November 2013

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

Foreword

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

On the taxation regime, the Supreme Court in the case of *Gujarat Fluoro Chemicals Ltd*. has held that it is only interest provided under Section 244A of the Income-tax Act, 1961 which may be claimed by the taxpayer and no other interest on such statutory interest would be available. The Supreme Court held that the decision in the case of Sandvik Asia Ltd. has been misquoted and misinterpreted by the taxpayer and also by the Revenue Authorities. The misinterpretation is that the Revenue Authorities are obliged to pay interest on interest in the event of their failure to refund the interest payable within the statutory period.

In another decision, the Supreme Court has held that creams containing pharmaceutical contents and primarily used for curing purposes are to be classified as medicaments. The Supreme Court pointed out that the deciding factor is whether the product contains pharmaceutical ingredients that have therapeutic or prophylactic or curative properties, the proportion being irrelevant. The product in dispute was prescribed by the dermatologists for treatment of dry skin conditions. The fact that product was sold over the counter without prescription did not qualify it immediately to be a cosmetic product.

The Empowered Committee of State Finance Ministers (EC) is scheduled to meet in Shillong later this month to continue its deliberations on the report of the Parliamentary Standing Committee on the Constitution Amendment Bill relating to GST. Any tangible movement on GST is expected in EC's next meeting.

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

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

A. Didar Singh

Recent Case laws

I. DIRECT TAX

Supreme Court Decisions

Advance license benefit and duty entitlement pass book benefits taxable in the year in which these are actually utilized by the taxpayer, not in the year of receipt

The taxpayer was entitled to the benefit of making duty free imports of raw materials obtained through advance licenses and a duty entitlement pass book (DEPB) issued against export obligations. The taxpayer maintained its books on mercantile basis. For AY 2003-04, the taxpayer claimed deduction of INR 1.257 million under the head 'advance license benefit receivable' and a deduction in respect of 'DEPB benefit receivable'. These benefits were related to entitlement to 'import duty free' raw material under the relevant EXIM policy by way of reduction from raw material consumption. The taxpayer excluded the aforesaid amounts from its total income since they could not be said to have accrued until imports were made and the raw material consumed. Rejecting the taxpayer's claim, the AO held that the benefit of an entitlement to make duty free imports of raw materials obtained through advance licenses and DEPB, against export obligations was income in the year in which the exports are made and not in the year in which the duty free imports were made and consumed by the taxpayer. The Commissioner of Income-tax (Appeals) [CIT(A)] and the Tribunal ruled in favor of the taxpayer relying on the taxpayer's own Tribunal decision of earlier years. The Bombay High Court also declined to admit the Revenue's appeal.

Aggrieved by this, the Revenue went to appeal before the Supreme Court. The Supreme Court held that advance license benefit and DEPB benefits are taxable in the year in which these are actually utilized by the taxpayer i.e. in the year of imports and not in the year of export. The income tax cannot be levied on 'hypothetical' income. Furthermore, the Supreme Court has applied the three tests laid down by various Supreme Court decisions, namely, whether the income accrued to the taxpayer is real or hypothetical; whether there is a corresponding liability of the other party to pass on the benefits of duty free import to the taxpayer even without any imports having been made; and the probability or improbability of realisation of the benefits by the taxpayer has to be considered from a realistic and practical point of view. It was also observed that the Revenue has accepted the order of Tribunal in favor of taxpayer for some assessment years but filed appeal with the High Court for other years. It was held that the Revenue cannot be permitted to 'flip-flop' on an issue and it ought to let the matter rest rather than spend the taxpayers' money in pursuing litigation for the sake of it. Further it was also observed that in the subsequent accounting year, the taxpayer did make imports and did derive benefits under the advance license and the

DEPB and paid tax thereon and hence it is not as if the Revenue has been deprived of any tax. Even the rate of tax remained the same in the present assessment year as well as in the subsequent assessment year. Therefore, the dispute raised by the Revenue is entirely academic or at best may have a minor tax effect.

CIT v. Excel Industries Ltd. [TS-506-SC-2013]

Unabsorbed depreciation (and business loss) of the same unit brought forward from earlier years has to be set off against the profits before computing exempt profits under Section 10A/10B of the Act

The taxpayer set up a 100 percent Export Oriented Unit (EOU) in AY 1988-89. For want of profits it did not claim benefits under Section 10B in AYs 1988-89 to 1990-91. From AY 1992-93 it claimed the said benefits for a connective period of five years. In AY 1994-95, the taxpayer computed the profits of the EOU without adjusting the brought forward unabsorbed depreciation of AY 1988-89. It claimed that as Section 10B conferred 'exemption' for the profits of the EOU, the said brought forward depreciation could not be set off from the profits of the EOU but was available to be set off against income from other sources. It was also claimed that the profits had to be computed on a commercial basis. The AO accepted the claim though the CIT revised his order under Section 263 and directed that the exemption be computed after set-off. On appeal by the taxpayer, the Tribunal reversed the order of the CIT. On appeal by the department, the High Court reversed the order of the Tribunal and held that the brought forward depreciation had to be adjusted against the profits of the EOU before computing the exemption allowable under Section 10B of the Act. The Supreme Court dismissed the appeal stating it to be devoid of any merit.

