September 2013

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

Foreword

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

The Forum constituted by the Government under Dr Parthasarathi Shome has commenced meetings with the industry representatives for exchange of views on tax related issues that concern the industry as a whole. FICCI has had three Interactive sessions so far with Dr. Shome and his team comprising of officials from CBDT and CBEC on August 21, 2013, August 29, 2013 and September 4, 2013, wherein, FICCI represented the taxation issues of the 'Financial Services Sector', 'Infrastructure Sector' and 'Manufacturing Sector' respectively. Another meeting is slated for 25th September, 2013. The interaction has been useful and we hope that Government will issue clarifications on some of the issues raised in due course of time.

FICCI has commenced the work of preparation of the Pre Budget Memorandum for the year 2014-15. We have already informed all our constituents to furnish their suggestions for inclusion in the Memorandum by 7th October, 2013. We propose to submit the Memorandum to the Government in the second week of November, 2013. We would look forward to your valuable suggestions.

On the taxation regime, the Central Board of Direct Taxes notified the much awaited Safe Harbour Rules inviting public comments. These rules shall be applicable for Assessment Years 2013-14 and 2014-15 for the recommended sectors and shall apply only where a taxpayer exercises his option to be governed by such rules, in a specified form to be furnished to the assessing officer before the due date of filing of return of income. FICCI, after consultation with its members, had submitted its comments on draft Safe Harbour Rules to the Government. The final rules are expected to be notified soon.

An interesting case has come up before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) regarding levy of Service Tax on the installation and erection of imported machinery when the price of the machinery includes charges for the said services. The CESTAT observed that there is a single contract between the taxpayer and the foreign supplier which relates both to the supply of machinery and its installation; no separate payment has been charged for the services rendered. Taxpayer has discharged the applicable Customs duty on the whole amount (including the value of the services rendered) envisaged in the contract. Therefore, prima facie it is not liable to pay service tax again on the services portion. The CESTAT accordingly granted stay to the petitioners.

On the GST, the Empowered Committee of State Finance Ministers is expected to meet on the 19th September, 2013 to review the reports of the three committees set up earlier this year to lay down the framework of GST covering the exemptions, thresholds, interstate commerce, GST Network etc.

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

Writ petition lies only after alternate remedy exhausted; Supreme Court quashes favourable High Court order

The taxpayer purchased a plot of land from Samutkarsh Co-operative Housing Society being developed by Savvy Infrastructure Ltd. (Savvy). In 2008, a search was conducted under Section 132 of the Act in the premises of the Society and Savvy. During the search, the Assessing Officer (AO) seized certain documents under Section 132A of the Act. One of the documents was a loose sheet of paper containing a list of members under the heading 'Samutkarsh Members Details'. One of the names was that of the taxpayer and certain details were mentioned against each name in different columns. On the basis of these documents the AO issued notices under Section 153C to the taxpayer to furnish his returns of income for Assessment Years (AY) 2001-2002 to 2006-2007. Upon receipt of the said notice, the taxpayer requested the AO to provide copies of the seized material. The AO supplied copies of three loose sheets of paper which, according to the taxpayer, did not belong to him. Under these circumstances, the taxpayer moved a writ petition before the Hon'ble Gujarat High Court challenging the aforesaid notices. The Gujarat High Court quashed the notices by holding that as the said documents undoubtedly did not belong to the taxpayer the condition precedent for issuance of notice was not fulfilled and therefore the action taken under Section 153C of the Act stood vitiated.

Though the Supreme Court did not express any opinion on the correctness or otherwise of the construction that was placed by the High Court on Section 153C of the Act, it held that as alternate remedy was available to the taxpayer, the High Court ought not to have entertained the writ petition and instead should have directed the taxpayer to file a reply to the said notices. Upon receipt of a decision from the AO, if for any reason taxpayer was aggrieved by the said decision, this could be questioned before the forum provided under the Act. Accordingly, the order of the Gujarat High Court was reversed.

It is worthwhile to note that there is no alternate remedy available under the Act against the issuance of notice under Section 153C of the Act.

CIT v. Vijaybhai N. Chandrani [TS-343-SC-2013]

High Court Decisions

Only CBDT can condone a delay in filing a return

The taxpayer filed a belated return under Section 139(4), for AY 2009-10, claiming deduction under Section 80IB(10) of the Act. On the premise of applicability of Section 80AC, the AO disallowed the deduction under Section 80IB. Section 80AC provided that no deduction under Section 80IB shall be allowed unless the return is filed on or before due date specified under Section139(1), a condition that was not satisfied in the present case. The taxpayer also made a representation explaining the delay in submitting the return. The taxpayer filed a writ petition against the said order of the AO before the Karnataka High Court. The taxpayer questioned the vires of Section 80AC. The taxpayer also highlighted that the returns for AY 2006-07, 2007-08 and 2008-09 had been filed within the due date under Section 139(1), in compliance with the requirement under Section 80AC. The Revenue contended that under Section 119(2)(b)&(c), it was the CBDT alone which had the jurisdiction to consider the taxpayer's request for condonation of delay in filing return, in the context of claiming deduction under Section 80IB read with Section 80AC of the Act.

The Karnataka High Court confirmed the Revenue's contention and directed the taxpayer to file the necessary application enclosing all material information and records to the CBDT for a decision over condonation of the delay in filing the returns. The High Court also stated that if the CBDT had issued any Circular/instructions delegating such powers to its officers, then the CBDT should forward those application papers to the concerned delegate to consider the application and pass orders in accordance with law. The High Court further stated that that if the taxpayer filed the application with the CBDT within one month, the CBDT or its delegates would pass an order within five months (from the date of application).

Unique Shelters P. Ltd. v. Union of India [TS–385–HC–2013 (Kar)]

Delhi High Court rules in favour of expatriate employees on various tax issues

Recently, the Delhi High Court pronounced a composite judgment disposing several appeals in the case of Yoshio Kubo and others pertaining to critical aspects of taxability in the case of expatriate employees.

