesses who are considered by the Service Tax Department to be ineligible to make a declaration under Section 106(2) of the Finance Act, 1994. This would result in transparency and encourage the defaulters to voluntary declare their tax liability without inviting the risk of their declaration being rejected.

On the taxation regime, the Karnataka High Court in the case of Nike Inc. held that activities of a non-resident in respect of purchase of goods by its liaison office are not taxable under the Income Tax Act, 1961 ('the Act'). Such activities are

confined to purchase of goods in India for the purpose of export which is exempt under the Act.

We do hope that this newsletter keeps you updated on the latest tax developments.

We would welcome any suggestions to improve the content and the presentation of this publication.

A. Didar Singh

Recent Case laws

I. DIRECT TAXES

Supreme Court Decisions

Section 194C of the Act does not apply to contract manufacturing agreements

The taxpayer, a manufacturer of pharmaceutical products, entered into agreements with various manufacturers who manufactured the said items according to the specifications provided by the taxpayer. The AO held that the transaction between the taxpayer and the manufacturer was in the nature of a 'works contract' and fell within the purview of Section 194C of the Act and that the taxpayer ought to have deducted tax thereon. The taxpayer was held to be in default and was made liable to pay the tax and interest under Section 201(1) and 201(1A) of the Act. On appeal by the taxpayer, the Tribunal held that the transaction was one of sale simplicitor and was not in the nature of a work contract and that the taxpayer was not liable to deduct tax at source under Section 194C of the Act. The tax department's appeal to the High Court was dismissed by following the High Court's own decision in the case of CIT v. Reebok India Company [2008] 306 ITR 124 (Del HC).

The Supreme Court held that on examining the terms and conditions, invoices, purchase orders and challans indicating payment of excise duty, there was no material on record to indicate that the transaction in question was a 'contract for carrying out works'. Hence, Section 194C of the Act was not attracted. The Supreme Court also observed that Section 194C of the Act has been amended by the Finance (No.2) Act, 2009, with effect from 1 October 2009 to provide that 'work' includes manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from such customer. It is clarified that the definition of the word 'work' will not include manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from a person other than such customer.

CIT v. Silver Oak Laboratories P. Ltd (Supreme Court SLP No. 18012/2009)

High Court Decisions

Activities of a liaison office confined to purchase of goods for export is not taxable in India

The taxpayer is a company incorporated in USA. From its office in USA, it arranges for all its subsidiaries worldwide, the various brands of sports apparel for sale to customers. For this purpose, the taxpayer engages various manufacturers all over the world on a job to job basis, who directly dispatch the apparel to the various subsidiaries. In India, the taxpayer has a liaison office (LO) to facilitate procurement of goods from the manufacturers in India.

The Assessing Officer (AO) held that the taxpayer carried out business in India through its LO and attributed 5 percent of

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the export value to the Indian operations of the taxpayer.

The issue for consideration before the Karnataka High Court was whether the activities of the taxpayer in India through its LO gave rise to any income which had accrued/arisen or deemed to have accrued/arisen in India.

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

- Relying on the decisions of the Supreme Court in the case of Anglo-French Textile Company Limited v. CIT [1953] 23 ITR 101 (SC) and CIT v. RD Agarwal and Company and another [1965] 56 ITR 24 (SC), it was held that the taxpayer was not carrying out any business in India;
- The taxpayer has no right in the payments made by the subsidiaries to the manufacturers;
- Explanation 1(b) to Section 9(1)(i) of the Act provides that no income of a non-resident shall be deemed to accrue or arise in India through or from operations which are confined to the purchase of goods in India for the purpose of export. In the instant case, as the whole object of the transaction is to purchase goods for the purpose of export, it was deemed that the goods are supplied to the taxpayer even though the goods are actually supplied to the buyers. Accordingly the taxpayer was entitled to exemption under Explanation 1(b) to Section 9(1)(i) of the Act; and
- No income of the taxpayer could be taxed under Section 5 or Section 9 of the Act.

CIT and ACIT/DCIT v. Nike Inc [ITA No.976 of 2008]

Operational subsidies eligible for tax holiday; Distinguishes Supreme Court ruling in Liberty India

The taxpayer claimed a deduction under Section 80-IB and 80-IC of the Act. During the relevant year, the taxpayer had received some amounts on account of transport subsidy, interest subsidy, insurance subsidy and power subsidy. The AO disallowed the taxpayer's claim for deduction under Section 80IB and 80IC on account of these subsidies. The Commissioner of Income-tax (Appeal) [CIT(A)] and the Tribunal allowed the appeal of the taxpayer, thereby allowing the deduction under Section 80IB and 80IC of the Act on account of subsidies.

The Gauhati High Court held that power subsidy, insurance subsidy, interest subsidy and transport subsidy, being operational subsidies, would be eligible for deduction under Section 80IB and 80IC of the Act. The High Court observed that in order to claim deduction either under Section 80IB or under Section 80IC of the Act, the taxpayer had to establish that there was a direct, intrinsic and first degree nexus between a subsidy, on the one hand, and the profits and gains, on the other, derived from, or derived by, the industrial undertaking concerned. After going through the Government schemes under which the

subsidies were granted and the purpose for which they were utilized, the High Court upheld the Tribunal's finding that all the four subsidies were operational in nature and had direct nexus with the manufacturing activities of the industrial undertaking and hence were eligible for deduction under Section 80IB and 80IC of the Act. The High Court also distinguished the tax department's reliance on the Supreme Court ruling in Liberty India vs. CIT [2009] 317 ITR 218 (SC) to hold that the subsidies in that case were not operational and hence, not eligible for the deduction as the ruling was rendered in the context of Duty Entitlement Pass Book (DEPB) or duty drawback scheme, which was not related to the business of industrial undertaking per se for its manufacturing or production.

CIT v. Meghalaya Steels Ltd. [TS-241-HC-2013(GAUH)]

Removal of benefit of exemption under sub-section (6) of Section 115JB and 115-O of the Act for SEZ units not ultra-virus, unfair or violative of Article 14 of the Constitution of India

The taxpayer filed a writ petition against the insertion of proviso to Section 115JB(6) and to Section 115-O(6) inserted by the Finance Act 2011 making it liable to pay Minimum Alternate Tax (MAT) as well as Dividend Distribution Tax (DDT). With the enactment of SEZ Act in 2005, it was provided that the provisions of the Act would be applicable to the SEZ units, subject to modifications as specified in the SEZ Act. By virtue of provisions contained in the SEZ Act, SEZ units, etc. were exempted from payment of MAT as well as DDT under the Act. However, through the Finance Bill, 2011, a proviso was inserted below Section 115JB(6) and 115-O(6) of the Act (as contained in the Second Schedule to the SEZ Act) to withdraw the exemption available to the SEZ developers/contractors /units. Aggrieved, the petitioners argued that such withdrawal of exemption was against the Doctrine of Promissory Estoppel and Doctrine of Legitimate Expectation.