Himatsingka Seide Ltd. v. CIT [TS-516-SC-2013]

High Court Decisions

Non-residents entitled to benefit of 10 percent tax rate on long-term capital gains on listed securities

The taxpayer, a company registered in Scotland, sold shares of an Indian company which was listed on the Bombay Stock Exchange to a Malaysian company by way of an off-market sale. The taxpayer computed long-term capital gains as per the first proviso to Section 48 of the Act.

The taxpayer approached the Authority for Advance Rulings (AAR) for deciding on whether the lower tax rate of 10 percent would be applicable for computing the tax payable on long-term capital gains earned by the taxpayer. The AAR held that the lower rate of 10 percent was available only if the second proviso to Section 48 of the Act was applicable while computing the gains. As the second proviso to Section 48 of the Act was not applicable to the taxpayer, the lower rate of tax of 10 percent was not available to the taxpayer.

The taxpayer carried the matter to the Delhi High Court (High Court). The question before the High Court was whether the long-term capital gains arising to the taxpayer on

sale of shares in the Indian company would be taxable at the rate of 10 percent.

Based on the facts of the case and the arguments, the High Court, among other things, observed and held as follows:

- The proviso to Section 112(1) of the Act does not state that an assessee who avails the benefits of the first proviso to Section 48 of the Act is not entitled to the benefit of the lower rate of tax at 10 percent. Also, the benefit cannot be denied because the second proviso to Section 48 of the Act is not applicable.

- If the Legislature wanted to deny the benefit of the lower rate of tax, it would have been specifically stipulated.

- Accordingly, the taxpayer was entitled to apply the lower rate of tax at 10 percent on the long-term capital gains.

Cairn UK Holdings Limited [Writ Petition (Civil) No. 6752/2012 (Delhi High Court)]

Conflicting Decisions in connection with interest under Section 244A, on the amount of interest on refund delayed

Recently, the Delhi High Court in the case of India Trade Promotion Organization v. CIT [TS-454-HC-2013(DEL)] analysed the provisions of Section 244A and observed that the Section starts with the expression 'where refund of any amount becomes due and payable…', and hence these words imply a much wider and broader meaning, and the expression 'any amount' would cover in its ambit even the interest element which has accrued as is payable on the date of refund. The High Court further relying on the decision of Madhya Pradesh High Court in the case of CIT v. HEG Limited [2009] 310 ITR 341 (MP)], which had held that the expression 'any amount' would include the amount refundable plus the interest due and payable on the tax amount refunded. The same case was also carried to Supreme Court (189 taxman 335), wherein the Supreme Court clarified that when a refund order is issued, this should include the interest payable on the amount, which is refunded and if the refund does not include interest due, it would be liable to pay interest on such shortfall of interest. The High Court also held that if the AO/Revenue is allowed to pay only the principal amount and not pay the interest component under Section 244A for an unlimited period with impunity and without any sanction, it would amount to granting premium to a non-compliance of law.

However, subsequently the three judge bench of the Supreme Court, in the case of CIT vs. Gujarat Fluro Chemicals (SLP No. 11406 of 2008), held that a taxpayer is not entitled to receive interest on the interest due on tax refund. In this case the matter was originally dealt with by the division bench of the Supreme Court (before referring it to the larger bench). It was observed by the division bench that in the case of Sandvik Asia Ltd. vs. CIT [2006] 150 Taxman 591 (SC), the interest was ordered on the basis of equity. Since there is nothing in the provisions of Section 214 of the Act providing for payment of interest on excess payment of advance tax, the order passed in Sandvik Asia was not correct. Accordingly, the matter was referred to the larger bench of the Supreme Court. The larger bench of the Supreme Court held that it is only interest provided under Section 244A of the Act which may be claimed by the taxpayer and

no other interest on such statutory interest would be available. The Supreme Court held that the decision in the case of Sandvik Asia has been misquoted and misinterpreted by the taxpayer and also by the Revenue Authorities. The misinterpretation is that the Revenue Authorities are obliged to pay interest on interest in the event of its failure to refund the interest payable within the statutory period. The Supreme Court also observed that the decision in the case of Sandvik Asia was based on the specific facts of the case in that there was an inordinate delay on the part of the tax department in refunding a certain amount which included the statutory interest, and it was directed to pay compensation for this and not interest on interest due on the tax refund.