In its judgment, the High Court held that:

- Amounts paid directly by the employer to discharge its employee’s income-tax are a non-monetary perquisite and eligible for exemption under Section 10(10CC) of the Income-tax Act, 1961 (the Act).
- Multiple stage grossing up would not be applicable in the case of expatriates exemption benefit under Section 10(10CC).
- Employer’s contributions to overseas social security, pension and medical/health insurance do not qualify as a perquisite under Section 17(1)(v) of the Act and are not taxable in the hands of the employees.
- Tax borne by the employer is to be excluded while computing the perquisite value of Rent Free Accommodation under the Act.
- Hypothetical tax deducted from the salary income of the expatriate employees under a scheme of tax equalization, is not taxable in their hands.
- Refund of excess TDS received by the expatriate employees, which was not due to them under the terms of the overseas assignment,

should not be taxed in the hands of the employees.

- Tax Consultant's fees paid by the employer, under company policies, for ensuring proper expatriate tax compliances for the expatriates was held not taxable in the hands of the expatriate employees.

Yoshio Kubo & Ors. [TS-361-HC-2013(DEL)]

Tribunal Decisions

Force of Attraction Rule does not apply to services rendered outside India

The taxpayer, a tax resident of the USA, had entered into an agreement with its group company in India (Indian Co) for providing certain marketing and management services to the Indian Co. A part of the managerial services were provided by the taxpayer in India through its employees. Accordingly, a Service PE of the taxpayer was created in India. The taxpayer offered to tax the consideration received from the Indian Co towards rendering such part of managerial services in India.

The issue for consideration before the Mumbai Tribunal was whether the consideration for marketing services rendered outside India was taxable in India on account of the Force of Attraction Rule (FoA) contained in Article 7 of the India-USA tax treaty.

Based on the facts of the case, the Tribunal, inter-alia, observed and held that for the FoA to be applicable, the following two essential conditions should be satisfied:

- Business activity should be carried on in the state where the PE is situated; and
- Business activity carried on must be of the same or similar kind as those effected through the PE.

Accordingly, in the instant case, the consideration for services rendered outside India does not trigger taxation in India as, inter-alia, the provisions relating to the FoA are not satisfied.

WNS North America Inc [ITA No. 2944/Mum/2012]

Disallowance under Section 40(a)(ia) of the Act for TDS default applicable to expenses paid during the year; Allahabad High Court ruling in Vector Shipping Services a mere 'obiter dicta'

The taxpayer was involved in the business of stock broking. In its assessment order the AO had disallowed a transaction charge amounting to Rs. 98,198 under Section 40(a)(ia) of the Act which was deleted by the Commissioner of Income-Tax (Appeals) [CIT(A)]. Aggrieved by the Order of the CIT(A), the Revenue had preferred an appeal before the Tribunal. The taxpayer also filed a cross objection against the disallowance on the basis that no amount was outstanding at the end of the year and hence the disallowance could not have been made under Section 40(a)(ia) of the Act. In support of the cross objection the taxpayer relied on the Special Bench decision in Merilyn Shipping and Transports [TS-220-ITAT-2012(VIZ)] and also relied on the recent decision of the Allahabad High Court in the case of ACIT v. Vector Shipping Services (P) Ltd. [TS-352-HC-2013(ALL)]. However, the Calcutta HC in the case of CIT

v. Crescent Export Syndicate [TS-199-HC-2013(CAL)] and CIT v. Jakir Hossain Mondal (ITA No. 31 of 2013 dated 4 April 2013) and Gujarat High Court in the case of CIT v. Sikandarkhan N. Tunvar [TS-186-HC-2013(GUJ)] reversing the Special Bench decision in the case of Merilyn Shipping (supra) has held that disallowance under Section 40(a)(ia) is to be made irrespective of the fact that the amount under dispute is outstanding at the year end or not.

In this context the Mumbai Tribunal observed that in Vector Shipping (supra) it was only a passing remark by the Allahabad High Court that no disallowance under Section 40(a)(ia) should be made when the amount under dispute is not outstanding and hence it is 'obiter dicta'. Contrarily, the Calcutta HC in the case of Crescent Exports Syndicate, Jakir Hossain and the Gujarat HC in the case of Sikandarkhan had dealt with this issue on merits arising out of the Special Bench decision in Merilyn Shipping and had specifically disapproved it. Therefore, the aforesaid High Court decisions constituted the ratio decidendi of these cases. Thus the Mumbai Tribunal deciding the issue in favour of the Revenue held that it is the ratio decidendi of a judgment which prevails upon a contrary obiter dicta of another judgment.

ACIT v. Rishti Stock and Shares Pvt. Ltd. [TS-359-ITAT-2013(Mum)]

Interest expenditure has to be netted against interest income and only the difference, if any, can be considered for disallowance under Section 14A read with Rule 8D

In AY 2008-09, the taxpayer invested INR 9.5 million in shares on which it earned INR 300 as dividend. The AO applied Rule 8D and made a disallowance of INR 1.5 million. The taxpayer claimed that no expenditure had been incurred to earn the dividend income on the basis that while the interest expense was INR 18.3 million, the interest income was INR 18.6 million and there was a net surplus interest income of INR 0.379 million. The CIT(A) held that the AO had not established a nexus between the expenditure incurred and the tax-free income and that as the taxpayer had net positive interest income, there could be no disallowance of the interest expenditure under Section 14A read with Rule 8D. He sustained the disallowance at 0.5 percent of the average investment.

The Mumbai Tribunal dismissing the department's appeal held that no nexus had been established by the AO between the expenditure incurred by the taxpayer and the tax-free income earned by him. Further, as the interest income was more than the interest expense and the taxpayer had net positive interest income, the interest expenditure cannot be considered for disallowance under Section 14A and Rule 8D.

ITO v. Karnavati Petrochem Pvt. Ltd. (ITA No. 2228/Ahd/2012 dated 5 July 2013)

Payer liable for default of tax deduction at source though expense not claimed as deduction

The taxpayer relied on the rulings in the case of Hindustan Coca Cola Beverage P. Ltd. v. CIT (2007) 293 ITR 226 (SC), CIT v. Adidas (I) Marketing P Ltd (2007) 288 ITR 379(Del)] and Vodafone Essar Ltd v. DCIT (2011) 135 TTJ 385 (Mum). Relying on SB ruling in Mahindra and Mahindra Ltd. v. DCIT (2009) 313 ITR (AT) 263 (Mum SB) the taxpayer further argued that the AO is not entitled to pass any order under Section 201/201(1A) of the Act if no action is initiated in the case of the payees who are otherwise liable to pay tax and the time limit for making the assessment under Section 147 has already expired. Relying on the ruling in Pfizer Ltd. v. ITO (2013) 55 SOT 277, the taxpayer also pointed out that the interest paid to sister concerns was not claimed as a deduction and therefore, proceedings under Section 201 and 201(1A) of the Act were invalid.