The Karnataka High Court held that the withdrawal of exemption to SEZ units, developers, etc was valid in law. The High Court held that the Doctrine of Promissory Estoppel could not be made applicable in the present case to nullify the amendments since the amendment removed a flaw in the law (there was no sunset clause for the exemption), removed the inequality between SEZ companies and other companies with regard to taxation, and restored the tax base of the country which was being eroded by the exemptions. Further, the amendment was within the sovereign power of the Government to regulate fiscal policies. Lastly, the amendment did not transgress any of the fundamental rights of the petitioners guaranteed under the Constitution. Based on this, the High Court upheld the removal of exemption to the SEZ units as constitutionally valid. The High Court observed that while all other companies were liable to pay MAT and tax on dividend distribution, the SEZ establishments and units were exempted though they are making profits. This situation had lead to discrimination amongst SEZ establishments/units and other companies. Realising this, the legislature brought in the amendments to remove the discrimination among the companies. Based on the above, the High Court dismissed the writ filed by the petitioners and upheld the

Constitutional validity of the insertion of proviso to sub-section (6) Section 115JB and 115-O of the Act by virtue of which SEZ companies were made liable to MAT and DDT.

Mindtree Ltd. v. UOI & CIT [TS-261-HC-2013(KAR)]

Sale of shares in a company holding only land cannot be considered to be sale of land

The taxpayer, a listed Company, and others in the group held 98.73 percent shares in BFSL. The taxpayer and others sold their entire shareholding in BFSL to DLF Commercial Developers Limited. At the time of sale of shares, BFSL held only one asset, i.e. land purchased from BSL. As the sale of shares was executed through the Magadh Stock Exchange and STT was paid, the taxpayer claimed that the gain on sale of shares as exempt under Section 10(38) of the Income Tax Act, 1961 (The Act).

The AO held that the taxpayer, BFSL and BSL were all controlled by common shareholders and that the scheme to first sell the land to BFSL and then to sell the shares of BFSL was devised with the sole purpose of avoiding tax on the capital gains which would have arisen if the land was sold directly. It was held that the formalities of the transaction and the legal nature of the corporate bodies had to be ignored by lifting the corporate veil and the taxpayer was liable to tax on the short-term capital gains on sale of immovable property. The Tribunal upheld the order of the AO.

The Karnataka High Court held that though BFSL was a shell company with no asset other than the land and by buying the shares of BFSL, DLF in effect purchased the land, the transaction cannot be said to a sham or an unreal one. The transaction was real, valuable consideration was paid, all legal formalities were complied with and what was transferred were the shares of BFSL and not the immovable property. Since the taxpayer was able to avoid tax by resorting to tax planning, it had taken advantage of the benefit of the law or the loopholes in the law, which enured to his benefit. After seeing how the loophole was exploited within the four corners of the law, it is open to Parliament to amend the law plugging the loophole. However, it cannot be done by judicial interpretation. Section 10(38) of the Act is unambiguous. If the shareholder chooses to transfer the land through a transfer of the shares of the company owning the land, it would be a valid legal transaction in law and cannot be said to be a colourable devise or a sham merely because tax is avoided thereby. Therefore, the taxpayer was eligible to claim exemption under Section 10(38) and was not liable to tax.

Bhoruka Engineering Inds. Limited v. DCIT (ITA NO. 120 of 2011)

Tribunal Decisions

Sponsorship payments for international cricket events do not constitute royalty

The taxpayer, an Indian company, was appointed as one of the partner for cricketing events organized by the International Cricket Council (ICC). It made payments to two Singapore companies viz., Global Cricket Corporation Pte Ltd (GCC) and Nimbus Sports International Pte Ltd (Nimbus), for getting certain sponsorship

rights i.e. the right to advertise on billboards at the venue, color advertisement space in the official brochure/website of the ICC etc.

The AO disallowed the payments in the hands of the taxpayer under Section 40(a)(i) of the Act on the basis that the payments made to GCC and Nimbus were in the nature of royalty and accordingly tax was required to be deducted from these payments.

The issue for consideration before the Delhi Tribunal, inter alia, was whether the payments to GCC and Nimbus were in the nature of royalty.

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

- Relying on the decisions of the Delhi High Court in the case of DIT v. Sheraton International Inc [2009] 313 ITR 267 (Del HC), DIT v. Sahara India Financial Corporation [2010] 189 Taxman 102 (Del HC) and the decision of the Delhi Tribunal in the case of Nimbus Sports International Pte Ltd [2011] 145 TTJ 186 (Del), the Tribunal held that the payment by the taxpayer to Nimbus and GCC was purely for advertisement and publicity of the brand name of the taxpayer;
- The payment was not in the nature of royalty as it was not for the use of any trade mark or brand name. The use of the ICC's logo was only incidental to the main services obtained by the taxpayer; and
- As GCC and Nimbus did not have any Permanent Establishment in India, the payments were not taxable in India and consequently there was no requirement for deduction of tax at source on such payments.

Hero MotorCorp Ltd v. ACIT [ITA No. 1980/Del/2012]

Benefit of Section 80-IA(4) of the Act on profits from development of infrastructure facility undertaken for Government allowed, even though work executed as per specification of the Government

The taxpayer is engaged in the business of laying railway tracks, bridges and also building roads as per the specifications of the Government or its customers. The benefit of Section 80-IA(4) is available to an enterprise which is engaged in the development / operating / maintaining of an infrastructure facility. After considering the explanation and proofs submitted by the taxpayer, the AO allowed the claim for deduction under Section 80IA(4) of the Act. However, the Commissioner of Income-tax (CIT), by way of proceedings under Section 263 of the Act, held that the taxpayer was doing contract work and was consequently not eligible for the deduction under Section 80-IA(4) of the Act.

The Tribunal held that the order under Section 263 is invalid for AY 2006-07 as the amendment relied upon by the Revenue was not available during the assessment for AY 2006-07. Hence, an assessment order could not be treated as erroneous on account of a subsequent amendment or substitution in law. For AY 2007-08, the Tribunal observed that as per the Explanation to Section 80IA(4)(i) of the Act, said 'infrastructure facility' means a road including a toll road, a bridge or a rail

system. A Build Operate Transfer (BOT) contract in respect of a railway could never exist. Thus, the Tribunal rejected the CIT's arguments that Explanation to Section 80-IA of the Act was introduced to grant benefit to BOT contracts only. The Tribunal held that such an intention would make the Explanation to Section 80-IA(4)(i) otiose.