India Trade Promotion Organization v. CIT [TS-454-HC-2013(DEL)]

CIT v. Gujarat Fluro Chemicals (SLP No. 11406 of 2008)

Date of Acquisition for claiming depreciation

The taxpayer acquired/received imported cars pursuant to merger of other companies. The appointed date of merger was 1 April 2004. The taxpayer claimed depreciation on such imported cars since the cars were acquired from appointed date of amalgamation i.e. on 1 April 2004.

The AO contended that the motor cars were acquired by the merging/transferor companies between 1 March 1975 and 31 March 2001 and therefore under clause (a) of proviso to section 32(1) of the Act, the taxpayer is not eligible to claim depreciation on such imported cars. The CIT(A) upheld the contention of AO, but the Tribunal accepted the plea of the taxpayer. Before the High Court the department had claimed that merger/amalgamation is not a transfer as defined u/s. 2(47). The High Court held that (i) Merger can be a mode of acquisition of asset (ii) Shares issued were consideration for transfer of assets (iii) the taxpayer was not owner of such cars prior to 1 April 2004 and (iv) the Legislature has treated amalgamation as transfer and has specifically provided, computation of the actual cost of the assets transferred upon amalgamation. High Court held that since the taxpayer acquitted the imported cars after 1 April 2001, clause (a) of proviso to section 32(1) of the Act was not applicable and the taxpayer was entitled to claim depreciation on the imported cars.

CIT v. Mira Exim Ltd. [2013] 38 taxmann.com 50 (Del)

Grant received by a subsidiary from its holding company to recoup losses is not taxable as revenue receipt under the Act

The taxpayer, a Government company, is a wholly owned subsidiary of State Trading Corporation (STC). The taxpayer received INR 2.5 million as grant from STC to recoup losses incurred by the taxpayer. The taxpayer claimed that grant received was not taxable since it is a capital receipt. However the AO held that the payment as trade receipt and bought the same to tax. The taxpayer received the amount from its holding company and not from a third party or a public authority. It was not on account of any trade or a commercial transaction. The intention and purpose behind the said payment was to secure and protect the capital investment made by STC in the taxpayer therefore it can be classified as a gift or a

capital grant and does not partake character of trading receipts. Therefore, the High Court held that grant received from holding company for recouping losses of its subsidiary is not taxable as revenue receipt under the Act.

CIT v. Handicrafts & Handlooms Exports Corporation of India Ltd. [ITA 3 of 2013 decided on 5 September 2013 (Del)]

Tribunal Decisions

Expenditure incurred by an Indian company on issue of shares of foreign parent company under an ESOP is allowable as revenue expenditure

The taxpayer is a wholly-owned subsidiary of Novo Nordisk A/S, Denmark (Denmark Parent) engaged in the marketing and distribution of healthcare products. The Denmark Parent had a scheme called NNAS Global Share Programme, 2005 (ESOP) by virtue of which the employees of the taxpayer company would be entitled to opt to purchase shares of the Denmark Parent at a price less than market price. Under the ESOP, the Denmark Parent would allot shares during January-February, 2006. The employees will not be entitled to sell the shares so allotted until the end of 2008. Furthermore, the difference between the purchase price of the shares and the average market price of the shares during the purchase offer period was recharged by the Denmark Parent to the taxpayer. For AY 2006-07, the taxpayer filed its ROI claiming ESOP recharge cost of INR 15.2 million as deductible expense, being the expenses actually incurred by the taxpayer. However, such expenses were disallowed by the AO and by the CIT(A).

The Bangalore Tribunal relied on the decision of Mumbai Tribunal in the case of DCIT v. Accenture Services Pvt. Ltd. (ITA 4540/Mum/2008) and allowed the claim of the taxpayer. The Tribunal also relied on the decision of the Bangalore Special Bench in the case of Biocon Ltd. v. DCIT [2013] 35 taxmann.com 335 (Bang) (SB). Further relying on the Supreme Court decision in the case of Sassoon J. David & Co. (P) Ltd. v. CIT [1979] 118 ITR 261 (SC), it was held that just because the foreign parent company was benefited the expenditure cannot be rejected.

