June 2013

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

Foreword

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

The GST continues to be a "Work in Progress". The Empowered Committee of the State Finance Ministers had met on 10th and 11th May, 2012 in Mussorie and reviewed the progress made by the three Committees on the Revenue natural rates, exemptions, Inter-state trade etc. Mr Sushil Kumar Modi, Deputy Chief Minister of Bihar and Chairman of the Empowered Committee is scheduled to discuss certain issues concerning GST with the representatives of FICCI and the other national level trade and industry bodies on 7th June, 2013 in Delhi. FICCI shall keep you updated on these developments.

On the taxation regime, the Finance Act 2012 introduced the Advance Pricing Agreement (APA) Program in India effective from 1 July 2012. Thereafter, the Central Board of Direct Taxes (CBDT) notified the Advance Pricing Agreement Scheme on 30 August 2012, which contained detailed Rules and Forms for Applications/Annual Compliance. In a welcome move, the CBDT has now published a comprehensive 'APA Guidance with FAQs' (Guidance Note) as a part of its taxpayers' services.

The Gujarat High Court has held that no penalty can be imposed under section 117 of the Customs Act upon an importer for his failure to file import documents (bill of entry) and clear the goods within 30 days of unloading thereof at a Customs Station. It observed that there is no time limit specified in the Customs law for filing a bill of entry. The law only provides for a time limit post which the goods at the customs station can be disposed off if not cleared within the prescribed time limit.

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

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

A. Didar Singh

Recent Case laws

I. DIRECT TAXES

High Court Decisions

Amounts payable during any time of the year are disallowable if tax is not deducted at source from such amounts

The Kolkata Tribunal relying on the decision of a Special bench in the case of Merilyn Shipping [2012] 20 taxmann.com 244 (Visakhapatnam) held that if the amounts have been paid then no addition shall be made by invoking the provisions of Section 40(a)(ia) of the Act since the section applies only to the amounts payable.

On appeal, the Calcutta High Court held that comparison between the draft and the enacted law is not permissible. Nor can the draft law or the bill be used for the purpose of regulating the meaning and purport of the enacted law. It is the finally enacted law that is the will of the legislature. Therefore, the Special Bench of Tribunal in case of Merilyn Shipping fell into an error in not realizing this aspect of the matter. The Special Bench of Visakhapatnam Tribunal sought to remove the rigour of the law by holding that the disallowance shall be restricted to the money which is yet to be paid. This amounted to supplying the casus omissus, which was not permissible and could have been done only by the Supreme Court in an appropriate case. Based on Section 40(a)(ia) of the Act, those expenses on which tax is deductible at source under Chapter XVII –B of the Act are sought to be disallowed, if such tax has not been deducted or after deduction has not been paid to the government. Unless any amount is payable, it can neither be paid nor credited. If an amount has neither been paid nor credited, there can be no occasion for claiming any deduction. The language used by the legislature in the finally enacted law is clear and unambiguous, whereas the language used in the Finance Bill, 2004 was ambiguous. The law was deliberately made harsh to secure compliance of the provisions requiring deductions of tax at source. It is not the case of an inadvertent error. Accordingly, the majority views expressed in the case of Merilyn Shipping are not acceptable. Therefore, disallowance can be made by invoking the provisions of Section 40(a)(ia) of the Act even for the amounts that have been paid during the year, subject to fulfillment of the conditions specified therein.

CIT v. Crescent Export Syndicates (TRIBUNAL No. 20 of 2013, G.A. No. 190 of 2013)

The Bombay High Court upheld the reopening of assessment, based on tangible material obtained during assessment proceedings of the subsequent year. Reopening was to disallow the payment of support fees, etc. to an associated enterprise, since the issue was not considered in the original assessment proceedings

The taxpayer paid business support charges, guarantee fees and other service charges to its holding company. The AO reopened the assessment for AY 2006-07 under Section

148 of the Act stating that during AY 2007-08, the details furnished by the taxpayer showed that no substantial or specific services have been rendered by the holding company. These payments were also subject to transfer pricing and this issue was not verified by the Transfer Pricing Officer (TPO) in AY 2006-07. The AO alleged that if the facts being the same for the AY 2006-07, such expenses need to be disallowed for AY 2006-07 and reopened the assessment. The reopening was within a period of four years from the end of the relevant AY.

The High Court reiterated that it is a settled principle of law that reopening of an assessment on the basis of information, which is disclosed in the course of assessment proceedings for a subsequent AY, is permissible and upheld reopening of the case based on tangible material obtained during assessment proceedings of the subsequent year to examine payment of support fees, etc. to AEs, since the issue had not been considered in the original assessment by the TPO and the AO.

Rabo India Finance Ltd. v. DCIT (Writ Petition No.592 OF 2013) Bombay High Court

The Delhi High Court held that in the absence of tangible material on record, reassessment proceedings under Section 147 of the Act to merely determine Arm's Length Price of international transactions reported in Form 3CEB are invalid

The taxpayer filed an income-tax return for AY 2006-07, which was processed under Section 143(1) of the Act accepting the returned income. Subsequently, the AO reopened the case under Section 147 of the Act by recording the following reasons for reopening:

- Foreign exchange loss as claimed by the taxpayer cannot be allowed on a notional basis;
- A claim of expenditure under the heading 'data usage charges' provides enduring benefits, hence it should be treated as capital in nature; and
- Determination of Arm's Length Price (ALP) in relation to the international transactions entered into by the taxpayer with its associated enterprises (AEs).

The High Court upheld that determination of ALP of international transactions, one of the purported reasons to reopen the assessment in this case, is not a valid reason. There was no material with the AO, when the reasons were recorded, to indicate that the ALP determined by the taxpayer was not correct. In this relation, the High Court relied on the Supreme Court decision in the case of CIT v. Kelvinator of India Ltd. [2010] 320 ITR 561 (SC) to observe that the AO has power to reopen the assessment provided there is 'tangible material' to come to the conclusion that income has escaped assessment. The High Court observed that even under a regular assessment, the AO would need to have some material, information or document in his possession to form an opinion that any one of the four conditions stated in Section 92C(3) of the Act have been met. In this case, without any allegation by the AO that the ALP determined by the taxpayer was not correct, the reopening for such a reason was not valid.