The Tribunal also held that the work done by the taxpayer would not fall within the definition of a works contract even though the definition for works contract was not available in Section 80-IA of the Act. The meaning of works contract as per Section 194C of the Act could be adopted where 'work' has been given an inclusive definition but has excluded the manufacturing or supplying of a product according to the requirement or specification of a customer by using material purchased from a person other than such customer. Therefore, considering the nature of work done, it would not fall within the meaning of works contract for the purpose of the Act due to the exclusion provided in Section 194C of the Act. Further, the Tribunal held that, the Explanation to Section 80-IA substituted by the Finance (No.2) Act, 2009 with retrospective effect would have to stand down in view of the Supreme Court's decision in the case of S. Sundaram Pillai [AIR (1985) SC 582]. This is because, the substitution of the Explanation to Section 80-IA of the Act attempts to take away the statutory benefit granted to the taxpayer under Section 80-IA(4) of the Act without making an amendment to Explanation to Section 80-IA(4) of the Act.

ARSS Infrastructure Projects Ltd v. ACIT [TS-263-ITAT-2013(CTK)]

Section 14A disallowance can be made on estimated basis applied to dividend income on shares held as stock-in-trade even though disallowance under Rule 8D cannot be made

The taxpayer was engaged in the business of share trading. During the year under consideration the taxpayer had earned dividend income which was exempt. The taxpayer had paid interest on the amount borrowed for purchase of shares. However, the taxpayer had not made any disallowance under Section 14A of the Act in respect of the expenditure relatable to the exempt income. The AO computed the disallowance under Section 14A of the Act read with Rule 8D(2)(ii) and (iii) of the Income Tax Rules, 1961 (the Rules). The CIT(A) held that Rule 8D is not applicable to the taxpayer since there was no investment on which estimated disallowance can be calculated. However, Section 14A of the Act is still applicable even if disallowance cannot be made under Rule 8D of the Rules. Accordingly, the CIT(A) estimated 10 percent of the dividend earned as disallowance under Section 14A of the Act. Aggrieved by the relief granted by the CIT(A) to the taxpayer, the AO appealed before the Tribunal.

The Kolkata Tribunal held that Rule 8D(2)(ii) and Rule 8D(2)(iii) of the Rules can only be applied in situations where the shares are held as investments and it does not apply where shares are held as stock-in-trade. It further held that where the shares are held as stock-in-trade and not as investments, the disallowance even under Rule 8D of the

Rules is restricted to the expenditure directly relatable to earning of exempt income i.e. under Rule 8D(2)(i) of the Rules. It further held that Section 14A of the Act would still apply in the cases where shares are held as stock-in-trade. It further held that in case of assets which yield exempt income are shares and are held as stock-in-trade and not as investment, Section 14A disallowance would be equal to related direct and indirect expenditure. However, the disallowances under Rule 8D of the Rules in such cases would be restricted only to direct expenditure.

DCIT v. Gulshan Investment Co Ltd (ITA No. 666/Kol/2012)

For employees' contribution to provident and pension fund etc., employer will get deduction only if payment is made before the 'due date' as defined in the Explanation to Section 36(1)(va) of the Act

The AO during the year under consideration made disallowance under Section 36(1)(va) read with Section 2(24)(x) of the Act on account of employee's contribution to the Employees Provident Fund (EPF) and Employees State Insurance Corporation (ESIC) on the ground that the same was deposited to the credit of the Government beyond the due date as defined under the Explanation to Section 36(1)(va) of the Act. The taxpayer claimed that since it was paid before the due date of filing the return of income, the same should be allowed as deduction during the year under consideration. The CIT(A) allowed the taxpayer's appeal relying on the decision of the Supreme Court in the case of CIT v. Alom Extrusions [2009] 319 ITR 306 (SC) and the decision of the Delhi High Court in the case of CIT v. Aimil Ltd. & Ors. [2010] 321 ITR 508 (Del HC).

The Mumbai Tribunal held that the provisions of Section 43B of the Act do not cover the employees' contribution to EPF and it applies only to the employer's contribution to EPF. Employer's contribution is governed by Section 37, whereas employees' contribution is specifically governed by Section 36(1)(va) of the Act. Further, it also held that in order to fall under Section 43B of the Act, the amount under dispute has to be 'otherwise allowable', i.e., under the relevant provision of Section 36(1)(va) of the Act. Since the payment by the due date under Section 36(1)(va) having not been made, the same is not allowable thereunder, so that there is no scope for application or invocation of Section 43B of the Act. On the other hand, if the payment has been made, Section 43B again becomes of no functional relevance. Inter alia the Tribunal has placed reliance on the decisions of the Kolkata Tribunal in the case of DCIT vs. Bengal Chemicals & Pharmaceuticals Ltd. (ITA No. 1680/Kol/2010) and JCIT vs. I.T.C. Ltd. [2008] 112 ITD 57 (Kol SB). Decisions of Supreme Courts in the case of IT vs. Vinay Cement Ltd. [2007] 213 CTR 268 (SC) and Alom Extrusions (supra) were distinguished stating that same are with the reference to amendment to Section 43B by the Finance Act 2003.

ITO v. LKP Securities Ltd. (ITA No. 638/M/2012 dated 17 May 2013)

Section 45(3)/50C taxing the capital gains not applicable to transfer of stock-in-trade, as same is not a capital asset

The taxpayer was engaged in the business of builders and promoters, manufacturing and trading of bakery and confectionary products and running franchise and was also a partner in various firms. The taxpayer had acquired development rights and shown the same as current assets in the balance sheet. The taxpayer had entered into a Joint Venture (JV) and agreed to bring in the development rights as his capital contribution at INR 2.5 million. After deducting cost of acquisition of land and development rights, the taxpayer declared profit of INR 0.56 million as business income.
The AO held that the asset which was introduced in the JV was a capital asset and on transfer of a capital asset to a firm capital gain would arise. Further, the AO adopted the stamp duty value of the right to development in land transferred and computed the net taxable capital gain after the deducting cost of acquisition.

The Tribunal held that the value of development rights was consistently shown under the head 'current assets' in the balance sheet and this was also excluded from the purview of Wealth Tax since it was a business asset. It was held that if an asset held as stock-in-trade is transferred, Section 45(3) and Section 50C of the Act has no application as the asset is not capital assets under Section 2(14) of the Act.

ACIT v. Ali Akbar Jafari (ITA No. 1256/PN/2010)

List price available in the manufacturer's website is only an indicative price and it is not mandatory for the manufacturer to sell only at that price

The Chennai Tribunal rejected the contention of the taxpayer that the list price could not have been used, for the reason that it was not in the public domain. However, the Tribunal accepted that the list price is only an indicative price. The Tribunal held that for making a comparative study under Comparable Uncontrollable Price (CUP) method, what is required is a comparison with actual sale and purchase with an unassociated enterprise or transaction between unassociated enterprises. It cannot solely be based on list prices, which at the best can be considered only as a reference point.