Novo Nordisk India Pvt. Ltd. v. DCIT [TS-524-ITAT-2013(Bang)]

TDS credit will be available, based on evidence produced, even if no TDS certificate is available or no TDS entry is found in the system of the tax department

During the year under consideration, the taxpayer claimed total TDS of INR 215.2 million. However, the AO gave TDS credit only of INR 119 million. The CIT(A) held that the taxpayer has to submit all TDS certificates and the AO needs to verify them. Accordingly, the AO may allow TDS credit based on the original challans available on record or based on the details of such TDS available on the computer system of the tax department. The issue before the Tribunal was whether the TDS credit can be given if a TDS certificate is not available with the taxpayer or entry is not shown in Form 26AS.

The Mumbai Tribunal relying on the decision of Bombay High Court in the case of Yashpal Sawhney v. ACIT [2007] 293 ITR 539 (Bom) held that even if the deductor had not issued a TDS certificate, the claim of the taxpayer has to be considered on the basis of evidence produced for deduction of tax at source as the tax department was empowered to recover the tax from the person responsible for deduction of tax if he or she had not deducted tax or after deducting failed to deposit with the Central Government. Further reliance was also placed on the decision of the Delhi High Court in the case of Court On Its Own Motion v. CIT [2013] 352 ITR 273 (Del), wherein the High Court directed the tax department to give TDS credit to the taxpayer, where the deductor had failed to upload the correct details in Form 26AS on the basis of evidence produced before the tax department. The tax department was required to give TDS credit once a valid TDS certificate had been produced or where the deductor had not issued TDS certificates, on the basis of evidence produced by the taxpayer for deduction of tax and on the basis of indemnity bond. Accordingly, the Tribunal modified the order of the CIT(A) and directed the AO to give TDS credit on the basis of evidence produced by the taxpayer for deduction of tax at source.

Citicorp Finance (India) Limited v. ACIT (ITA No. 8532/Mum/2011 dated 13 September 2013)

Delhi Tribunal held that the taxpayer activities of a trading intermediary (commonly referred as 'Sogo Shosha' in Japanese context) are akin to a trader and not a service Provider

The taxpayer is a wholly-owned subsidiary of Mitsubishi Corporation (MC) Japan, which is one of Japan's leading 'Sogo Shosha' or general trading companies. The taxpayer was engaged in import of products from associated enterprises and further resale. The taxpayer took a position that it effectively acts as a provider of support services to the 'Sogo Shosha' activities of MC Japan. The Transfer Pricing Officer (TPO) and the Dispute Resolution Panel (DRP) were of the view that the transactions in question were trading transactions. The TPO adopted Operating Profit/Total Cost as the Profit Level Indicator to review the arm's length nature of transactions, wherein the total cost was computed including cost of goods sold.

The Tribunal upheld the findings of the tax department. It held that both purchases and sales made by the taxpayer are recorded in its books of account. The title in the goods is held by the taxpayer for some time and that the transactions were done on a principal to principal basis. Such activity cannot be bracketed with that of a commission agent or a broker. Thus, the activities in question are akin to trading activities. The Tribunal further held that the comparables in this case have not been selected keeping in view the functional profile of a trading entity. Based thereon, the Tribunal set aside the issue to the file of the AO for fresh adjudication in accordance with law.

Mitsubishi Corporation India Private Ltd. v. ACIT [(ITA No 5147/Del/2010) Assessment Year 2006-07]

Hyderabad Tribunal held that transactions between the taxpayer and its related parties having a PE in India are transactions between two 'resi-

dent' entities and cannot be termed as 'international transaction'

The taxpayer is promoted by IJMII Mauritius (IJMII), which, in turn, is a wholly-owned subsidiary of IJM Corporation Berhad, Malaysia (IJM Malaysia). During the financial year 2007-08, the taxpayer secured sub-contracts from the following related parties:

- IJM Corporation Berhard, Malaysia Project office, situated at New Delhi, a PE in India.
- Joint venture with IJMII, an Association of Persons (AOP) in India.
- Joint venture with National Building Construction Co. Ltd (NBCC) and VRM, an AOP in India.

The taxpayer out of abundant caution reported these transactions in Form No. 3CEB. The TPO rejected the TP study and the various submissions made by the taxpayer and determined the arm's length price at INR 1049.5 million.

The Tribunal held that the transaction between the taxpayer and PE and the transactions with the joint venture with IJMII do not fall within the ambit of international transactions as defined in the Act for the following reasons:

Transactions with PE

- The PE has a place of business in India by virtue of its registration under the provisions of Section 592 of the Companies Act, 1956.
- POA executed by the Principal Company in favor of the Director, resident in India, to manage the branch operations in India clearly goes to establish beyond doubt the fact that the entire control and management in relation to Operations in India is situated in India only. Therefore, the PE should be treated as resident in India.
- Under the provisions of the India-Malaysia tax treaty, a PE is treated as a separate legal entity, independent of its foreign principal enterprise. Therefore, the PE should be treated as resident in India, the business profits attributable to PE being taxable in India and all business decisions relating to PE being entered and concluded in India.