The High Court held that there could not have been an addition on account of ALP as the only two other purported reasons to reopen (loss on account of foreign exchange fluctuations and the data usage charges) had not resulted in any addition.

Cheil Communications India Private Limited (Income Tax Appeal No. 578 of 2012) Delhi High Court

Tribunal Decisions

Export Commission paid to non-resident agents is not taxable in India

The taxpayer, a company incorporated in India, made commission payments to non-resident agents for marketing and distribution of various grades of reclaim rubber in foreign countries. The commission was paid to the non-resident agents without deducting taxes, on the basis that since the foreign agents did not have any business connection in India, the payment made to them was not taxable in India.

The Assessing Officer (AO) disallowed the payments in the hands of the taxpayer under Section 40(a)(i) of the Act on the basis that tax was required to be deducted from the payments made to the non-resident agents.

The issue for consideration before the Mumbai Tribunal was whether the commission payments to non-resident agents were taxable in India.
Based on the facts of the case, the Tribunal, inter alia, observed and held as follows:

- The withdrawal of Circular No.23 of 1969 does not affect the taxability of commission payments as the services were rendered/used outside India, payments were made/received outside India and the non-resident agents did not have a business connection or a PE in India;

- Relying on the decisions of the Delhi High Court in the case of CIT v. EON Technologies [2011] 203 Taxman 266 (Del) (HC) and the Co-ordinate Bench decision in the case of Armayesh Global v. ACIT [2012] 51 SOT 564 (Del), it was held that the income of non-resident agents does not accrue or arise or deemed to accrue or arise in India;

- Accordingly, the taxpayer was not liable to deduct tax on payments made to the agents.

Gujarat Reclaim & Rubber Products Ltd v. ACIT (ITA No.8868/Mum/2010)

IT enabled customer management services provided by a foreign company results in a PE in India

The taxpayer, a company incorporated in and a tax resident of USA is engaged in the business of providing IT enabled customer management services. In order to service its customers, the taxpayer had procured certain IT enabled call centre / back office support services from its subsidiary company in India (Indian subsidiary). The Indian subsidiary also made payments to the taxpayer towards reimbursement for

link charges and license charges (for use of software).

The AO held that the taxpayer has various forms of PE in India such as Fixed place PE, Service PE and DAPE and attributed huge profits to the PE in India. The AO also held the link charges / license charges to be taxable in India as Royalty under Section 9(1)(vi) of the Act and Article 12 of the India-USA tax treaty.

The issue for consideration before the Delhi Tribunal, inter alia, was whether the taxpayer had a PE in India and whether the link charges / license charges are in the nature of royalty.

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

PE

- The taxpayer had a fixed place PE in India on the following account:
  - The employees of the taxpayer frequently visited the premises of the Indian subsidiary to provide supervision, direction and control the operations of the Indian subsidiary and such employees had a fixed place of business at their disposal;
  - Indian subsidiary was practically the projection of taxpayer's business in India and it carried out its business under the control and guidance of the taxpayer, without assuming any significant risk in relation to its functions; and
  - Certain hardware and software assets were provided by the taxpayer to the Indian subsidiary on a free of cost basis.
- The Indian subsidiary did not constitute a DAPE of the taxpayer in India as the conditions provided in Article 5(4) of the India-USA tax treaty were not satisfied.

- The Tribunal also outlined the manner in which the profits were to be attributed to the PE so created in India.

Taxability of link charges/ license charges

- Relying on the decision of the Mumbai Tribunal in the case of B4U International and the decision of the Delhi High Court in the case of Nokia Networks OY, the Tribunal held that the amendment to Section 9(1)(vi) of the Act does not affect the provisions of the tax treaty in any manner;

- Purchase of software would fall within the category of copyrighted article and not towards acquisition of any copyright in the software and hence the license charges are not in the nature of royalty;

With regard to the taxability of the link charges, the Tribunal held that since neither the taxpayer nor the Indian subsidiary had any control or possession over the equipment, link charges do not quality as

equipment royalty in terms of Article 12 of the tax treaty and hence are not taxable in India.

Convergys Customer Management v. ADIT [ITA No. 1443/Del/2012 & 5243/Del/2011]

Consideration for transfer of 'merchant banking' business is a non-taxable capital receipt

The taxpayer was engaged in the business of merchant banking. The taxpayer and its Managing Director incorporated a wholly owned subsidiary (WOS) on 11 October, 2000. Thereafter, an agreement for transfer of business was entered into between the taxpayer, its MD, the WOS and Arthur Andersen & Associates (AA), which wanted to invest in a merchant banking business as a strategic investor. Under the transfer of business agreement, the taxpayer transferred the employees and know-how related to merchant banking business to the WOS, for which it received a consideration of INR 2.5 million. As per the agreement, creditors, liabilities and assets like real estate and other tangible assets were not transferred. In its return of income for Assessment Year (AY) 2001-02, the taxpayer treated the consideration received by it as capital receipt not chargeable to tax. However, during the assessment proceedings, the AO disallowed the taxpayer's claim and added back INR 2.5 million, treating it as revenue receipt.

The Mumbai Tribunal held that the consideration of INR 2.5 million received for the transfer of merchant banking business was a capital receipt. The Tribunal observed that the agreement indicated that the receipt of INR 2.5 million was for the transfer of business and contracts. The Tribunal also referred to the co-ordinate bench ruling in the case of the transferee, regarding the same business transfer agreement wherein the transferee's claim for depreciation on the consideration was rejected by holding that it was not for technical know-how, but for the transfer of clients and client relationships. The Tribunal therefore observed that it was clearly established that consideration was for the transfer of business and contracts.