Redington (India) Limited v. ACIT [ITA No.2164/Mds/2010]

Bangalore Tribunal adjudicated on comparability aspects of companies selected by the Transfer Pricing Officer in respect of software development services and market support services rendered by the taxpayer to its Associated Enterprises

Software Development Services

The Tribunal held that provisions written back should not be excluded from the profit and loss account while computing operating profit. In respect of various

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comparables selected by the Transfer Pricing Officer (TPO), the Tribunal inter-alia held as below:

- Upholding the taxpayer's argument that wide fluctuations in margins year-on-year was indicative of extraordinary operating circumstances and in the absence of segmental information in respect of software development services and products, the company could not be accepted as a comparable;

- A company engaged in clinical trials and manufacture of bio-products could not be compared to the software development services rendered by the taxpayer;
- The TPO could not rely on data availed through notice issued under Section 133(6) of the Act, if such data is contrary to the data available in the Annual Report of the company;

- The parameter for identifying a comparable entity has to be seen from the angle of functions performed by the company, size of the company in terms of revenue, stage of business cycle and the company's growth cycle;

- The Tribunal rejected the taxpayer's claim that a company should be excluded merely because it was earning abnormal profits. The Tribunal held that the taxpayer had not demonstrated the presence of abnormal factors which had contributed to earning of abnormal profits by the company.

The Tribunal also upheld the threshold of 15 percent for application of the related party transaction filter for selection of comparables.

Market Support Services

The Tribunal has drawn distinction between the functional and risk profile of a market support service provider vis-à-vis the functional and risk profile of a typical trading and commission agent company.

Logica Private Ltd. v. ACIT [IT(TP)A No.1129/Bang/2011]

Bangalore Tribunal adjudicated on principles of comparability analysis in respect of software research & development and pre-sales & marketing services while determining Arm's Length Price in an international transaction

In respect of software research and development services, the Tribunal ruled that the size of a comparable is an important factor in comparability analysis and the turnover range of INR 10 million to INR 2 billion is an appropriate range given the taxpayer's facts and circumstances. The Tribunal also directed that the segmental margins of the software development services segment ought to be considered for comparability analysis instead of computing the margins of the company at an entity level.

In respect of pre-sales and marketing services, the Tribunal drew a distinction between the functional and risk profile of

a market support service provider vis-à-vis the functional and risk profile of a commission agent company and observed that commission agents concludes contracts by themselves or on behalf of third parties i.e. the key feature for an agency is the binding principal and if the binding principal is missing there would be no agency. Accordingly, companies engaged in rendering non-binding pre-sales and marketing support services could not be compared with companies engaged in rendering binding commission agency services.

The Tribunal upheld that once the taxpayer's international transaction had been accepted to be at the arm's length price (ALP) by the TPO for a particular AY then it shall be applied consistently for other AYs given that the facts and circumstances of the case are consistent.

NDS Services Pay-TV Technology Pvt Ltd v. ACIT [IT(TP)A No.1089/Bang/2011]

Investment made in foreign subsidiaries is not in the nature of the transactions referred to under Section 92B of the Act. Transfer pricing provisions are not applicable to a transaction in the absence of an income element

The Hyderabad Tribunal opined that investment in share capital of subsidiaries outside India are transactions not in the nature of transactions referred to in Section 92B of the Act and in the absence of income from the transaction, transfer pricing provisions are not applicable.

Vijai Electricals Ltd. v. ACIT (ITA No.842/HYD/2012)

Chennai Tribunal upheld transfer pricing adjustment on advertising, marketing and promotion expenditure using the Bright Line Test, subject to exclusion of selling expenses

The Chennai Tribunal relied on the Special Bench decision in the case of LG Electronics India Pvt. Ltd v. ACIT [2013] 140 ITD 41 (Del) (SB) on principle issues, and on applying the Bright Line Test (BLT) for determining the 'excessive advertising marketing and promotion (AMP) adjustment'. However, on application of the BLT, the Tribunal ruled that the steps mentioned in Rule 10B(1)(C) of the Rules must be followed.

In relation to the hypothetical brand development fee, the Tribunal held that the concept of add-on brand value on normal sales and add-on brand value on additional sales brought by the revenue to justify two additions is hazy and not supported by any empirical data. Thus, the adjustment towards brand development fee was deleted. The Tribunal further held that sales expenditure, which had no connection with the building of the logo, but which was directly in connection with sales had to be excluded in applying the BLT for computing the AMP adjustment. On selection of comparables, the Tribunal held that companies using a foreign brand cannot be considered as comparable companies for applying the BLT. In relation to adjustment towards product development expenditure, the Tribunal

opined that both the taxpayer and Ford Motor Company (FMC) had benefitted from the product development expenditure incurred and hence 50 percent of the advantage derived on account of product development spending ensued to the taxpayer and the remaining 50 percent to FMC, and therefore 50 percent had to be recouped from FMC.

Ford India Private Limited v. DCIT (ITA No. 2089/ Mds/2011)

LIBOR (without markup) can be adopted as Comparable Uncontrolled Price to benchmark interest rate charged to AEs for loans given in foreign currency

The Tribunal held that in case, where the loan provided to the AE was in foreign currency, the domestic Prime Lending Rate would have no applicability and the LIBOR should be taken as the ALP rate.

Hinduja Global Solutions Limited v. ACIT (ITA No. 254/MUM/2013)

Notifications/Circulars/ Press releases

Transfer pricing reporting requirement expanded. Additional clauses and Specified Domestic Transactions reporting introduced in revised Accountant's Report (Form No. 3CEB)

The Central Board of Direct Taxes (CBDT) has issued a Notification amending the relevant rules and revising the Accountant's Report in Form No. 3CEB to align the reporting requirements with the amended definition of international transaction and the extended provisions of Transfer Pricing covering Specified Domestic Transactions (SDT).
Salient features of the revised Form include:

- **Specific reporting for International Transactions** - The details of international transactions like guarantees received or given, issue/buyback of equity shares/convertible preference shares/convertible debentures, purchase/sale of marketable securities, capital financing transactions including receivables and any transaction arising out of business restructuring or reorganization are to be reported in separate clauses. Deemed international transactions are also to be reported under a separate head.

- **Reporting of Specified Domestic Transactions** – A separate Section 'Part C' has been introduced in Form 3CEB for reporting of SDT. The details of the transactions of expenditure to persons specified under Section 40A(2) (b) of the Act, acquisition or transfer of goods and services with reference to Section 80A(6), 80-IA(8) and 80-IA(10) of the Act as well as any other transactions covered under SDT are to be reported in specific clauses along

with quantitative details, wherever relevant. Reporting is required for SDT resulting in more than ordinary profits to an eligible business under Section 80-IA(10) or Section 10AA of the Act.