The Cochin Tribunal held that so long as the amount of interest is income in the hands of the recipient, TDS is liable to be made even if the payer has disallowed the expenditure under Section 40(a)(ia) or has not claimed it as expenditure at all. The Tribunal distinguished the ruling in Pfizer Ltd. on facts. The Tribunal observed that the expression 'any income by way of interest' should be viewed from the angle of the payee/recipient and not from the angle of the payer and therefore, the accounting treatment given by the payer may not be relevant for purposes of Section 194A. The Tribunal also observed that it is a settled position that the Revenue shall not be entitled to recover the TDS amount from the payer if the recipient has paid tax on it and thus the objective of the provisions of Section 201 is only to compensate the Government for the failure of taxpayer to deduct TDS. The Tribunal however, accepted the legal position that the taxpayer cannot be treated as an assessee in default if the payees have directly paid tax on the said interest income.
The taxpayer had credited interest to its sister concerns during AY 05-06, on which it had not deducted tax at source (TDS) under Section 194A of the Act. Therefore, the AO raised a demand under Section 201 treating the taxpayer as an 'assessee in default'. The AO further levied interest under Section 201(1A) of the Act. The taxpayer had not claimed deduction for the interest payment while calculating taxable income. The CIT(A) ruled against the taxpayer. Aggrieved, the taxpayer preferred an appeal before the Cochin ITAT. The taxpayer contended that it could not be treated as an assessee in default if the payees had directly paid tax on the said interest income.

Agreenco Fibre Foam (P) Ltd v. ITO [TS–395–ITAT–2013 (Coch)]

Decision of a non-jurisdictional High Court is not binding on other High Courts and Tribunals

The taxpayer was in appeal before the Tribunal on the issue relating to allowability of deduction under Section 80-IA(4) of the Act. The Tribunal after considering the entire facts and circumstances of the case observed that the taxpayer is a developer of infrastructure projects and is entitled for deduction under Section 80-IA(4) of the Act. In spite of such direction of the Tribunal the AO issued a fresh show cause notice and proceeded to pass a consequential order thereafter, declining to grant deduction under Section 80-IA(4) of the Act. The tax department claimed that the Tribunal has remitted the issue back to the file of the AO for fresh consideration. Therefore, the AO proceeded to enquire about each project, so as to determine the projects which are entitled for deduction under Section 80-IA(4) of the Act, while giving effect to the order of the Tribunal. Subsequently, the taxpayer filed a Miscellaneous Application (MA) on the ground that certain mistakes apparent from record have been found into the same.

While disposing of such MA, the Tribunal has interalia broadly discussed the following important aspects of a binding nature of the Supreme Court/High Court's decision:

- In India, the Supreme Court is the highest court of the country. As per Article 141 of the Constitution of India the law declared by the Supreme Court is binding on all Courts in India.
- Though there is no provision like Article 141 which specifically lays downs the binding nature of the decisions of the High Courts, it is a well accepted legal position that a single judge of a High Court is ordinarily bound to accept as correct judgments of courts of a co-ordinate jurisdiction and of the Division Benches and of the Full Benches of their court and of the Supreme Court.
- Equally well settled is the position that when a Division Bench of the High Court gives a decision on a question of law, it should generally be followed by a co-ordinate Bench in the subsequent case.
- It is well settled that the decision of one High Court is not a binding precedent on another High Court.
- Though there is no specific provision making the law declared by the High Court binding on subordinate courts, it is implicit in the power of supervision conferred on a superior Tribunal that the Tribunals subject to its supervision would confirm to the law laid down by it.
- The law declared by the Supreme Court being binding on all courts in India, the decisions of the Supreme Court are binding on all courts, except however the Supreme Court itself, which is free to review the same and depart from its earlier opinion if the situation so warrants.
- The decisions of the High Court are binding on the subordinate courts and authorities or Tribunals under its superintendence throughout the territories in relation to which it exercises jurisdiction. It does not extend beyond its territorial jurisdiction and at best it can only have persuasive value.

Sushee Infra Pvt. Ltd. v. DCIT [TS-306-ITAT-2013(HYD)]

No presumptive distribution of partnership's assets on dissolution

The taxpayer was dissolved with effect from 1 April 2000 vide dissolution deed was executed on 10 April 2000. The deed of dissolution provided that one of the properties, being land at Kolhapur, would remain the property of the firm and same is to be sold by the firm and after paying all the debts/liabilities balance amount was to be distributed amongst the partners. The property remained to be the property of the taxpayer and it was sold by the taxpayer on 27 March 2003. The sale deed for the sale of the property was actually executed on 29 March 2003 and hence, capital gains was required to be assessed in AY 2003-04 in the hands of the taxpayer.

The AO, applying the provisions of Section 2(47) read with Section 45 of the Act, taxed the capital gain on in the hands of the taxpayer in AY 2001-02. The CIT(A) confirmed the addition made by the AO.

The Pune Tribunal held that for application of Section 45(4) it is not only sufficient that there is dissolution but there must be transferred by way of distribution of the assets. Since the property was never transferred to the partners on execution of the deed of dissolution, the partners cannot be deemed to be the owners of the said property. The AO was not right in assessing capital gains in year of dissolution, based on presumption of transfer to partners. Capital gains would be assessable in hands of the firm only on actual sale of the property. The Tribunal also held that the capital gains would be taxable in AY 2003-04 in the hands of the taxpayer which has sold the land.

S. Balmukund Paper Merchant v. ITO [ITA No. 593/PN/2011 (Pune)]

Accumulated profits taxable as 'deemed dividend' in shareholding ratio, not entirely

The taxpayer was holding 14 percent shares in an Indian Company in which public are not substantially interested. The taxpayer had received a loan amounting to INR 7.5 million prior to 31 March 2002 and further INR 7.6 million was received during the FY 2002-03 from the said company. The credit balance in profit & loss account of the Company as on 31 March 2002 was INR 19.5 million and profit for the FY 2002-03 was INR 26.1million. Apart from the taxpayer, there were three other shareholders owning more than 10 percent shares in the company and who had received total loan amounting to INR 29.9 million prior to 31 March 2002 and INR 30.6 million during the FY 2002-03.