Relying on the Calcutta High Court ruling in CIT v. Siewart & Dholakia (P.) Ltd. [1974] 95 ITR 573 (Cal), the Tribunal held that the consideration received for the transfer of the merchant banking business that was discontinued was capital in nature and it could not be held as compensation received during the course of business. Also, the Revenue did not have any authority to decide the adequacy of the consideration. The Tribunal also distinguished the Karnataka High Court judgment in CIT v. Tata Coffee Ltd [2009] 29 DTR 336 (Kar) relied upon by Commissioner of Income-tax Appeals [CIT(A)] stating that in the said case, the receipts were considered as revenue as discontinuance of the unit had not resulted in the loss of enduring trading asset. Contrary to this, in the taxpayer's case, it did not have any active source of income as the post-transfer income of the taxpayer consisted only of dividend from shares and mutual funds, profit on sale of shares, interest income and nominal consultancy charges. Hence, it was observed that there was a substantial loss in the profit-earning capacity of the taxpayer after entering into the agreement. Finally, regarding the taxation of capital receipt, the Tribunal held that as there was no cost of acquisition for the assets, it could not be taxed as capital gains.

IGFT Ltd. vs. ITO (ITA No.: 1284/M/10)

No Section 14A disallowance on ECB interest since borrowings not used for shares

The taxpayer had received dividend income of Rs 20.63 million during AY 2006-07. The dividend was claimed as exempt under Section 10(34) of the Act. The AO disallowed certain expenditure, being interest on External Commercial Borrowings [ECB] under Section 14A of the Act. The disallowance was worked out applying Rule 8D and by placing reliance on ITAT Special Bench ruling in Daga Capital Management Pvt. Ltd. (2009) 117 ITD 169 (Mum)(SB). The taxpayer had contended that no expenditure in relation to dividend income was incurred as relevant investments were made in the past out of its capital and free reserves.

Ruling in favour of the taxpayer, the Mumbai Tribunal observed that disallowance under Section 14A of the Act could not be made with respect to interest paid by the taxpayer on ECBs. Relying on the jurisdictional High Court judgment in Godrej & Boyce Manufacturing Co. Ltd., the Tribunal observed that Rule 8D could not be applied for the AY 2006-07 under consideration as the Rule was applicable prospectively from AY 2008-09 onwards. Further, on merits also, the Tribunal observed that even where Rule 8D is applicable, it is open for the taxpayer to show with reference to its accounts that the borrowings were made and utilized for specific purposes, precluding application of Section14A of the Act. The Tribunal observed that in the present case, the taxpayer had proved that each of the four ECB loans were raised by the taxpayer for the import of equipment and were not used for financing of investment on which tax-free income was earned. Based on the above, the Tribunal held that no disallowance under Section 14A of the Act could be made with respect to the ECB interest, which was sought to be apportioned to the tax-free dividend income. However, with regard to estimation and disallowance of indirect expenditure, the Tribunal remitted the matter back to the AO for verification of the taxpayer's claim that no indirect expenditure had been incurred.

TML Drive Lines Ltd. v. ACIT (I.T.A. No. 6064/Mum/2010)

Expenses for inter-bank connectivity of ATMs held to be capital in nature on which depreciation is allowable; Depreciation on leased assets including sale and lease back (SLB) transactions allowable

The taxpayer had made payment to Indian Bank Association for participating in Shared Payment Network Systems (SPNS). This facility provides the connectivity facility of ATM of one bank to another bank. Some payment was also made for computer software. The taxpayer argued that the entire expenditure was revenue, but the auditors had classified it as capital expenditure in the Tax Audit Report. The AO and the CIT (A) disallowed the expenditure. The Mumbai Tribunal held that the disallowance of the expenditure on SPNS was correct as it was capital in nature. The SPNS facility was of an enduring nature and such a facility not only hooked the banks together, but also helped in providing various other facilities, such as ATM facilities of any bank, depositing cash and

using sundry facilities. The Tribunal, however, directed the AO to allow depreciation on the ATM link up expenditure i.e. SPNS.

One of the business functions of the taxpayer was leasing assets to its clients. The taxpayer leased the assets in two segments, one being sale and lease back (SLB) and the other being normal lease transaction. The AO observed that the seven SLB transactions were eyewash, and were used by the taxpayer as a colorable device to lower its taxable income and disallowed the depreciation claim on them. In respect of two other transactions, the AO had disallowed the claim for depreciation as the assets leased out by the taxpayer were not put to use by the lessees. The CIT(A) upheld the AO's order in respect of SLB transactions and assets not having been put to use by the lessee.

The Mumbai Tribunal observed that the issue relating to the SLB transaction was covered by the Delhi High Court judgment in Cosmo Films [(2011) 338 ITR 266 (Delhi)], wherein the High Court in similar circumstances had allowed the depreciation claim. The High Court had allowed the claim as the taxpayer had provided the AO with all the information requested, i.e. lease agreements, copies of bills for purchase of assets, inspection reports, copies of insurance cover etc. Thus, proving the transaction as genuine and not sham transaction, the Tribunal observed that the ratio laid in the decisions of Mid East [2003] 87 ITD 537 Mum SB and Special Bench ruling in IndusInd [2012] 135 ITD 165 (Mum SB), relied upon by Revenue, were reversed by the Delhi High Court's judgment. On the issue of ownership of the asset in SLB transactions, the Tribunal relied on SC ruling in ICDS [2013] 350 ITR 527 (SC) wherein it was held that in case of finance lease transactions, the lessor was eligible to claim depreciation. The tests to claim depreciation was that the taxpayer should have been the owner of the asset, and should have used the asset for business purpose. Further, relying on the Bombay High Court judgment in Kotak Securities Ltd [2010] 317 ITR 236 (Bom), the Tribunal observed that, as far as the lessor (taxpayer) was concerned, the asset should have been given on lease and he should have received lease rent, then the assets could be termed as 'used' in the context of the lessor. Thus the taxpayer was allowed depreciation in respect of all leased assets, including the SLB transactions.

Development Credit Bank Ltd. v. DCIT (ITA No. 3006/Mum/2001 & ITA No. 4892/Mum/2003)

Consideration received for voting in subsidiary is not a taxable income

RRL was a joint venture between the taxpayer and a 100 percent subsidiary of Tyco USA. Tyco USA had another subsidiary, Tyco ME, which was designated to conduct marketing and promotion of its specific products, which was also carried on by RRL in India. Tyco USA and Tyco ME entered into an agreement with the taxpayer. In pursuance to the agreement the taxpayer was to take all actions within its control, including exercise of its voting rights in order to ensure that RRL did not engage or participate directly or indirectly in any business in India involving manufacturing, marketing and promotion of the specified industrial products listed therein. For this,

Tyco ME agreed to pay a consideration of USD 400,000 to the taxpayer.