Notification No. 41/2013/ F.No.142/42/ 2012 dated 10 June2013

Employees' Provident Funds Organisation issues a circular to its field officers to ensure full compliance in respect of International Workers

The Employees' Provident Funds Organisation (EPFO) has issued a circular directing its field officers to ensure full compliance in respect of all International Workers (IWs). In the circular, the EPFO has observed cases of non- compliance vis-à-vis IWs. The circular reiterates that there are damages, interest and prosecution implications for non-compliance under the Employees' Provident Funds and Miscellaneous Provisions Act. In view of the non-compliance, the EPFO has directed its officials to ensure proper compliance in respect of all IWs and has suggested them to collect information from Foreigner Regional Registration Offices for cross checking the compliances. This circular is a continuation of the EPFO's effort to tighten its enforcement machinery and to check noncompliance in respect of expatriate employees.

II. SERVICE TAX

High Court Decisions

Cenvat credit is available on input services used in manufacturing exempt products which were further used to process final dutiable products

The taxpayer ("ONGC") was engaged in the business of supplying crude oil to its purchasers from its process platforms in Mumbai along with transferring the semi-stabilized crude oil to 'Uran process platforms' where it undergoes the process of stabilization. The process of stabilization yields both crude oil (exempt) and various downstream products like Naphtha, Ethane-Propane, LPG and residual gas (taxable). Input Services were availed at both the Uran plant and at the administrative offices at Mumbai. The Revenue Authorities denied Cenvat credit on the basis that the input services were used exclusively at the Mumbai Offshore for manufacture of crude oil which was an exempt product. The matter finally reached the Bombay HC.

HC relied on the decisions in the case of Commissioner of Central Excise Delhi [2004 (171) ELT 145 SC] and Collector of Central Excise v Solaris Chemtech Limited 2007 [(214) ELT 481 SC] wherein, it was held that the crude oil being an intermediate product was necessary for the manufacture of the final product and as long as the final product was dutiable the taxpayer would be entitled to credit in

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respect of input services used in or in relation to the manufacture of final product. The fact that the intermediate product used in the manufacture of the final product is exempted would not make a difference for the entitlement of the credit. However, the taxpayer would be required to comply with the provisions of Rule 6 of CCR and accordingly would be entitled to credit only on the quantity of input services used in the manufacture of ultimate dutiable final product. For the above reasons, the HC held that the order passed by the CESTAT was not correct.

Oil & Natural Gas Corporation Ltd v CCE, CST & CC [2013 (196) ECR 0331] (Bombay HC)

Outward transportation service used for delivering goods at the door step of the customer is an eligible input service where the place of removal is 'premises of the buyer' i.e. ownership remains with the seller till it reaches the 'premises of the buyer'

The taxpayer was registered under the category of "goods transport agency" for the purpose of service tax. The taxpayer pays service tax on the outward freight charges and takes the Cenvat credit under the CCR as the ownership of goods was that of the taxpayer till the goods reached the premises of the buyer.

The Revenue Authorities were of the view that the taxpayer is not entitled to claim Cenvat credit on the service tax paid towards outward transportation of goods cleared from the factory (place of removal). The matter reached before the Punjab and Haryana HC.

The HC relied on its own decision in the case of Ambuja Cements Ltd v Union of India 2011 [(40) VST 64 P&H] and Circular issued by the Central Board of Excise and Customs ("CBEC") on August 23, 2007 wherein, it was held that in terms of Rule 2(l) of the CCR, outward transportation up to the place of removal falls within the expression "input service". If a manufacturer is to deliver the goods to the purchaser at its premises, the place of removal would not be the factory gate of the manufacturer but that of the purchaser. Therefore, if the ownership of the goods and the property in the goods has been transferred to the purchaser at his doorstep, the outward transportation of goods cleared from the factory would be an input service within the meaning of Rule 2(l) of the CCR.

CCE v Haryana Sheet Glass Ltd [2013 (59) VST 456] (Punjab and Haryana HC)

Tribunal Decisions

Denting and painting activities are essential for transforming bus bodies into a finished product and thus are to be considered as manufacturing activities

The taxpayer was working within the factory of JCBL Ltd and was undertaking the following activities in relation to manufacture of bus bodies:

(i) Inspection & rectification of buses (including denting & painting work)

FICCI

(ii) Shifting of bus structure from inner plant (loading and unloading)

(iii) Material & scrap shifting and supply to lines & miscellaneous work

The Revenue Authorities contended that all the above activities amounted to production or processing of goods for, or on behalf of, the client and were accordingly, liable to service tax under the category of Business Auxiliary Service ("BAS"). The matter reached before the CESTAT.

The taxpayer, submitted that the activities performed by them are incidental and ancillary to manufacture and hence, covered by the definition of manufacture under section 2 (f) of Central Excise Act, 1944. Reliance was also placed on Note 6 of section XVII of the Central Excise Tariff and it was contended that the activity of denting and painting are essential for transforming the semi-finished bus body into a complete and finished article and hence, they amounted to manufacture.

The CESTAT held that the processes of denting and painting carried out on the bus bodies before they are cleared out of the factory are essential for both completion of 'manufacture' and for transforming the semi-finished article into a complete and finished article. Hence, the above processes would amount to manufacture. As regards the activity of shifting of goods, it would not fall under BAS as the words production and processing would cover only the activities which bring some change in goods. Further, the activity of shifting of goods would not get covered under the category of cargo handling services since these goods could not be regarded as cargo in common parlance. Accordingly, the taxpayer's position was upheld.

Sharwan Kumar v CCE Chandigarh-I [2013 (30) STR 176 TRI-DEL] (Delhi CESTAT)

Rendering of services for transportation of personnel by a helicopter and keeping the helicopter ready for the same in lieu of minimum fixed charges and hourly charges basis the actual flying hours is not an activity covered under the service of 'supply of tangible goods service'

The taxpayer obtained a permit from the Director General of Civil Aviation permitting it to provide non-scheduled air transport services'. Agreements were entered into with the State Government for providing service of transportation of their personnel. For this purpose, the taxpayer had to provide manpower for flying helicopters and bear the expenses in relation to the maintenance of these helicopters. The taxpayer had to keep the helicopters ready at a particular place to provide an instant service to the personnel as and when required. The taxpayer charged certain minimum fixed charges (basis minimum fixed flying hours) as well as hourly charges basis the actual operation of the helicopters. The taxpayer was not discharging any service tax on such monthly charges recovered by them.

The Revenue Authorities wanted to levy service tax under the taxable category of "supply of tangible goods". The matter reached the CESTAT, which held that the

services of transportation of the personnel cannot be taxable under the category of 'supply of tangible goods service' merely because fixed monthly consideration is charged or because the taxpayers have to provide ready helicopters as and when required. Though the agreements read as 'Charter Agreements', the terms of the same were for providing transportation of the personnel only. So the services qualified as those of 'transportation of passengers' which was not a taxable service during the disputed period.