Transactions with Joint Venture with IJMII

- The joint venture is formed in India by an agreement between the respective parties and assessed to tax as an AOP. As defined under Section 6(2) of the Income-tax Act, an AOP is said to be resident in India in any previous year except where during that year the control and management of its affairs is situated wholly outside India.
- Since the transactions were between two resident entities there was no possibility of shifting of profits outside India or erosion of the country's tax base.

IJM (India) Infrastructure Ltd. v. ACIT [ITA No. 1814/Hyd/2012, Assessment Year 2008-09]

Notifications/Circulars/ Press releases

Central Board of Direct Taxes notifies the rules for application of General Anti Avoidance Rules

Notification No. 75/2013, dated 23 September 2013

The Central Board of Direct Taxes (CBDT) vide Notification No. 75/2013, dated 23 September 2013 has notified the rules relating to the application of General Anti Avoidance Rules (GAAR) provisions. The salient features of the rules are:

- The provisions of GAAR shall not apply to:
  a. An arrangement where the tax benefit arising to all the parties to the arrangement in the relevant assessment year does not exceed INR 30 million in aggregate;
  b. A foreign institutional investor in certain cases;
  c. A non-resident person who has investment by way of offshore derivative instruments or otherwise, directly or indirectly, in a FII; and
  d. Any income accruing or arising to, or deemed to accrue or arise to, or received or deemed to be received by, any person from transfer of investment made before 30 August 2010.

  - Without prejudice to (d) above, the provisions of GAAR shall apply to tax benefit, obtained from an arrangement, on or after 1 April 2015.
- Where a part of an arrangement is declared to be an impermissible avoidance arrangement, the Consequences in relation to tax shall be determined with reference to such part only.
- The mechanism for reference of cases for application for GAAR and time limits has also been provided.

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II. SERVICE TAX

High Court Decisions

Sections 65(25a), Section 65 (105) (zzze) and Section 66 of the Finance Act, 1994 held to be ultra vires as amended by the Finance Act,2005 to the extent of services being provided by a club to its members

Three different clubs of Ahmedabad filed a writ seeking that Sections 65(25a), Section 65(105) (zzze) and Section 66 of the Finance Act, 1994 be held ultra vires to the extent of services being provided by a club to its members.

Relying upon a long line of cases, the latest among them being the Jharkhand HC decision in the case of Ranchi Club Limited [2012 (26) STR 401 (Jhar)], the Gujarat HC took note of the principle of mutuality and held that since service requires existence of two parties, no service transaction can exist between club and its member. In this regard, income tax jurisprudence was also considered. The HC also held that there was no loss of mutuality even if the club in question was incorporated under the Companies Act, 1956.

Sports Club of Gujarat Ltd v Union of India [2013 (31) STR 645 (Guj)]

Tribunal Decisions

Mark up charged on import of goods on behalf of various traders/ merchants and selling the same on high sale basis not liable to service tax under Business and Auxiliary Service

The taxpayers were engaged in trading of various commodities such as edible oils, petroleum products, gold, silver, groceries etc. They undertook import as well as export of these items on behalf of various traders/merchants. In case of import they placed order on foreign suppliers, opening LC and the goods were purchased on their own account. On arrival in India, these goods were sold to the customers on High Seas Sale basis.

The documents for import of the items are filed by the respective customers, who declare the value inclusive of the mark-up for the purposes of customs duty assessment. The Revenue was of the view that the taxpayers are rendering services of import and export to the customers and, therefore, they are liable to Service Tax under the category of "Business Auxiliary Services". The matter reached before the CESTAT.

CESTAT held that from the import documents as well as invoices it was evident that the transaction was one of trading or sale. The mark-up/trade margin charged by the taxpayer was also subject to customs duty as part of the transaction value. There was no reason why the same part of the transaction value could be taken out of the customs transaction and subjected to Service Tax under the guise of Business Auxiliary Services. The Board's Circular 32/2004-Cus dated May 11, 2004, also clarified that customs duty liability should be discharged on the value inclusive of trade margin in the

case of High Seas Sales transaction. Accordingly, CESTAT held in favor of the taxpayer that no service tax would be leviable.