The AO considered that loans given to the shareholders till 31March 2002 were more than the accumulated profit of INR 19.5 million and therefore there was no accumulated profit till 31 March 2002. Therefore, the AO taxed INR 3.6 million being 14 percent of the total accumulated profit of INR 26.1 million, i.e. profit proportionate to the shareholding of the taxpayer, as deemed dividend under Section 2(22)(e) of the Act.

The Commissioner of Income-tax (CIT) set aside the order of the AO directing that the entire loan of INR 7.6 million should be treated as deemed dividend under Section 2(22)(e) of the Act. For the purpose the CIT considered accumulated profit to be INR 43.6 million including balance of INR 19.5 million till 31 March 2002. The CIT further observed that there is nothing in Section 2(22)(e) suggesting restriction of taxability in proportion to the shareholding of the taxpayer.

The Pune Tribunal held that loans advanced to shareholder in preceding years need to be reduced from opening balance of accumulated profit, irrespective of whether the same had been assessed as deemed dividend earlier or not is a possible view adopted by AO and is supported by judicial precedents. Therefore the CIT is denuded from exercising his power under Section 263 of the Act unless the CIT finds such view to be erroneous on the basis of any contrary judgment or legal position. As the loans covered under Section 2(22)(e) given during the year exceeded the available accumulated profits, the Tribunal also did not find any error in the AO not taxing the entire loan given to the taxpayer but restricting it in proportion of the shareholding of the taxpayer and held that there is no justifiable ground for invoking Section 263 of the Act.

Kewalkumar Jain v. ACIT [TS-383-ITAT-2013(PUN)]

Upholds tax exemption on proprietorship succession, McDowell ratio not applicable

During the previous year ending on 30 March 2009, the taxpayer transferred all the assets and liabilities of his proprietorship concern to a private limited company as per the Deed of Succession. In the Deed of Succession, the taxpayer had revalued the assets at INR 9.63 billion and received 1,80,000 shares of INR 50 each in the company at a premium of INR 53,450 per share aggregating to INR 9.63 billion as consideration for the transfer. The net worth of the proprietor concern was INR 16.1 million. The taxpayer had claimed exemption under Section 47(xiv) of the Act in respect of the said transfer.

The AO denied the exemption under Section 47(xiv) on the basis that the taxpayer had not complied with the clause (c) of proviso to Section 47(xiv), as the taxpayer had transferred the assets as values higher than the book values. The AO treated INR 9.61 billion, being the difference between consideration of INR 9.63 billion and net-worth of INR 16.1 million as business income of the taxpayer.

The CIT(A) deleted the addition.

On department's appeal the Tribunal held that the taxpayer had duly complied with the condition as stipulated under Section 47(xiv)(c) of the Act. This proviso only requires that same proprietor does not receive any consideration or benefit directly or indirectly in any form or manner other than by way of allotment of shares in the company. The words 'other than by way of allotment of shares in the company' qualify the words 'does not receive any consideration or benefit' as well as 'directly or indirectly'. This clearly denotes that proviso (c) permits receiving of consideration or benefit directly or indirectly by way of allotment of shares in the company. Further, the decision of Mcdowell & Co. will not be applicable to the current case as the provision of section 47(xiv) has been incorporated by the government through the Finance Act and therefore same cannot be said to be illegal and the transactions being carried out according to that provision cannot be regarded to be against the national interest and for tax evasion.

ACIT v. Joe Marcelinho Mathias [ITA No. 43/PNJ/2013 (Panaji)]

Consideration for sale of shares kept as Escrow cannot be attached for demand on the company

The petitioner along with other shareholders of the taxpayer entered into an SPA for sale of their shareholding in the taxpayer. A part of the sale consideration was kept in Escrow. Escrow agreement provided that in case certain tax liabilities arise in the taxpayer, the Escrow agent should release the escrow amount to the purchaser.

The specified tax liabilities were raised on the taxpayer. Considering the agreement that Escrow amount was linked to tax demand, the AO claimed the Escrow amount, and after initial denial, the Escrow agent paid the same to the AO.
On a writ the High Court held that recovery proceedings under Section 226(3) of the Act are in the nature of garnishee proceedings whereby a garnishee is called upon to directly pay a debt to the creditor of a person to whom the garnishee is indebted. The provision neither confers jurisdiction nor provides machinery for an AO to adjudicate the indebtedness of a third party to the taxpayer. Thus, it enable the AO to recover only in cases where a third party admits to owing money or holding any money on account of the taxpayer or in cases where it is indisputable that the third party owes money to or holds money on account of the taxpayer. The decision of the AO was set aside and was directed to forthwith refund the amount recovered from the Escrow agent.

AAA Portfolios P. Ltd & Ors. [TS-340-HC-2013 (Del)]

Disallowance under Section 14A to be considered for computation under Section 115JB of the Act

The taxpayer had received exempt dividend income of INR 2.2 million, however, had not considered any disallowance under Section 14A in relation to such exempt income. The AO disallowed INR 0.7 million under Section 14A and also considered added the same in computation of book profit under Section 115JB of the Act. Both the adjustment were confirmed by the CIT(A).

The Tribunal held that the amount disallowable under Section 14A of the Act is always a part of the expenses specifically debited to the profit and loss account and hence the amount disallowable under Section 14A of the Act is covered under clause (f) of the Explanation 1 to Section 115JB and therefore, the same needs to be added back to the net profit for computing 'book profit' under Section115JB of the Act.

ITO v. RBK Share Broking Pvt. Ltd. [TS-338-ITAT-2013(Mum)]

Ahmedabad Tribunal held that no transfer pricing adjustment should be made on interest free advances to Associated Enterprises owing to commercial considerations

The taxpayer is primarily engaged in the business of manufacturing and sale of printing inks and other intermediate and allied products and had set up its subsidiary in the US (Micro USA) which carried out manufacturing activities with the base material supplied by the taxpayer. The international transactions with Micro USA included sale of goods and some guarantees/advances given by the taxpayer, which assisted Micro USA to borrow funds from banks/financial institutions. As per the transfer pricing study, advance issued by the taxpayer on behalf of its Associated Enterprises (AEs) was said to be in the nature of quasi capital and such advances were provided without any charge.