The taxpayer claimed the receipt as a capital receipt not liable to tax. However, the AO held that, since the amount received by the taxpayer was for exercising its right to make RRL relinquish its right of manufacturing, marketing and promotion of specified products, it was to be considered as revenue income.

The Kolkata Tribunal held that exercising of voting rights was not the business of the taxpayer and that similar receipt had never been received by the taxpayer either in the earlier years or in the subsequent years. Further, it was held that the receipt was not of recurring nature, and thus, the receipt was not income in the hands of the taxpayer.

Carnival Investment Limited Vs. ITO (ITA No. 568/Kol/2011)

The Mumbai Tribunal held that for a transaction to come within the purview of the deeming provision of Section 92B(2) of the Act, the transaction must be an international transaction i.e. either or both of the enterprises should be non-residents

The taxpayer sold the medical-imaging business to Carestream Health India Pvt. Ltd. (Carestream India) through an asset purchase agreement, pursuant to the global agreement between respective holding companies. The TPO suo moto assumed jurisdiction and proceeded to determine the ALP of the aforesaid transaction, alleging it to be a deemed international transaction as per Section 92B(2) of the Act.

The Tribunal held as follows:

On Deemed International Transaction - Section 92B(2) of the Act contains reference of Section 92B(1) of the Act. Hence, its true intent is to define the meaning of 'international transaction' as contained in Section 92B(1) of the Act. Any transaction to be covered within the purview of 'deemed international transaction' as provided under Section 92B(2) of the Act, first of all, should qualify as an 'international transaction' i.e. wherein either or both the parties to the transaction are non-residents.

The deeming provision as contained under Section 92B(2) of the Act is not applicable in this case as:

- There is no prior agreement between the taxpayer and Carestream US or Carestream India and Kodak US as required under Section 92B(2) of the Act; and
- On perusal of the Global Asset Purchase Agreement, it is evident that the Indian affiliates were given full authority to take their own decisions with regard to sale of the imaging business.

If it is assumed that this transaction was a consequence of the Global agreement entered into by respective holding companies, even then neither there was any prior agreement, nor the terms and conditions for sale were dictated by the non-resident associated enterprises for invoking the provision of Section 92B(2) of the Act. Further, since the instant transaction is a domestic transaction and not an international transaction, provisions of Chapter X of the Act cannot be invoked.

On lifting of Corporate Veil - Relying on the decision of the Supreme court in the case of

Vodafone International Holdings BV v. UOI [2012] 341 ITR 1 (SC) Vodafone, the Tribunal held that the corporate veil cannot be pierced and the legal character of two separate but related entities cannot be ignored under normal circumstances unless the tax department proves the factum of influence of foreign associated enterprises over the affairs of the domestic entity. Upon piercing the corporate veil and declaring this transaction as a sham, the global transaction will survive. Since the global transaction is between Kodak US and Carestream US, both of whom are unrelated entities, this transaction would fall outside the purview of Chapter X of the Act.

On Selection of the Most Appropriate Method - It is mandatory for the TPO to select one of the prescribed methods for computing the ALP of an international transaction. The TPO has suo moto assumed jurisdiction and consciously infringed the relevant provisions of the Act by not adhering to the prescribed methods. Hence, this matter cannot be remanded to the TPO, as this would mean giving them an opportunity to rectify their earlier mistake.

Kodak India Pvt. Ltd v. ACIT (ITA No. 7349/Mum/2012)

Chandigarh Tribunal denies the exemption relating to Leave Travel Concession as journey included overseas travel

The Chandigarh Tribunal in the case of the taxpayer has held that the amount received by the taxpayer on account of leave travel concession is not eligible for income tax exemption as the taxpayer travelled to a foreign destination.

Shri Om Parkash Gupta, v. ITO(ITA No.938 /Chd/2011, AY 2007-08, dated 29 April 2013

Charges paid for foreclosure of home loan eligible for deduction while computing Income from House Property under the Act

Recently, the Mumbai Tribunal has held that prepayment charges paid for early closure of loan shall be allowed as a deduction while computing Income from House Property under the Act.

Windermere Properties Pvt. Ltd. v. DCIT [ITA No. 7192/MUM/2010, AY 2006-07, dated 22 March 2013]

Notifications/Circulars/ Press releases

CBDT answers FAQs on Advance Pricing Agreements

The Finance Act 2012 introduced the APA Program in India effective from 1 July 2012. Thereafter, the CBDT notified the Advance Pricing Agreement Scheme on 30 August 2012, which contained detailed Rules and Forms for Applications / Annual Compliance. The CBDT has now published a comprehensive 'APA Guidance with FAQs' (Guidance Note). Some of the key points addressed in the Guidance Note are highlighted below:

- A Unilateral APA can be converted into a Bilateral APA before the finalisation of the terms of the APA. Taxpayers can request for Unilateral APA for certain transactions and a Bilateral APA for other transactions,

even in one application, which shall be filed with the Competent Authority (CA) of India.

- In case of Multilateral APA application, if negotiations with one or more countries fail, the taxpayer can either opt for a Unilateral APA or even a Multilateral APA not involving the country with which an agreement could not be reached.

- The understanding reached at the end of the pre-filing consultation would be reduced in writing and also communicated to the taxpayer. This will form the basis for the final application.

- If the value of the international transactions eventually happens to be more than what was earlier projected, this would have no effect on the quantum of the fee which has already been paid.

- Internationally, most countries allow sharing of APA information with on-field audit officers. The confidentiality provisions of the Act also allow such sharing within the income tax department.

- There are no rollback provisions in the APA Scheme. Therefore, the TPO cannot be directed to undertake audits of prior periods consistent with the APA outcome.

- Once the ALP is determined in accordance with an APA agreement, there is no provision for allowance of 3 percent variation.

- Annual compliance audit is a focused audit with a view to ensure compliance with terms of the APA and would not be as wide-ranging or broad-based as a regular Transfer Pricing (TP) audit.