State Trading Corporation Of India Ltd v CST [2013-TIOL-1266-CESTAT-MUM]

Taxpayer not liable to service tax under the category of franchisee services if he does not have representational right to represent the inclusive of sub-licensees

The taxpayer obtained license to use/get used Fusion BT Technology (Cry 1Ac, Cry1Ab) from M/s Bio-century Transgene (China) Co Ltd, including the right under agreement to multiply cotton seed containing Fusion Bt Technology (Cry 1Ac Cry 1AB) for transferring the technology to the sub-licensees. The taxpayer in turn had given seven sub-licenses. Based on the agreement between the taxpayer and the sub-licensees where the terms and conditions of the license between all seven sub-licensees and based on various statements recorded under Section 14 of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 the issue in question was whether the activities undertaken by them of giving rights to sub-licensees would be covered under franchise services. The matter reached before the CESTAT.

CESTAT held that the foremost pre-requisite to qualify as taxable service is that the franchisee should have been granted representational right to sell or manufacture goods or to provide service or undertake any process identified with franchisor, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved. In a franchisee transaction, franchisee loses his individual identity and represents the identity of a franchisor to the outside world. The department failed to show that the taxpayer granted representational rights to sub-licenses to sell or manufacture or provide identified services.

The taxpayer had given the technology to the sub-licensees to further multiply for onward sale by them to the farmers for the purpose of growing commercial crop hence they were neither entitled to any 'representational right', nor entitled to grant/have actually granted any representational right to the sub-licensees. Hence, the CESTAT held that activity in question would not be taxable as franchise service

Global Transgene Ltd v Commissioner of Central Excise, Aurangabad [2013-TIOL-1259-CESTAT-MUM]

Financial lease does not encapsulate operating lease agreement in absence of option to lessee to purchase asset, hence not liable to service tax

The Taxpayer was engaged in providing aircraft parts/equipments to airlines on lease for fixed period on payment of monthly lease charge. The question in dispute was whether the aforesaid arrangement, in the absence of clause categorically substantiating that it was a financial lease, could be stated to be a financial lease and hence liable to service tax. The matter reached before the CESTAT.

CESTAT Delhi, relying on the decision of Association of Leasing and Financial Services Company [2010(20) STR 417 SC] held that an agreement where no component of finance existed, did not constitute a financial

lease. Financial lease did not cover operating lease agreement where option was not given to lessee to purchase the said assets. In the above mentioned arrangement, there existed no clause in the agreement whereunder an option would be given to the airlines to purchase the asset or have effective ownership of the asset and no evidence to show that agreement covers 75 percent or more of the estimated economic life of the asset. The lease Agreement not being a financial lease was held not to be liable to service tax.

CST Delhi v Lufthansa Technik Service India P Ltd [2013 (31) STR 730 (Tri-Del)]

III. VAT/ CST/Other State Level Taxes

High Court Decisions

Sales made by the taxpayer exempted but purchases made from unregistered dealers not exempted under Section 5(3) of Central Sales Tax Act, 1956

Taxpayer purchased goods from unregistered dealers and supplied the same to exporters who exported them, who eventually sold in course of export outside country. The question in dispute was whether such sale or purchase of goods can be said to take place in course of export.

The matter reached before the Rajasthan HC which noted that as per Section 5 of the Central Sales Tax Act, 1956 ('CST Act'), last sale or purchase of any goods preceding sale or purchase occasioning export of those goods out of territory of India, shall be deemed to be in course of such export. The HC held that purchases made from unregistered dealers would not be covered under this concept of penultimate sales and wouldn't be eligible for the benefit of Section 5(3) of CST Act.

Assistant Commercial Taxes Officer, Jodhpur v Jodhpur Arts & Crafts House [2013 (40) STT 334 (Rajasthan)]

Tribunal Decisions

Defatted soya flour obtained from soya bean cannot be treated as "flour" under the West Bengal Value Added Tax Act, 2003 hence subject to tax

The taxpayer was engaged in the manufacture of "defatted soy flour" and imported it from Indore into West Bengal on stock transfer basis. In absence of way bill being produced for import, the goods were seized under Section 76 of the West Bengal Value Added Tax Act, 2003 ("VAT Act"), irrespective of relevant stock transfer invoices and consignment notes being produced before the authorities.