Mesco Airlines Ltd v CCE New Delhi (2013-TIOL-653-CESTAT-DEL) (Delhi CESTAT)

No restriction for an input service distributor on distribution of credits for the services received prior to its registration as an input service distributor. The only condition required to be fulfilled for claiming such credits is making payment of service tax before availing such credits

The taxpayer registered itself as an input service distributor on October 4, 2008 and distributed the Cenvat credits to its other manufacturing units. Such credits distributed also included those credits which were availed prior to the registration as an 'input service distributor'.

The Revenue Authorities denied the distribution of Cenvat credit to its other manufacturing units for the services received prior to the registration as an 'input service distributor'. The matter reached before the CESTAT where, it was contended by the taxpayer that he was registered under the provisions of the Service Tax Rules, 1994 and there is no restriction in respect of the credit distributed with respect to the date on which the tax liability has been discharged.

The CESTAT held that the there is no restriction under the CCR with regard to the period for availing Cenvat credit of service tax paid. The only condition required to be satisfied for distributing credits for the period is that the payment of service tax should be made prior to the registration. Restriction on an 'input service distributor' to distribute credits on or after registration is unwarranted and is not provided for, in the law.

Dagger Forst Tools Ltd v CCE, Mumbai-I [2013 (30) STR 206 TRI - MUM] (Mumbai CESTAT)

Demand in respect of admissibility of credit should be raised on the ISD and not on the units. Credits are admissible after the place of removal of the goods

The head office of the taxpayer was registered as an input service distributor ("ISD") and distributed Cenvat credit to its units. In the due course of its business, the taxpayer had availed the Cenvat credit of service tax paid on various input services on the basis of invoices issued by their head office which was registered as ISD.

The Revenue Authorities were of the view that the credit has been received elsewhere and not by the taxpayer. The Revenue Authorities also contended that

the credit taken in respect of various services have no nexus with the manufacture and certain portion of the credit which has been availed is for the services received beyond the place of removal.

The matter reached before the CESTAT where the taxpayer contended that the demand in respect of admissibility of credit should be raised on the ISD and not on the units as the credit has been availed by the taxpayer based on invoices issued by ISD and not on the basis of the invoices of the service providers. Further, in terms of Rule 7 of the CCR, denial of the Cenvat credit distributed by the ISD is not justified when the credit distributed against the documents referred to in Rule 9 of CCR does not exceed the amount of service tax paid thereof and credit on services relatable to exempted goods / services has not been distributed.

The CESTAT agreed with the contentions of the taxpayer on the point that denial of the Cenvat credit distributed by the ISD was not justified. On the issue of disallowance of credit on various services on the ground that there is no nexus with the manufacture and the credit is admissible only up to the place of removal, it was held that credit of service tax on various services such as advertising agency services, business auxiliary services, etc was admissible.

Castrol India Ltd v CCE Vapi [2013 (30) STR 214 TRI - AHMD] (Ahmadabad CESTAT)

III. VAT/ CST

High Court Decisions

In the absence of any specific restriction on use of second hand machinery for setting up the unit, taxpayer entitled for exemption even if second hand machinery used for setting up the unit

The taxpayer was a medium scale industrial unit engaged in the manufacture of paper and paper boards used for writing, printing and such other purposes. The taxpayer took benefit of Notification No 729/93 ("Notification") issued under the provisions of Kerala General Sales Tax Act, 1963. As per the Notification, new industrial units under medium and large scale industries were provided exemption from sales tax for a period of seven years from the date of commencement of commercial production. However, the aggregate exemption under the Notification could not exceed 100 percent of the 'Fixed Capital Investment'. 'Fixed Capital Investment' was further defined in the Notification as total investment of land, building, plant and machinery, power generating system, delivery vehicles and the like required for industrial purposes.

The taxpayer established an industrial unit in 1999 and claimed the benefit of exemption provided under the Notification. However, the State VAT authorities sought to deny the benefit of exemption in respect of the 'second hand machinery' imported by the taxpayer.

While denying the benefit to the taxpayer, the VAT authorities also relied on the manual issued by them in respect of the Notification which clarified that all brand new plant and machinery were eligible for exemption under the Notification and second hand capital goods would not qualify for the same.

The Kerala HC upheld the eligibility of exemption to the taxpayer on the basis that there was no restriction under the Notification to deny exemption in respect of 'second hand machinery'. While rendering its decision, the HC relied on the decision of SC in case of State of Karnataka v Balaji Computers (2006 147 STC 269) wherein, the apex court made an observation that in case there is any doubt that the language employed in a notification admits two views and is ambiguous, the view which is beneficial to assessee had to be taken. The HC also observed that the manual on which the state VAT authorities had relied on was only to create awareness of the concessions available in the Notification and therefore, the same cannot override the exemption provided in the Notification.

Victory Paper & Board (India) Ltd v State of Kerala and Others [2013 (60) VST 64] (Kerala HC)

Tribunal Decisions

Dispensing of medicines by doctors in the course of medical treatment is not liable to sales tax by applying dominant nature test as well as the transaction nature

The taxpayer was engaged in rendering medical services through its clinics all over India. The services rendered by the taxpayer were in the nature of consultancy, advise, diagnosis and treatment. For rendering the services, the taxpayer had hired doctors / consultants who in course of medical treatment had dispensed homeopathic medicines to the patients. The taxpayer had not obtained registration either under Karnataka Value Added Tax, 2003 ("KVAT Act") or under Central Sales Tax Act, 1956.

The Revenue Authorities wanted to treat the dispensation of medicines by the taxpayer as 'sale of goods' against which the taxpayer argued that the taxpayer did not sell any medicines to the patients. The matter reached before the Karnataka VAT Appellate Tribunal which held that the transaction effected by the taxpayer so far as dispensation of medicine of transaction was concerned was not a transaction of sale of goods and was a pure service contract.

In arriving at the above decision, The Tribunal relied on the principles of law laid in the decision rendered by SC in case of Bharat Sanchar Nigam Limited v UOI (2006 SC 1383) and observed that under the Constitution of India, only three types of contracts can be artificially disintegrated – hire purchase, catering contracts and works contract. Since the taxpayer is not undertaking any of the aforementioned three transactions, the same cannot be artificially bifurcated. Further, by applying the dominant nature test and transaction nature test, it could be said that dispensing of medicine by the taxpayer

during the course of providing an integrated package treatment was a transaction of sale of goods.