Tolerance band for Financial Year 2012-13 notified – 3 percent for all cases other than Wholesale Traders

The Central Government has stipulated, vide a Notification, that a tolerance band of 1 percent for wholesale traders and 3 percent in all other cases shall be applicable for FY 2012-13, i.e. AY 2013-14.

As per the notification, where the variation between the ALP determined under Section 92C of the Act and the price at which the international transaction or specified domestic transaction has actually been undertaken does not exceed 1 percent of the latter for wholesale traders and 3 percent of the latter in all other cases, the price at which the international transaction or specified domestic transaction has actually been undertaken shall be deemed to be the ALP for AY 2013-14.

SEBI Circular

On 3 September 2009, Securities Exchange Board of India (SEBI) had issued a circular (2009 Circular) prescribing conditions applicable to amalgamation of listed company into an unlisted company and claiming exemption from Rule 19(2)(b) of Securities Contracts (Regulation) Rules, 1957 (SCRR). SEBI issued Circular No. SEBI/CFD/DIL/5/2013 dated 4 February 2013 (2013 Circular) repealing the 2009 circular and providing additional procedures and conditions to be complied with.

However, issues were raised about applicability of circular and certain provisions therein.

SEBI has issued a circular dated 21 May 2013 clarifying certain issues in 2013 Circular, as follows:

- The 2013 Circular applies to all listed companies entering into a Scheme of Amalgamation / Merger / Reconstruction / Reduction of Capital etc., irrespective of whether exemption from Rule 19(2)(b) of SCRR is sought from SEBI or not.
- Requirement of submission of valuation report in 2013 Circular is not applicable where there is no change in the shareholding pattern of the listed / resulting company.
- The 2013 Circular required that approval of public shareholders, for the Scheme, should be obtained through postal ballot and e-voting and that Scheme should be acted upon only if the votes cast in favour of the Scheme by public shareholders are at least two times the votes cast against the Scheme by public shareholders.

The ratio of required votes (2:1) is revised and it is provided that the Scheme can be acted upon only if the votes cast in favour of the Scheme by public shareholders are more than the votes cast against the Scheme by public shareholders. Also, the requirement of postal ballot is applicable only in the following cases:

(a) Where any additional shares have been allotted, pursuant to the Scheme of the promoter / promoter group, related parties, associates, subsidiaries of such promoter / promoter group of the listed company, or

(b) Where the Scheme involves a listed company and any other entity involving the promoter / promoter group, related parties, associates, subsidiaries of such promoter/ promoter group.

(c) Where the parent listed company has acquired the equity shares of the subsidiary, by paying consideration in cash or in kind in the past to any of the shareholders of the subsidiary which may be a promoter / promoter group, related parties, associates, subsidiaries of promoter / promoter group of the parent listed company, and if that subsidiary is being merged with the parent listed company under the Scheme.

Circular No.CIR/CFD/DIL/8/2013 dated 21 May 2013

SEBI issues clarifications on amended ESOP Guidelines (regarding purchase of a company's shares from secondary markets)

The SEBI, in a recent Circular has provided clarification on the amended ESOP Guidelines. The ESOP Guidelines were amended in January 2013, to prohibit companies from buying/selling their own securities in the secondary market for ESOP purposes. SEBI had given time till 30 June 2013 to the listed companies having such ESOP Schemes to align with the amended Guidelines. The recent Circular has now extended this timeline to 31 December 2013, apart from providing certain other clarifications.

Circular No. CIC/CFD/DIL/7/2013 dated 13 May 2013

Indian Government declares interest rate on Employees' Provident Fund Scheme

Indian Government has declared a rate of interest of 8.5 percent on deposits in the Employees' Provident Fund Scheme for the financial year 2012-2013.

Circular No. Invest.I/3(2)/133/ROI/2012-13/4462 dated 15 May 2013

CBDT notifies income-tax returns and extends the scope of e-filing

As the Government has adopted a path of bringing technology to ease procedural and administrative statutory requirements, all the corporate as well as some individuals are mandated to file their tax returns electronically. Recently, the CBDT issued a Notification to widen the scope of e-filing of income-tax returns.

Notification No. 34/2013 [F. No. 142/54/2013 – TPL]

Online generation of Part A of the Form 16 made mandatory

Recently, the CBDT has issued a Circular making it mandatory for the employers to generate Part A of Form No. 16 from the TDS Reconciliation Analysis and Correction Enabling System (TRACES) Portal and thereafter verifying before issuing to the employee.

Circular No. 04/2013 dated 17 April 2013

II. SERVICE TAX

High Court Decisions

Services used for installation of storage tank containing raw material outside factory are eligible as input services for claiming Cenvat Credit

The taxpayer was engaged in manufacturing of excisable goods and has installed storage tanks for storing ammonia outside his factory. The taxpayer claimed Cenvat Credit of service tax paid on input services like the services of consulting engineers, construction, erection etc for the installation of these storage tanks on the basis that the input / raw material stored therein is intended to be used for manufacture of final product. Show cause notice was issued to the taxpayer demanding reversal of Cenvat credit and the demand was confirmed after adjudication. Aggrieved by the same, taxpayer filed an appeal before the Tribunal which was dismissed and hence the issue was directed to the High Court (HC).

HC placed reliance on Rule 3(1) of the CCR 2004 and held that the input services were eligible for Cenvat Credit as the only stipulation in the provision is that the input services should be received by the manufacturer. Hence, it is irrelevant whether they are received in the factory or not. Also Rule 2(l) of the CCR 2004 provides that services used by the manufacturer either directly or indirectly, in or in relation to the manufacture of final products are eligible input services. Hence, the services

used for erection and installation of storage tank containing ammonia are input services and hence eligible for Cenvat Credit.

Deepak Fertilizers and Petrochemicals Corporation Ltd v CCE, Belapur [2013-TIOL-212-HC-MUM-CX]

Tribunal Decisions

Cenvat Credit on the input services is not deniable which were used for providing an output service, the value of which is not recovered

The taxpayer was engaged in the business of advertising services. During the course of an audit, it emerged that the taxpayer was discharging service tax on receipt basis as laid down under the law. In certain cases where the amount billed by the taxpayer could not be realized and therefore no service tax was being paid. An order was passed by the Assistant Commissioner denying input credit in respect of services where no amount could be recovered. An appeal was made to the Commissioner (Appeals) by the taxpayer wherein the appeal was decided in the favour of taxpayer.