The seizure was challenged by the taxpayer on the ground that what was imported was 'flour' and not liable to VAT. The matter reached the West Bengal Tax Tribunal

which held that the seizure was not illegal or irregular. It noted that items mentioned at entry 27 A to Schedule A of the VAT Act are paddy, rice, wheat, flour, atta, maida, suji, besan and sattu. These are all obtained through various modes of grinding of the grain wheat. The intent of the legislature was to declare wheat related items including "flour "as tax free. Defatted soya flour being a derivative of soya bean is obtained through a series of physical and chemical processes and hence taxable under the VAT Act. Being a completely unique entity the same cannot be covered under the heading "flour" under entry 27 A of Schedule A to the VAT Act

Ruchi Soya Industries Ltd v STO, Duburdih Check-post (2013 (063) VST 0141]

IV. CUSTOMS

High Court Decisions

Exemption under Notification No 32/97 Cus available subject to fulfillment of condition of jobbing, even if 30 percent raw materials procured domestically

The taxpayer was engaged in the manufacture of chemicals. Exemption was sought in terms of Notification No 32/97 Cus, dated April 1, 1997 which is subject to the condition that the imported goods would be used for execution of an export order placed on the importer by the supplier of goods by jobbing. Further a value addition of 10 percent or more in exported product over value of imported goods was required.

The matter reached before the Bombay HC. The HC upheld taxpayer's availment of the exemption and held that since the word jobbing was not categorically defined in the aforesaid notification, general meaning would be applied to the word jobbing i.e. carrying out work. Benefit could not be denied on the ground that indigenous material to the extent of 30 percent had been used in the jobbing process to obtain the exported product. The same would require addition of words to the aforesaid notification which was not permissible. The exemption notification had to be strictly read without addition or subtraction of words.

CC (Imports), Mumbai v Sujag Fine Chemicals (India) Ltd. [2013 (295) ELT 32 (Bom)]

Non production of original and duplicate copies of ARE-1 does not invalidate rebate claim

The Taxpayer was engaged in the business of manufacture of Polythene Insulated Jelly filled Optical Cables and Fibre cables used in telecommunication falling under the Tariff head 85.44 of the Central Excise Tariff and export thereof. The dispute in question related to the claims of rebate filed by the taxpayer under Rule 18 of the Central Excise Rules, 2002 and the matter reached before the Bombay HC.

The HC held that the taxpayer was eligible for rebate claim on the basis of bills of lading, banker's certificate of inward remittance of export proceeds and certification

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by Customs authorities on triplicate copy of ARE-1, even if original and duplicate copies were not produced. The procedure under Notification No 19/2004 (NT), was only to facilitate the process of rebate application and enables the authority to be satisfied that the requirement of goods having being exported and being of duty paid character are met. The procedure so laid down was directory in nature and could not be construed as mandatory.

UM Cables Limited v Union of India [2013 (293) ELT 641 (Bom)]

V. CENTRAL EXCISE

Supreme Court Decisions

Creams containing pharmaceutical contents and primarily used for curing purpose are to be classified as medicaments under Heading 33.03 of the Central Excise Tariff Act, 1985 irrespective of proportion of its pharmaceutical constituents and whether sold without a prescription across the counter

The dispute in question was whether the product "Moisturex" was a medicament for cure or a cosmetic product for skin care. This classification debate had significant tax-arbitrage consequences. The taxpayer was classifying the product as 'medicament' for curing ailment relating to skin, under Heading 33.03 of the Central Excise Tariff Act, 1985 ("CETA Act") subject to 15 percent duty.

The SC upheld the contention of the taxpayer and pointed out that the deciding factor is whether the product contains pharmaceutical ingredients that have therapeutic or prophylactic or curative properties, the proportion being irrelevant. The product in dispute was undoubtedly prescribed by the dermatologists for treatment of dry skin conditions, the constituent ingredients being therapeutic and prophylactic. The fact that product was sold over the counter without prescription did not qualify it immediately to be a cosmetic product. If the products primary function was cure and not care it was a medicament.

CCE, Mumbai-IV v Ciens Laboratories, Mumbai [2013 (295) ELT 3 (SC)]

Liability of a purchaser of auctioned assets to pay for unpaid liabilities on the assets

The taxpayer defaulted in paying a loan to the State Financial Corporation resulting in its land, building and plant & machinery ("assets") being auctioned. By virtue of a Sale Deed and Agreement, the auction sale was made free from encumbrances with a clause stating that the statutory liabilities arising out of the assets stated to be borne by the purchaser. Certain unpaid excise duty had to be recovered and hence the dispute in question was whether the Excise department could recover the amount from the purchaser.

The matter finally reached before the Supreme Court. Setting aside the impugned

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judgment of the HC, the SC held that it is the taxpayer and not the purchaser who is liable for the recovery action for the excise duty. The SC noted that the expression in the Sale Deed and Agreement mentions the statutory duties arising out of the land and building or the plant and machinery and held that excise duties were not statutory duties arising from any of these assets, but became payable on the manufacture of excisable items by the erstwhile owner/taxpayer, hence it was the taxpayer who was liable to pay the same. The SC took note of the fact that a proviso has been added in Section 11 of the Central Excise Act from September 10, 2004 (which may lead to a different conclusion) but the relevant period in this case was prior to September 10, 2004 and hence would not be impacted by this proviso. The SC also went on to point out that the conclusion could have been otherwise had the transaction been of purchase of the entire business as such, rather than a purchase of assets as was the case here.