The Transfer Pricing Officer (TPO) held that these advances are in the nature of interest bearing advance and based on the weighted average cost of funds of the taxpayer, 11 percent p.a. should be charged as interest on the advances. The TPO further held that the average credit period allowed to the AE was higher than the average credit period allowed to the unrelated third party customers and for the excess days, the TPO charged interest at 11 percent p.a. on the receivables from the AE. The CIT(A) largely upheld the TPOs order except directing to rework the addition by applying international bank rates i.e. the London Inter-bank Offered Rate (LIBOR) or American rate of interest as applicable to the transactions under consideration.

The Tribunal agreed with the taxpayer's contention that there should be no interest on the advances given to the AE based on the commercial and business considerations involved and held:

- The advance was in the nature of quasi capital. It was not open to the taxpayer to subscribe to the equity capital without prior obtaining approval from the Reserve Bank of India (RBI).
- Micro USA was also playing a very significant role in the taxpayer's sale and distribution chain in as much as the taxpayer was the sole vendor to the said concern so far as sales of raw material and semi finished goods were concerned.
- In the case the arm's length price (ALP) had to be determined in such transactions, the Comparable Uncontrolled Price (CUP) method could be applied, and LIBOR or any other bank linked rate was generally taken as a rate for a comparable uncontrolled transaction. In this regard, the Tribunal held that the typical LIBOR plus rate, related to transactions in which banks made advances with a motive of making profits from lending activities, should be applied.

  However, in the taxpayer's case, the rationale for advancing amounts was in lieu of pending RBI approvals in connection with its equity infusions and in this case, the two enterprises were mutually dependent for commercial reasons.
- On the basis of pure commercial factors and notwithstanding the management, capital and control relationship between the parties, such non-interest bearing advances were equally justified even if the taxpayer and Micro USA were independent enterprises.

Further, the Tribunal deleted the adjustment on the excess credit period offered to the AE due to following reasons: (a) Cost of funds blocked in the credit period is inbuilt in the sale price of the products; (b) Similar products were not sold to any other concern at any other price; (c) There was no standard credit period for the products sold to AE.

Micro Inks Ltd v. ACIT [2013] 36 taxmann.com 50 (Ahd)

The Delhi Tribunal held the TPO's action of splitting the composite royalty into technology royalty and trademark royalty as arbitrary

Maruti Suzuki India Limited (MSIL or the taxpayer) is a manufacturer of passenger cars in India. MSIL entered into a Technical Assistance and License Agreement (License Agreement) with Suzuki Motor Corporation, Japan (SMC) first in 1982 when it was an independent 100 percent Government of India (GOI) owned entity which granted MSIL the exclusive right to manufacture specific models of Suzuki cars by using licensed technology, know-how and the 'Suzuki' trademark owned by SMC. Based thereon, MSIL used the co-branded trademark 'Maruti-Suzuki' on its products starting 1982. Further, MSIL in 1992 and various other subsequent dates, entered into similar license agreements with SMC for other models of passenger cars, even as SMC acquired interest in MSIL during these years (54.12 percent shares by March 2003). MSIL paid lump-sum royalty as well as running royalty to SMC under the License Agreements.

For FY 2004-05, the TPO made an adjustment in relation to the advertising, marketing and promotion (AMP) expenses incurred by the taxpayer, using the Bright Line Test. Further, the TPO made an adjustment in relation to payment of royalty by bifurcating the composite royalty payment made by MSIL between 'use of technology' and 'use of brand name' with reference to the proportionate expenditures incurred by SMC on Research & Development (R&D) and on brand promotion as per its consolidated financial statements. The TPO held that a payment for use of SMC's brand name is not warranted when the same has been promoted by the taxpayer itself in the Indian market. The TPO also observed that the process of piggybacking of the 'Maruti' trademark by the 'Suzuki' trademark and co-branding as 'Maruti-Suzuki' resulted in impairment of the 'Maruti' brand value because 'Maruti' was a stronger brand in the Indian markets. The Dispute Resolution Panel (DRP) affirmed the action of the TPO subject to minor adjustment.

The Tribunal held that it was an independent decision of MSIL to use the co-brand trade mark 'Maruti-Suzuki'. The License Agreement entered into between the GOI and SMC in 1982 specifically provided for the use of a co-brand trade name/logo of the taxpayer and Suzuki whereas SMC acquired the controlling interest in MSIL in 2003. Therefore, there could not be application of any influence to manipulate royalty payments and erode the Indian tax base. As the terms and conditions of the agreement have remained unchanged since then, the License Agreement can be said to be at arm's length for FY 2004-05.

The Tribunal further held that the royalty paid by the taxpayer to SMC was under a single/indivisible contract which provided the taxpayer the exclusive right and license to manufacture and sell the licensed product. The primary intent of the license is transfer of technology and not trademark usage. The decision to use the 'Suzuki' brand name was taken in order to advance the taxpayer's own commercial interest. Thus, the TPO's conclusion that a portion of royalty paid to SMC was attributable to the use of the brand name is not sustainable.

The Tribunal also held that the Special Bench's decision in the case of LG Electronics India Private Ltd.1 has to be applied to determine the ALP of the AMP expenses incurred by the taxpayer. Expenditure incurred in connection with sales not to be brought within the ambit of AMP expenses. The Tribunal remitted the matter back to the TPO to decide the rate of AMP expenses by following the precedence laid down in LG India's case.

Maruti Suzuki India Limited vs. ACIT (ITA No. 5237/ Del/2011)

Delhi Tribunal allows proportionate taxability of stock options in the hands of expatriate employees

The Delhi Tribunal in the case of Robert Arthur Keltz, held that only proportionate perquisite value in relation to benefits under an Employee Stock Option Plan, pertaining to India specific jobs or activity performed by such employee, is taxable.

ACIT v. Robert Arthur Keltz, 35 Taxmann.com 424, Assessment Year 2007-08, dated 24 May 2013

Notifications/Circulars/ Press releases

India and Morocco sign a protocol amending the tax treaty

India and Morocco signed a protocol on 8 August 2013, amending the tax treaty. The protocol is based on international standards of transparency and exchange of information which will now allow effective exchange of information including banking information between tax authorities of the two countries. The protocol also provides that each country shall use its information gathering measures to obtain the requested information even though it may not need such information for its own domestic tax purposes. The amended tax treaty is expected to enhance mutual co-operation between India and Morocco.