Revenue authorities made an appeal to the Tribunal. The Tribunal rejected Revenue Authorities's appeal by agreeing with the first appellate authority's decision wherein it was stated that there was no specific provision in CCR 2004 denying Cenvat Credit on the input services which were used for providing an output service, against which the payments could not be recovered. It was also held that Rule 14 of CCR 2004 was inapplicable for the reason that it envisaged reversal of Cenvat Credit wrongly utilized or erroneously refunded and not reversal of Cenvat Credit in situations where recovery was pending and written off as bad debts later. It further held that there cannot be one-to-one co-relation in availing of Cenvat Credit of input services to the provision of output services.

CST v Krishna Communication [2013-TIOL-490-CESTAT-AHM]

No liability of taxpayer under Goods Transport Agency ("GTA") service when no consignment note is issued by the owner of the vehicles that are used for transporting goods from place of manufacture to the place of delivery

The taxpayer was engaged in manufacturing Ready Mix Concrete ("RMC") and hired vehicles for carrying RMC from place of manufacture to place of delivery of the goods. The vehicles were provided by the owner for use as per terms of a contract in receipt of consideration which involved certain payments on monthly basis and certain payments based on the number of kilometers run. Revenue Authorities considered this as a consideration for services of GTA and demanded service tax from the taxpayer on reverse charge basis. The taxpayer filled appeal before the Tribunal.

On examining the terms of the contract, the Tribunal held that the contract is for hiring of vehicles under which the vehicles are to be painted as directed by the taxpayer and showing his logo. The operator was responsible only for the vehicle and there are no custodial rights or responsibilities of

goods carried and no consignment note (which normally is a document of title for the goods) was issued. Therefore, in the event of such non-issuance of consignment note by the operator, they cannot be considered as a GTA. Tribunal also held that the services provided were that of a Goods Transport Operator and not of a GTA and mere fact that the operator is doing an activity of transportation cannot make the operator a GTA. Tribunal disagreed with the argument of Revenue Authorities that the log-book maintained by the operators should be considered as equivalent to consignment note and allowed the appeals.

Birla Ready Mix v CCE [2013 (30) STR 99 (TRI-DEL)]

Services provided to international inbound roamers on behalf of a foreign telecommunication provider ("FTP"), are to be treated as export under Export of Service Rules, 2005 ("Export of Service Rules")

Taxpayer was engaged in providing telecom services in India. It entered into agreements with various FTPs to provide services to international inbound roamers who are registered with the foreign operators. The lower appellate authority held that these services were chargeable to service tax in India and not eligible for export status under the Export of Service Rules. Taxpayer hence filed an appeal before the Tribunal.

Taxpayer contended that as per the agreement, the service is rendered to the FTP who discharges the consideration for such services in convertible foreign exchange. Hence, the transaction is one as defined in Rule 3(1) (iii) of Export of Service Rules. They also relied on Circular no 111/5/2009-ST dated February 24, 2009, which clarified that for the services that fall under Category III [Rule 3(1) (iii)], the relevant factor is the location of the service receiver and not the place of performance when the benefit of the service accrues outside India. Also as per the UK and Australian laws, the receiver of service is the FTP and not their subscribers. Reliance was also placed on the case of Paul Merchants Ltd. [2012-TIOL-1877-CESTAT-DEL] wherein in it was held that Western Union was the actual recipient of the services provided by its agents and sub-agents and not the persons receiving money in India.

On the other hand, Revenue Authorities relied on CBEC Circular 141/10/2011-TRU dated May 13, 2011 which clarified that the Circular No 111/5/2009-ST dated February 24, 2009 stated that the accrual of benefit should be judged based on where the effective use and enjoyment of service has been obtained and in the present case the subscriber is situated in India and hence the consumption and enjoyment of the service is in India.

Tribunal allowed the appeal by holding that the agreement for supply of services and also the consideration flow is between the taxpayer and the FTP therefore FTP is the actual recipient. The Tribunal also placed reliance on the laws relating to GST in UK and Australia, it is evident that when a service is rendered to a third party on your customer's behalf, the service recipient is your customer and not the third party. Reliance was also placed on Circular No111/5/2009-ST dated February 24, 2009

and Paul Merchant's case to hold that the FTP was the actual beneficiary and the actual service recipient of the services provided by the taxpayer.

Vodafone Essar Cellular Ltd v CCE [2013-TIOL-566-CESTAT-MUM]

Services provided to an overseas client by two group companies under a joint agreement wherein consideration is routed through one company to another. In such a case, the receiving company cannot be treated as sub-contractor. Therefore, the services qualify as exports under Export of Services Rules under Rule 3(1)(iii) hence not liable to service tax

The taxpayers along with Jubilant Biosys Ltd, Bangalore ("Group Company") are subsidiaries of Jubilant Life Sciences Ltd. Both the units are 100% EOUs. While the taxpayer unit conducts research on the synthesis of the drug molecules based on the information supplied to them and manufactures the drug on laboratory scale, the group company gets some quantity of the drugs so manufactured by the taxpayer and conducts research on its biological properties. The services or the product manufactured by the taxpayer are sent either directly or through its group company to the offshore clients. The payment for the services rendered by the taxpayer ie the payment for the services of synthesis of the molecules, from offshore clients is received through the group company.

Show Cause Notice and the Order-in-Original ("order") were issued holding that the taxpayer has provided the taxable services of scientific and technical consultancy covered by Section 65(105) (za) of the Finance Act, 1994 to group company and that the same does not constitute export of services under Export of Service Rules . Aggrieved by the Order, the taxpayer filed an appeal along with the stay application and contended that the services to the overseas client were provided under a joint agreement between the two group companies. Merely because the consideration was routed through the group company to the taxpayer, the taxpayer cannot be treated as sub-contractor.