Rana Girders Ltd v UOI [2013 (295) ELT 12 (SC)]

Tribunal Decisions

Discount received by the taxpayer in respect of pre-payment of deferred sales tax not to be treated as additional consideration, hence not liable to excise duty

The taxpayer had opted for a scheme of pre-payment of sales tax (for which a deferred payment option was available from the State Government) consequent to which a discount was also received vis-a-vis the quantum of sales tax to be deposited by the taxpayer. The tax authorities alleged that since the taxpayer had collected sales tax from buyers at the full statutorily prescribed rates, the discount received was additional consideration and the same was leviable to excise duty as per rule 6 of Valuation Rules, 2000. The matter reached before the Central Excise and Service Tax Appellate Tribunal ("CESTAT").

CESTAT held that one-off dispensations by the State Government vis a vis quantum of sales tax liability under the Package scheme of Incentives subsequent to the clearance of goods could not be a cause for redetermination of excise duty liability and relied upon an earlier tribunal decision in this regard. Hence the taxpayer was not liable to pay excise duty on the discount received vis a vis deferred payment of sales tax from the State of Maharashtra.

Automag India P Ltd v CCE, Pune-I [2013-TIOL-1275-CESTAT-MUM]

Husk field boilers and parts to be considered as agricultural and municipal waste conversion device producing energy for benefit under Notification No 6/2000-CE

The taxpayers were engaged in the manufacture of Husk fired boilers and parts thereof. The issue in question was whether they were entitled to the benefit of Notification 5/98-CE as amended by Notification 6/2000-CE during the impugned period. The matter reached before the CESTAT.

As per CESTAT, the photographs and description of the goods provided by the taxpayer evidence that they are manufacturing boilers in which agricultural or municipal waste was used for burning and on burning such waste, water gets heated to produce steam. CESTAT also noted that the CBEC had clarified that "husk fired boiler" can be considered as agricultural and municipal waste conversion device producing energy. Accordingly, the CESTAT held that benefit of the notification was available to the taxpayer.

CCE, Pune –III v Vikrant Inds [2013-TIOL-1318-CESTAT-MUM]

Notification & Circulars

New notification amending the CENVAT Credit Rules 2004 ("CCR") vis a vis credit reversal on clearance of capital goods

This notification amends Rule 3(5A) of CCR to provide for credit reversal on capital goods cleared as waste / scrap on "transaction value" instead of "depreciated value" thereby restoring pre-2012 scrap / waste credit reversal provisions.

Notification No 12/2013-CE (NT) dated September 27, 2013

DGFT notification providing for checks-and-balances vis a vis availment of incentive scrip eligible on Incremental exports

The DGFT vide these notifications have tried to bring in certain checks-and – balances vis a vis availment of incentive scrip eligible on incremental exports as per para 3.14.4 and 3.14.5 of Foreign Trade Policy. For the exports made during last quarter of FY 2012-13 the benefit of scheme will be limited to lower of following: 25 percent growth compared to corresponding quarter of FY 2011-12; or incremental growth of INR 10 Crores calculated similarly as foregoing. Claims in excess of this value will be subjected to greater scrutiny by Regional Authority.

Notifications 43 and 44 (RE-2013) / 2009-2014 dated September 25, 2013

CBEC circular clarifying that no service tax is payable on services rendered in relation to education under the new negative list based service tax regime

The circular clarifies that Notification No 25/2012-ST exempts "auxiliary educational services" and "renting of immovable property" services provided to educational institutions and accordingly, services of transportation, hostels, house-keeping, canteens etc would be exempt from service tax.

Circular No 172/7/2013 - ST dated September 19, 2013

CBEC circulars clarify the circumstances on which arrests to be made under Customs, Excise and Service Tax

CBEC has issued circulars on provisions relating to arrest and bail under Service Tax, Central Excise and Customs law whereunder it has called for utmost care and caution while exercising power of ar-

rest and has prescribed that approval for arrest would be granted only where intent to evade duty is evident; CBEC has also prescribed guidelines and modalities to be complied by authorities at the time of arrest

Circular No 974/08/2013-CX issued under Excise, Circular No 38 / 2013-Cus under Customs and Circular no 171/6/2013-ST under service tax; all dated September 17, 2013

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