Press release dated 8 August 2013 – www.pib.nic

Central Board of Direct Taxes notifies the additional information to be furnished along with Tax Residency Certificate

The Central Board of Direct Taxes (CBDT) vide Notification dated 5 August 2013 has amended Rule 21AB of the Income-tax Rules, 1962 (the Rules), which provides that a taxpayer who wishes to claim relief under any tax treaty shall be required to furnish certain prescribed information in the newly notified Form No. 10F.

The amended Rule 21AB of the Rules, inter-alia, also provides that if the prescribed information or any part thereof is already contained in the Tax Residency Certificate (TRC) obtained by the taxpayer, then, the taxpayer would not be required to furnish such particulars in Form No. 10F.

Further, as per the amended Rule 21AB of the Rules, the taxpayer should keep and maintain such documents as are necessary to substantiate the relevant information and an income-tax authority may require the taxpayer to provide such documents in relation to a claim of any relief made by the said taxpayer under the relevant tax treaty.

Notification No. 57/2013 [F.No.142/16/2013-TPL]/SO 2331(E), dated 1 August 2013

CBDT revises Rules relating to information required to be furnished to the tax authorities on account of payment made to non-residents

The CBDT vide Notification dated 5 August 2013 has revised Rule 37BB of the Rules, which provides the procedure to be followed for furnishing the information while making payment to a non-resident. The revised Rule mandates reporting of certain additional information while making payment to a non-resident and a new format of Form No. 15CA and Form No. 15CB for furnishing information to the tax authorities have been notified. The Rule shall be effective from 1 October 2013.

Notification No. 58/2013 [F.NO.149/119/ 2012-SO(TPL)]/SO 2363(E), dated 5 August 2013

Organisation for Economic Co-operation and Development releases a revised discussion draft on transfer pricing aspects of intangibles

Based on the comments received in public consultations, the Organisation for Economic Co-operation and Development (OECD) on 30 July 2013 published a revised draft on transfer pricing aspects of intangibles (revised draft), divided into four sections.

- **Identification of specific intangibles** - The revised draft does not make any significant amendments to the definition of the term 'intangibles' but has provided an explanation of the terms 'marketing intangible' and 'unique and valuable intangibles'.
- Ownership of intangibles and transactions involving the development, enhancement, maintenance and protection of intangibles
- **Characterisation of transaction as use or transfer of intangibles** - The observations of the OECD in this section do not deviate substantially from those in the original draft.
- **Supplemental guidance for determining arm's length conditions in cases involving intangibles** -The principles laid down for determination of the ALP of intangibles in various situations in the revised draft are largely in line with the original draft. The matter in the original draft has been reorganised to systematically reflect the guidance on applicability of methods and comparability analysis.

Employees' Provident Fund Organization changes the process of issuing Certificate of Coverage for outbound employees

India has signed Social Security Agreements (SSAs) with other countries with a view to getting exemption from social security contribution in the host countries for outbound employees provided they contribute to social security in India.
To obtain the exemption, an outbound employee requires a Certificate of Coverage (COC) from the designated agency, the Employees' Provident Fund Organisation (EPFO), which serves as a proof of social security contribution in India.

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In order to avoid delays and to streamline the process of issuing COC, the EPFO has decided vide a recent Circular that the COC will now be issued by the local Regional Provident Fund Commissioner.

Launch of the annual Global Assignment Policies and Practices Survey

KPMG International Executive Services practice has recently launched the annual Global Assignment Policies and Practice Survey.

The Survey was responded to by over 600 organizations, with the majority of survey respondents being from the US. The Survey provides valuable trends and insight on how global organizations administer their international human resource programs.

II. SERVICE TAX

High Court Decisions

Refund under Notification No 41/2007 – ST shall be available to an exporter where commission has been paid to the commission agent even if such details are not included in the shipping bill

Notification No 41/2007 – ST dated October 6, 2007 provides for refund of service tax to an exporter of goods for the services used by him in connection with export of goods. This Notification stipulated certain conditions for refund of the said service tax, one of which required the exporter to declare the amount of commission paid or payable to the commission agent in the shipping bill.

In the present case, the taxpayer had not included the details of the commission paid to the commission agent in the shipping bill although the amount of commission was duly paid by the exporter-taxpayer. The taxpayer prayed for condonation of this technical error and the matter reached before the HC.

The Gujarat HC noticed that there was no intention on the part of the taxpayer to defraud the Revenue Authorities. Accordingly, the HC held that mere non-inclusion of the commission details in the shipping bill by the taxpayer would not disentitle him to claim refund and therefore, the taxpayer should be allowed refund in terms of the above mentioned Notification.

CCE & C, Surat – I v ABG Shipyard Ltd [2013 (31) STR 11 (HC-GUJ)]

Levy of service tax on restaurants and hotels is beyond the legislative competence of the Parliament as it falls within the legislative powers of the State Legislature

The taxpayer filed writ petitions challenging the validity of section 65 (105) (zzzzv) (ie services provided by a restaurant in relation to serving of food or beverage) and section 65 (105) (zzzzw) (ie services of accommodation for a continuous period of less than three months provided by a hotel, inn, guest house, etc) of the Finance Act.

The main contention of the taxpayer was that the imposition of service tax in relation to serving of food or beverage including alcoholic beverages represents only sale of goods which falls under Entry 54 of List II (State List) of the Seventh Schedule to the Constitution of India and therefore, within the exclusive competence of the State Legislature. Similarly, the State Legislature had enacted Kerala Tax on Luxuries Act by which luxury tax is levied on accommodation. By introducing service tax on these two activities, the Parliament has encroached upon the legislative powers of the State under Entry 54 and 62 of List II.

The Revenue Authorities contended that service tax can be imposed on the service involved during the sale of a product and so long as the statute does not transgress to any restriction contained in the

Constitution, contentions regarding lack of legislative power cannot be sustained.

The Kerala HC held that the purpose of incorporating the definition of 'tax on sale or purchase of goods' in Article 366 (29A) of the Constitution was to empower the State Governments to impose tax on the supply whether it is by way of or as a part of any service of goods. It held that when food is supplied or alcoholic beverages are supplied as part of any service, such transfer is deemed to be a sale and when the deeming provision permits the State Government to impose a tax on such transfer, there cannot be a different component of service on which service tax can be imposed.

Further, in relation to accommodation, the HC held that when the State Legislature had enacted the Kerala Tax on Luxuries Act by exercising the legislative power under Entry 62 of List II, imposition of service tax on accommodation provided in hotels and other similar establishments trenches upon the legislative function of the State under Entry 62 of List II.