Basis the agreement between the group companies and the overseas client, it was prima facie held by the Tribunal that the taxpayer/ group company can directly deal with the offshore clients and therefore shall not be regarded as sub-contractors. In view of the agreement, the service of developing the process of synthesis of drug molecules provided by the taxpayer has to be treated as having been provided to their overseas clients. Merely because the payment for their portion of service has been received by them through their group company, they cannot be treated as sub-contractor of the group company. Prima facie the Tribunal concluded that the service rendered by the taxpayer had been received by the overseas clients for the use in their business (the payment for which has been received in foreign currency) and is therefore covered by Rule 3(1)(iii) of the Export of Service Rules. Consequently, they are not liable to pay service tax and the stay application is allowed.

Jubilant Chemsys Ltd v CCE [2013-TIOL-448-CESTAT-DEL]

Sharing of staff with group companies to carry out their daily activities and reimbursement of their salaries on cost to cost basis, does not fall within the purview of Business Auxiliary Services ("BAS")

The taxpayer was engaged in recruitment and supply of manpower for the group companies and the cost of expenditure towards the salaries and other administrative expenses were reimbursed to the taxpayer by other group companies on actual basis from May 2006 onwards.

Show Cause Notices were issued to the taxpayer to show as to why the services rendered by the taxpayer to their group companies would not come within the purview of BAS. Thereafter, the Order in Original was issued to the taxpayer. Aggrieved by it, the taxpayer filed the present appeal.

Tribunal granted stay and held that the services provided by the taxpayer include recruiting staff and supplying them to the group companies to deal with activities taken by the group companies and thus does not fall under the purview of the BAS.

K Raheja Real Estate Pvt Ltd v CCE [2013-TIOL-535-CESTAT-MUM]

III. VAT/ CST

High Court Decisions

Lease rentals of machinery procured on lease from Delhi but used in Haryana are not liable to tax under Haryana General Sales Tax Act, 1973 - Place of taxation is the place where the contract is entered into and not the place of location or delivery of goods

The taxpayer was engaged in the business of manufacture and sale of air conditioning system and its components for automobiles in the State of Haryana and procured machinery on lease basis from outside the State of Haryana. The Revenue Authorities sought to levy purchase tax on such lease rentals.

The matter reached the High Court (HC). The HC relied on the judgement of SC in the case of 20th Century Finance Corporation Ltd v State of Maharashtra and held that transfer of right to use goods outside the State of Haryana cannot be taxed in the State of Haryana merely because the goods were within the State at the time of use. The HC held that the tax is not leviable in Haryana since the goods were not in the State at the time of entering into transaction of lease. Accordingly, the lease rentals couldn't be subject to tax in State of Haryana.

Sandan Vikas (India) Limited v State of Haryana and Others [2013 (59) VST 165 (P&H)]

IV. CUSTOMS

High Court Decisions

No penalty under Section 117 of the Customs Act, 1962("Customs Act") can be imposed upon an importer for his failure to file Bill of Entry and clear the goods within 30 days of unloading thereof at a customs stations

The Revenue Authorities had imposed different penalties on the Taxpayer for non-filing of bill of entry for release of goods for home consumption or warehouse within 30 days of the date of unloading the goods at the custom station.

The matter reached the HC, which, after an analysis of Section 46, Section 48 and Section 117 of the Customs Act held that there is no time limit specified under the Customs Act for filing of the bill of entry. Section 48 of the Customs Act only provides for the time limit post which the goods at the custom station can be sold by the Revenue Authorities. However, such time limit cannot be inferred to mean the time limit for filing of the bill of entry. Furthermore, where no time limit has been specified under the Customs Act, non-filing of bill of entry within a period of 30 days cannot be treated as breach of Section 117 of the Customs Act. Accordingly, no penalty is leviable.

Commissioner of Customs v Shreeji Overseas (India) Pvt Ltd [2013 (289) ELT 401 (GUJ)]

V. CENTRAL EXCISE

High Court Decisions

Interest on delayed payment of interest allowed at a reasonable rate of 9 percent per annum from the date of filing of refund application even though there was no statutory provision for such interest on interest

The taxpayer was engaged in the manufacture of various plastic products like HDPE and PP tapes etc. These goods were classified under Chapter 39 of the Excise Tariff of India Act,1985 ("Excise Tariff ") which provided the rate of duty applicable to such goods and also exemption from payment of certain duties. However, the Revenue Authorities were of the view that the said goods were not classifiable under Chapter 39 and on insistence of the Revenue Authorities, the taxpayer paid higher duty under protest for the period February 1987 to February 1992. In the meantime the matter was settled in favour of the taxpayer by a decision of the Madhya Pradesh High Court (HC) as well as Central Board of Excise and Customs ("CBEC") (vide Circular No 8/ 92 dated September 24, 1992 classifying the concerned goods under Chapter 39 of the Excise Tariff.

The taxpayer was litigating for obtaining refund and interest on delayed payment thereof. In this regard, the taxpayer filed a petition before the HC of Gujarat claiming interest on the delayed payment of interest for the period April 1, 2003 to September 2004. The taxpayer contended that there

was a gross delay on the part of the Revenue Authorities at all stages while sanctioning the refund claim and therefore, the taxpayer is entitled for interest on the delayed payment of interest by the Revenue Authorities. The Revenue Authorities contended that in the absence of any statutory provision providing for interest on interest, the taxpayer's claim was rightly rejected by the Revenue Authorities. Further, the Revenue Authorities also contended that payment of interest is governed either by a statute or under contractual agreement between the parties which is not applicable in the present case.

The HC noted that the taxpayer had lodged their refund claim way back in 1991 when the issue of classification was decided in their favour and also Revenue Authorities did not release the refund for a considerable period of time. It also noted that the taxpayer engaged in continuous litigation for years together before initially their refund claims were sanctioned even after the issue of classification was decided in their favour. Further, the interest on such delayed payment was also paid after a delay of 530 odd days. It held that the Revenue Authorities cannot avoid the liability of accounting for interest on the delayed payment of interest to the extent the same was paid late. Since such claim does not fall under statutory provisions therefore interest on delayed payment of interest at a reasonable rate of 9 percent shall be paid to the taxpayer.