Dr Batra's Positive Health Clinic Pvt Ltd Bangalore v State of Karnataka (2013 TIOL 01 TRI – BANG)

IV. CENTRAL EXCISE

High Court Decisions

An application filed before the Settlement Commission after the adjudication order is passed but before it is actually dispatched to the taxpayer, cannot be rejected on the grounds of maintainability

A Show Cause Notice ("SCN") was issued to the taxpayer demanding differential excise duty and reversal of Cenvat credit. On January 10, 2011 the taxpayer addressed a letter to the Commissioner specifically stating that a decision had been taken to file a settlement application under section 32E of the Central Excise Act, 1944 ("CEA"). The letter recorded that the taxpayer would file an application for settlement of the case probably within that week itself and requested the Commissioner to keep the adjudication proceedings in abeyance, until a settlement application was filed. On January 11, 2011 the Superintendent (Adjudication) addressed a letter to the Additional Director General, DGCEI, Mumbai for supply of documents relied upon in the SCN to the taxpayer. The Commissioner, notwithstanding the request of the taxpayer and without waiting for the supply of documents to the taxpayer, passed an adjudication order dated January 13, 2011 which was dispatched to the taxpayer on January 19, 2011. The taxpayer filed a settlement application before the Settlement Commission on January 14, 2011.

By a majority order, two members of the Settlement Commission held that under section 32E, an application to the Settlement Commission has to be filed by the taxpayer after the issuance of a SCN but before passing of an adjudication order. The majority held that the settlement application, which was filed on January 14, 2011, was not maintainable since the Commissioner had already adjudicated upon the SCN on January 13, 2011. The taxpayer filed the present writ petition against the said order of the Settlement Commission.

After hearing both the sides, the HC held that a purposive interpretation has to be placed on the expression 'before adjudication'. The adjudication process cannot be regarded as being complete merely upon the signing of an order by the adjudicating authority. If the adjudicating authority were to keep the order in its own drawer without dispatching it to the taxpayer, the latter would have no means of knowing that such an order has been passed. An adjudication order must be placed by the adjudicating authority out of his control by dispatching it to the taxpayer. In the instant case, since the adjudication order was dispatched to the taxpayer (on January 19, 2011) after the settlement application had been filed (on January 14, 2011), it should be deemed that the adjudication was completed on

January 19, 2011 only. Accordingly the settlement application could not have been dismissed as being not maintainable on account of treating it as being filed after passing of an adjudication order.

Vishnu Steels v The Union of India & Anr (2013-TIOL-339-HC-MUM-CX) (Mumbai HC)

Materials used for making the manufacturing area dust free and fire retardant qualify as 'inputs' in terms of Rule 2(f) of the CENVAT Credit Rules, 2001 and thus, the credit of taxes paid on the procurements should be available to the taxpayer

The taxpayer were in the business of manufacture of 'colour picture tubes' and they were claiming credit of various materials (viz cement powder, paint etc) which were being used to make the production floor dust free and fire retardant. Credit was disallowed by the Revenue Authorities on the ground that these materials were building materials and they were not required to be used either directly or indirectly in the manufacture of finished goods.

The CESTAT observed that the definition of 'inputs' under Rule 2(f) of the CENVAT Credit Rules, 2001 (then applicable) included all goods used for the manufacture of final product or within the factory of production for any other purpose. Basis that definition, the CESTAT held that credit on paints and other material used on the production floor to make it dust free and fire retardant should be available as 'inputs' as the same were used for purposes which were essential for assembling the final product.

The Revenue Authorities appealed before the Allahabad HC wherein it was argued by the Revenue Authorities that the impugned materials were not used in the manufacture of final products rather these were used for the production floor. The taxpayer in its defence, placed reliance on an earlier decision of Allahabad HC in its own case where credit was allowed on the same materials.

The Allahabad HC held that the word 'input' was to be examined with the word 'manufacture' and the definition of 'manufacture' covered not only the materials used in the final product but, included incidental and ancillary materials required for the completion of the final product. In this regard, the Allahabad HC relied on the decision of the SC in the case of Flex Engineering Ltd v CCE [2012 (5) SCC 609], where the SC observed that physical presence of an input in the final finished goods is not a pre-requisite for claiming MODVAT credit under a specific rule; an input may very well be indirectly related to manufacture and still be necessary for the completion of the manufacture of the final product. Basis the above and the decision cited by the taxpayer, the Allahabad HC decided the appeal in favour of the taxpayer and allowed credit of materials which were being used to make the production floor hall dust free and fire retardant.

Commissioner of Customs & Central Excise v Samtel Color Ltd (2013-TIOL-370-HC-ALL-CX) (Allahabad HC)

Export Oriented Unit clearing goods for export is entitled to claim rebate of excise duty paid on finished goods under Rule 18 of Central Excise Rules, 2002

The taxpayer was a 100 percent Export Oriented Unit, ("EOU") and was manufacturer for export of bulk drugs and formulations. The taxpayer was exporting the goods on payment of the applicable excise duty and sought rebate of such duty under Rule 18 of the Central Excise Rules, 2002 ("CER").

The Revenue Authorities rejected the claim of the taxpayer on the ground that the goods so manufactured by the taxpayer were exempted from excise duty, in terms of Notification No 24/2003 CE, dated March 31,2003 ("Notification"). Therefore, the taxpayer was not allowed to pay the duty and claim the rebate of duty so paid. The Revenue Authorities while rejecting the refund claim held that the exemption under Notification is an absolute exemption notification and therefore, the taxpayer was bound to claim such exemption. It was not open to taxpayer to pay the excise duty and thereafter seek rebate of the same. The Revenue Authorities also contended that the taxpayer has paid the duties of excise, on its own volition and had claimed the same as rebate of duty, in terms of Rule 18 of the CER, in contravention of the provisions of the Act. Further, when any duty was paid without availing the exemption, such payments could not be considered as duties of excise and therefore, no rebate can be availed, as per Rule 18 of the CER.

In response to the Revenue Authorities' contention that the Notification was an absolute exemption notification, the taxpayer contended that proviso under Notification clearly stipulates that exemption was not applicable for the goods when they were brought to any other place in India. Thus, the notification grants exemption for the goods cleared by an EOU. The taxpayer further, submitted that the exemption notification was to be read as a whole to understand whether the exemption was absolute or not and the Revenue Authorities had ignored the proviso to the notification in reaching its conclusion. As per the proviso, excise duty exemption is not applicable when the goods are cleared for consumption in India. Hence, when excise duty is payable there is no question of the finished goods being exempt from duty.

The taxpayer further argued that it had followed all procedures stipulated under Rule 5 of CENVAT Credit Rules, 2004 ("Credit Rules") and had cleared the final product for export on payment of duty. As the payment of excise duty on export of goods is legal therefore, the taxpayer was eligible to claim rebate. The taxpayer further contended that there is no bar under Rule 18 of CER that a 100 percent EOU can't export on payment of export duty. Therefore, the rebate claim filed by taxpayer under Rule 18 was tenable. The taxpayer further, argued that it does not make any local sales and therefore, no excise duty would be payable by the taxpayer. Therefore, the Revenue Authorities were bound to pay the rebate amount to the taxpayer, in cash, since he was not in a position to utilize the credit against it tax liability.