The HC thus declared that both section 65 (105) (zzzzv) and section 65 (105) (zzzzw) of the Finance Act are beyond the legislative competence of the Parliament and the taxpayer is entitled to seek refund of any payments made on the basis of the impugned clauses.

Kerala Classified Hotels and Resorts Association v UOI [2013-TIOL-533-HC-KERALA-ST]

Tribunal Decisions

Sponsorship of sports events even if they have a commercial element in them is excluded from the ambit of 'Sponsorship Services' and accordingly not liable to service tax

The taxpayers are sponsors of Indian Premier League ("IPL") matches. The taxpayer did not pay any service tax on such services as sponsoring sports events is not subject to the levy of service tax.

Revenue Authorities were of the view that sponsorship services provided by the taxpayer do not constitute sponsorship of sports events since a league match is not comprehended within the expression 'sports events' and there is commercial element involved in IPL matches.

The matter reached the CESTAT wherein the taxpayer, in respect of commercial element in the IPL events, contended that in absence of limiting words or phrases in the provision, the sponsorship is in relation to sports event namely cricket matches rather than IPL.

The CESTAT decided in favour of the taxpayer and held that the legislature has not put any restriction in the exclusion of "sports event" by enacting that where a sports events has a commercial purpose, the exclusion is inapplicable. In the absence of ambiguity, the golden rule of construction namely a construction whereby the literal meaning corresponds to the legal meaning must be adopted. It was held that there is no justification in the Revenue Authority's argument that as there is an underlying commercial element in the IPL events, the sponsorship, which is otherwise in relation to a sports event, is not so. On this basis, the CESTAT allowed the appeal filed by the taxpayer

Hero Honda Motors Ltd, DLF Ltd v CST, Delhi [2013-TIOL-871-CESTAT-DEL]

Sports stadium constructed for commonwealth games and used by public on payment of user charges is not a commercial construction and not liable to service tax

The taxpayer constructed sports stadium complex ("stadium") on tender invited by the Government of Maharashtra. It also constructed additional facilities in the existing sports facility as required by the Commonwealth Youth Games, 2008 ("games").

Revenue Authority was of the view that the construction undertaken by the taxpayer amounts to commercial or industrial construction on the ground that the stadium is used by the public and others later on, on payment of user charges. Therefore, the said activity is subjected to the levy of service tax.

The matter reached to the CESTAT wherein the taxpayer contended that the stadium was constructed for public welfare use only and not for commercial or industrial purpose even after the games were over.

The CESTAT held that stadium is a public facility for recreation of public and therefore, construction of stadium does not amount to commercial or industrial construction. A stadium cannot be considered as a commercial or industrial construction because some amount is charged for using the facilities therein.

BG Shirke Construction Technology Pvt Ltd V CCE, Pune-III [2013 (31) STR 52 (CESTAT Mumbai)]

Where input services are used in units both within and outside SEZ, exemption under Notification No 9/2009-ST, is to be allowed in respect of SEZ units in ratio of value (turnover) of services provided therein

The taxpayer, a developer of Special Economic Zone ("SEZ"), was engaged in providing output services to units within SEZ as well as units outside SEZ. The taxpayer claimed exemption by way of refund under Notification No 9/2009-ST of service tax paid on various input services used for providing output services to units located in SEZ.

Revenue Authority was of the view that input service tax should be apportioned in ratio of area developed by the taxpayer inside SEZ and outside SEZ.

The matter reached the CESTAT wherein the CESTAT held that the input service tax should be apportioned in ratio of turnover of services provided to SEZ units and non-SEZ units. Further, the CESTAT held that turnover based criterion is easily determinable whereas it is difficult to verify the measurements and period of activity undertaken when the ratio is based on areas developed in SEZ and outside SEZ

Mahindra World City (Jaipur) Ltd v CCE, Jaipur [2013 (39) STT 888 (CESTAT)]

Notional interest on security deposit taken for renting out the premises cannot be added to the taxable value if no evidence to show that deposit has influenced the rent received

The taxpayer is a service provider engaged in rendering various services including renting of immovable property of commercial complexes constructed by them. The taxpayer was discharging service tax liability on the rent received from the lessees and also took a security deposit from its lessees.

The Revenue Authorities were of the view that notional interest on the security deposit is also a consideration for the renting of the immovable property and, therefore, service tax liability should be discharged on the notional interest at the rate of 18 percent per annum on the security deposit collected by the taxpayer.

The matter reached before the CESTAT wherein the taxpayer contended that the security deposit from the lessees was towards the damages, if any. Further, the security deposit has no nexus with the area of the property rented out. The taxpayer relied on the decision of the SC in the case of CCE, Mumbai-III v ISPL Industries Ltd 2003 (154) ELT 3 (SC) wherein in respect of Central Excise valuation, the Court held that notional interest on the advances taken by the assessee from the buyers cannot be added to the assessable value of the goods cleared, unless, there is evidence to show that the interest free deposit taken has influenced the price.

The CESTAT applying the ratio of ISPL Industries Ltd case (cited supra) held that notional interest on security deposit taken for renting out the premises cannot be added to the taxable value in the absence of any evidence to show that deposit has influenced the rent received by the taxpayer.

Magarpatta Township Development & Construction Co Ltd v CCE, Pune-III [2013-TIOL-1068-CESTAT-MUM]

Even if leased aircrafts were delivered abroad, leasing services received from abroad are liable to service tax as the taxpayer used them in travel business for flying from Indian destinations to foreign destinations and vice versa

The taxpayer procured aircrafts on lease from abroad for which payment was made to various offshore entities. The taxpayer also kept a deposit with the lessor (International Finance Corporation) towards maintenance reserve. Revenue Authorities demanded service tax under the taxable category of 'Banking and Financial Services' category and 'Management Maintenance and Repairs' category on the lease payments made and maintenance reserve deposit kept abroad respectively. The matter reached the Tribunal on an appeal made by the taxpayer.

The taxpayer contended that the demand vis-a-vis maintenance reserve is not sustainable as the reserve kept abroad with the lessor is only a security deposit for repairs and maintenance of the aircrafts whereas the actual activity of maintenance and repairs is undertaken in India by a DGCA approved authority. As regards financial lease services, the taxpayer submitted that it had various branches outside India and since the aircraft was delivered outside India, the services were rendered outside India and thus no service tax can be levied on the transaction.