Shri Jagdamba Polymers Ltd v UOI [2013 (289) ELT 429 (GUJ)]

Extended period of limitation cannot be invoked for denial of Cenvat Credit where the taxpayer has made the relevant disclosures and there is no suppression of facts on his part with intent to evade payment of duty

The taxpayer procured HR sheets in coils from M/s TISCO which were used for manufacturing of finished goods, namely Tin Mill Black Plates, Full Hard Cold Rolled Coils and Electrolytic Tinplates. These HR sheets in coils qualified as 'inputs' for the taxpayer and accordingly, they availed Cenvat Credit of the duty paid on the said HR sheets. During the manufacturing process, certain sheets were found unfit for use in the manufacture of the finished goods and were rejected. Such rejected inputs were cleared in the name of 'Pickled & Oiled HR Coils' to the consignment agent of M/s TISCO and credit was reversed at the price which was lower than the price basis which credit was availed. The Revenue Authorities were of the view that credit reversal should be equal to the amount of credit availed on the 'inputs' which are returned to the supplier. A demand of tax along with interest and penalty was raised.

The taxpayer contended that since the rejected inputs were sold at lower price, therefore, it was not liable to pay duty at par with the Cenvat Credit benefit which they have availed. The aforesaid contention was rejected by the Tribunal on the ground that the rejects (ie Pickled & Oiled HR Coils) were not new products as they were not subjected to any manufacturing process. The CESTAT held that the reversal has to be of the same amount as contended by the Revenue

Authorities. The CESTAT dropped the equivalent penalty imposed on the taxpayer while dismissing the Revenue Authorities's contention that there was suppression of facts with intent to evade payment of duty because the taxpayer was submitting statutory monthly returns showing clearance of the 'inputs' under consideration. Extended period of limitation for the purposes of levying penalty was thus, held inapplicable.

The present appeal before the HC of Jharkhand was filed by the Revenue Authorities against the decision of the Tribunal in so far as it dropped the levy of penalty. The HC observed that the taxpayer was continuously making disclosures of the clearance of the impugned goods in every statutory monthly return and the same was in the knowledge of the Revenue Authorities. Therefore, the HC dismissed the appeal by stating that extended period of limitation could not be invoked as there was no suppression of facts on the part of taxpayer with intent to evade payment of duty and consequently, demand beyond the period of 12 months cannot be sustained in the eyes of law.

CCE v Tinplate Company of India Ltd [2013 (289) ELT 414 (JHAR)]

Tribunal Decisions

Permission to job work under Rule 4(6) can be granted to taxpayer's own unit for job-work on intermediate products which are independently marketable as well

The taxpayer has one factory at Tuticorin wherein they manufactured copper anode, copper cathode and continuous copper wire and they also had other factories at Silvassa, Chinchpada and Pipara. The taxpayer sought permission from the Deputy Commissioner of Central Excise, Tuticorin for removal of copper anode to their units at Silvassa , Chinchpada and Pipara under Cenvat Credit Rules, 2004 ("CCR 2004") for converting it to cathodes or copper wire. The Deputy Commissioner refused the permission on the ground that the taxpayers unit at Silvassa is not a job worker as it is their own unit and copper anode is neither an input nor partially processed input so as to qualify for movement under CCR 2004.

The matter reached the Customs, Excise and Service Tax Appellate Tribunal ("CESTAT"). The CESTAT held that that anode is both final product as well as intermediate product at their factory at Tuticorin. It also held that it is a final product when it is cleared on payment of duty and it is an intermediate product when it is further used in the manufacture of cathode or wire rods. Further, once the goods are recognized to be intermediate products, there is no reason to deny the benefit of CCR 2004.

CCE, Tirunelveli v M/s Sterlite Industries (I) Ltd [2013-TIOL-545-CESTAT-MAD]

Duty paid on procurement of JO trucks used for transportation of raw materials within the premises of manufacturing unit are eligible for Cenvat Credit

The taxpayer claimed Cenvat Credit of excise duty paid on purchase of JO trucks used for transporting raw materials within the manufacturing unit. The same was disallowed by the Revenue Authorities on the premise that JO trucks were not covered under the definition of 'capital goods' or 'inputs' as given under CCR 2004.

The matter reached the CESTAT where it was observed that the definition of 'inputs' covered those goods which are used in or in relation to manufacture of final products whether directly or indirectly irrespective of the fact that whether such goods are contained in the final product or not. Basis the above observation, the Tribunal prima facie held that the impugned trucks would be regarded as inputs used in relation to manufacture of final products. Accordingly, credit of excise duty on purchase of such trucks will be available to the taxpayer in terms of Rule 3 of CCR 2004 which provides that a manufacturer can avail credit of excise duty paid in relation to inputs. The Tribunal allowed the Stay Application and waived the condition of pre-deposit of duty demand, interest and penalty till the disposal of the appeal.

Jindal Steel and Power Ltd v CCE [2013 (290) ELT 121 (TRI-DEL)]

Notification & Circulars

CBEC notifies a Circular providing clarification with respect to admissibility of area-based exemption

The Central Board of Excise and Customs ("CBEC") has issued Circular No 968/02/2013- CX, dated April 01, 2013 ("Circular") for providing clarification with respect to admissibility of area-based exemption Notification No 49/2003-CE and 50/2003-CE, dated June 10, 2003 ("Notifications"). CBEC had earlier issued Circular No 960/03/2012-CX, dated February 17, 2012 clarifying that expansion of a Unit (which is claiming exemption under the Notifications) by acquiring an 'adjacent plot of land' and installing new plant and machinery on such land would also be eligible for availing exemption under the Notifications. The Circular has now clarified the expression 'adjacent plot of land'.

Central Excise Circular No 968/02/2013- CX, dated April 01, 2013

DGFT notified amendments to the provision of Foreign Trade Policy 2009-14 ("FTP")

The Ministry of Commerce announced the amendments to the provisions of FTP applicable for 2013-14. Extensive changes have been made vis-a-vis various export promotion schemes. Also, the much anticipated policy reforms for Special Economic Zones ("SEZ") have been announced as part of the policy reforms in the FTP supplement

Annual Supplement (2013-14) to the Foreign Trade Policy 2009-14

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