Basis the above facts and arguments, the HC held that the Revenue Authorities were bound to grant the rebate payable to the taxpayer, in cash, subject to certain conditions to safe guard the interests of the Revenue Authorities.

Orchid Health Care v UOI (2013-TIOL-416-HC-MAD-CX) (Madras HC)

Tribunal Decisions

Sales tax paid by the principal manufacturer on raw materials consigned directly to the job-worker cannot be added to the assessable value of the finished goods on which duty is discharged by the job worker

The taxpayer manufactured seamless stainless steel tubes / pipes for M/s IVCRL Infrastructures & Projects Ltd ("IVCRL") on job-work basis. Steel coils were purchased by IVCRL from Steel Authority of India Ltd ("SAIL") on payment of applicable sales tax but the consignment was directly shipped to the taxpayer's premises. The taxpayer used the steel coils for carrying out the job-work activity and claimed Cenvat credit of the excise duty paid on such coils. On the final product manufactured, the taxpayer paid excise duty on assessable value consisting of raw materials cost and job work charges.

Revenue Authorities alleged that amount of sales tax paid on purchase of steel coils by IVCRL should be included in the assessable value of the job work goods.

The matter reached before the CESTAT on an appeal made by the taxpayer. It was contended by the taxpayer that they were just the consignees of the purchases made by IVRCL and sales tax paid on such purchases could not be considered a part of landed cost of goods in their hands. To support the above view, the taxpayer relied upon the decisions given in the case of Surendra Steel Rolling Mills [2003 (155) ELT 357)] and Prem Khalsa Iron & Steel Rolling Mills [2005 (191) ELT 192)] which were on the same point and cover the issue in taxpayer's favour.

The Revenue Authorities argued that the sale tax amount which is indicated on the invoice of the SAIL should be considered while computing the landed cost of material in the hand of taxpayer and excise duty should be paid on the value which included sale tax amount.

The CESTAT held that the amount of sales tax could not be included in the landed cost of the inputs / raw materials for the reason that the said cost was not incurred by the taxpayer. The CESTAT held that IVRCL may claim credit of sale tax paid which discharging its sales tax liability. Further the CESTAT also discussed the alternative scenario wherein the goods would have been first received by IVRCL in their premises and then dispatched to the taxpayer's premises. In that case, IVRCL would have taken credit of the excise duty paid on such goods and would have prepared an invoice enabling the taxpayer to avail credit of such excise duty and the invoice so raised would not indicate the amount of sales tax. Basis the above and the decisions cited by the taxpayer, the

CESTAT decided the appeal in favour of the taxpayer.

Ratnamani Metals & Tubes Ltd v CCE [2013 (290) ELT 684 (TRI-AHMD)] (Ahmedabad CESTAT)

'Liril Active Shower Gel' is correctly classifiable under heading 34.01 as 'Soap' and not under heading 33.04 as Cosmetics

The dispute pertained to classification of the product 'Liril Active Shower Gel' for excise duty purposes. The taxpayer classified this under tariff heading 34.01 (which covers soaps in various forms) whereas, the Revenue Authorities contended that the same should be classified under Heading 33.04 (Beauty or make-up preparations and preparations for the care of the skin other than medicaments, including sunscreen or suntan preparations; manicure or pedicure preparations).

The CESTAT in the case [2003 (151) E.L.T. 387 (TRI - Mumbai)] ruled in favor of the taxpayer on the basis of the undisputed fact that the product was for washing of the skin / bath and noted that the advertising of the taxpayer, that the product makes its users feel fresh can, by no means justify its classification in Heading 33.04. The matter reached the SC which upheld the CESTAT's decision and held that the product 'Liril Active Shower Gel' should be covered by Heading 34.01 and not by Heading 33.04.

CCE v Hindustan Lever Ltd (2013-TIOL-27-SC-CX–LB)

For Domestic Tariff Area clearances of a 100 percent EOU, education cess and Secondary & Higher education cess would be chargeable only once under section 93 of the Finance Act, 2004 and section 138 of Finance Act, 2007 on the sum of basic customs duty and additional customs duty

The taxpayer is a 100 percent EOU and in addition to exports out of India, it also made clearances for domestic tariff area ("DTA") on payment of excise duty. DTA clearance of a 100 percent EOU attracts excise duty in terms of proviso to section 3(1) of CEA. In terms of this proviso, the excise duty leviable would be equal to the aggregate of duties of customs charged on the import of like goods into India including education cesses thereon. The dispute was as to whether education cess and Secondary & Higher education cess ("S&H cess") is to be levied again in respect of DTA clearances of a 100 percent EOU on the aggregate of the duties of customs which already includes the education cess and S&H cess. The taxpayer contended that once the aggregate of customs duties has been worked out in which the education cess had also been added, the question of arriving at the quantum of excise duty by adding further education cesses once again does not arise. The Revenue Authorities argued that since this excise duty was to be equal to the aggregate of duties of customs including education cess and S&H cess thereon, the taxpayer would be liable to pay education cess and S&H education cess once again on the excise duty calculated as mentioned above (under section 93 of Finance Act, 2004 and

section 138 of Finance Act, 2007), since education cesses are a separate levy.

The CESTAT noted that sections 93 and 94 of Finance Act, 2004 and sections 138 and 139 of Finance Act, 2007 while defining the measure of education cess and S&H cess in respect of excisable goods and imported goods respectively, specifically provide that the aggregate of duties of excise or aggregate of duties of customs, on which this cess is to be levied as surcharge, would not include education cess and S&H cess and thus, the intention of the legislature was never to charge education cess on education cess. The CESTAT also noted the settled position of law that there can be no objection for double taxation if the legislature has distinctly enacted it, but while interpreting general words of taxation, the same cannot be so interpreted as to tax the subject twice over to the same tax. On the basis of the foregoing, it was clearly held that the education cess and S&H cess would be chargeable only once on the aggregate of basic custom duty and additional customs duty and not once again on the excise duty so calculated.

Kumar Arch Tech Pvt Ltd v CCE [2013 (290) ELT 372 (TRI – LB)]

Notification & Circulars

Voluntary Compliance Encouragement Scheme Rules Notified

The Service Tax Voluntary Compliance Encouragement Scheme ("VCES") introduced in Budget 2013 has come into effect upon enactment of the Finance Bill, 2013 on May 10, 2013. The Government has, vide Notification issued the Service Tax Voluntary Compliance Encouragement Rules, 2013 given effect to this Scheme

Notification No 10/2013-ST dated May 13, 2013

Circular on VCES

The Government has, vide a detailed circular clarified a few issues pertaining to the Service Tax Voluntary Compliance Encouragement scheme.

Circular No 169/4/2013 - ST dated May 13, 2013

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