The Revenue Authorities argued that the taxpayer was liable to pay service tax under reverse charge since payment was made outside India for the services received in India.

The CESTAT prima facie held that just because the taxpayer had kept a reserve outside India with the lessor, no service tax can be demanded from them especially when the actual maintenance and repair services were performed in India by a DGCA approved authority. However, the demand with respect to finance leasing was sustainable as the CESTAT was of the prima facie view that though the aircrafts were delivered outside India, the same were used for flying from Indian destinations to foreign destinations and vice-versa. The taxpayer was held liable to pay service tax under reverse charge on the payments made for leasing of aircrafts. Considering the financial condition of the appellant, the CESTAT ordered the taxpayer to make part payment of the entire demand following which the recovery proceedings will be stayed till the disposal of the appeal.

Air India Charters Ltd v Commissioner (TAR), Service Tax [2013 (39) STT 1000]

Services of supply and installation of electrical transmission towers eligible for composition scheme post June 2007 even for a contract that was entered prior to June 2007

Taxpayer was engaged in the business of supply and installation of electrical transmission towers to M/s Power Grid Ltd and was discharging service tax under the taxable category of 'erection and commissioning' services. It started discharging service tax liability under the category of 'works contract' from June 2007 onwards. Revenue Authorities issued a SCN demanding tax, interest and penalties on the basis that the taxpayer could not have switched over to the taxable category of 'works contract' services after their introduction on June 2007 and were not eligible to claim the benefit of the new scheme under the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 ('the Rules"). Aggrieved by the same, the taxpayer filed an appeal before the CESTAT.

Taxpayer relied on the decision of the CESTAT in the case ABB Ltd v Commissioner of Service Tax, Bangalore [2011 (24) STR 199] and submitted that works contract became taxable only after its introduction on June 2007 and thus, they were eligible to claim the benefit after June 2007.

Revenue Authorities on the other hand submitted that the benefit under the Rules can be availed only in respect of a new contract that commences after June 2007. For the old contracts, the taxpayer was liable to pay service tax under the category of 'erection and commissioning' services only. It also relied on the Circular No

128/10/2010-ST dated August 24, 2010 which stated that the benefit under the Rules would only be available when the payment for the services was received after June 2007 irrespective of the time when it was provided.

The CESTAT prima facie held that Rule 3(3) of the Rules prohibits switching over from the taxable category of works contract services to other applicable entries during the currency of a contract and not vice-versa. Also, according to the decision of the CESTAT, Bangalore in the case ABB Ltd. (supra), no service tax was payable on such works contract before June 2007 and therefore, taxpayer was eligible to claim the benefit once the above transaction became taxable. Accordingly, pre deposit was waived and stay was granted by the CESTAT.

Electrical Manufacturing Co Ltd v CCE, Coimbatore [2013 (30) STR 439 (CESTAT-Chennai)]

Indian project office which is setup temporarily for implementation of a particular project is not a permanent establishment of the foreign head office and accordingly manpower services provided by the foreign head office to the project office is a service to self and not liable to service tax

Taxpayer, a foreign company, was engaged in providing design and consultancy services in India and had setup a project office in India for execution of the said services. The foreign head office deputed its personnel in the project office and raised debit notes for the expenditure incurred on their salaries and other expenses. Revenue Authorities issued SCN on the basis that according to section 66A (2) read with Explanation I the head office and the project office are two distinct entities and therefore, the deputation of personnel would qualify as Manpower Recruitment or Supply Agency ("MRSA") services. The demand, interest and penalty imposed in the SCN were confirmed by the Revenue Authorities. Aggrieved by the same, the taxpayer filed an appeal before the CESTAT.

Taxpayer contended that since the project office in India was opened only for a particular project and not for a long term period, it could not be treated as a permanent establishment of the foreign head office and accordingly the services of manpower rendered to project office should be treated as services to self. Hence, taxpayer had no liability to pay service tax on a reverse charge basis. Reliance was also placed on the decision of CESTAT in the cases of Rolls Royce Indus. Power (I) Ltd v CCE, Vishakhapatnam [2004-TIOL-529-CESTAT-DEL] and Bajaj Auto Ltd v CCE, Aurangabad [2004-TIOL-970-CESTAT-MUM] wherein it was held that temporary project office in India cannot be treated as a permanent establishment and consequently services to self were not liable to service tax.

The Revenue Authorities emphasized that the Indian project office had a separate legal entity from the foreign head office and therefore, service tax was payable by the Indian project office on MRSA services on reverse charge basis.

CESTAT prima facie observed that the project office located in India cannot be held to be a permanent establishment since it was not undertaking any work other than the work related to the specific project and would wind up once the project was completed. Also to qualify as a permanent establishment, the setup should be on a permanent basis which is not true in the case of the taxpayer. Therefore, the MRSA services were provided to self and accordingly, no service tax appear to be payable prima facie. Consequently, pre deposit was waived and stay was granted by CESTAT.

SNC Lavalin Inc v Commissioner of Service Tax, Delhi, Gurgaon [2013-TIOL-911-CESTAT-DEL]

Providing shipping vessels on charter hire basis is classifiable under 'Supply of tangible goods' ("STG") services if the main object of the hiring is to transport crude oil

Taxpayer provided shipping vessels to Oil and Natural Gas Commission ("ONGC") on charter hire basis for storage of crude oil. Agreement stated that the said shipping vessels were not to be used to transport crude oil but only to pass on the oil received from the rig to other vessels that transport the oil. Also the above vessels were required to carry out ship to ship transfer of cargo to other vessels. The Revenue Authorities issued a SCN on the basis that since the vessels were used for storage purposes, the services provided by the taxpayer were classifiable under the taxable category of storage and warehousing service. The matter reached before the Tribunal.

Taxpayer submitted that as per the agreement entered between the taxpayer and ONGC, the primary function of the vessels was that of transportation of oil from the oil well to the ports. Therefore, the services were not liable to service tax under the category of 'storage and warehousing' services. Further, it relied on Ministry letter no 334/1/2008-TRU dated February 29, 2008 wherein it was clarified that the activity of charter hiring of vessels for off-shore operations would fall under 'supply of tangible goods' service. It also relied on the decision of Bombay HC in the case of Indian National Ship Owners Association v UOI [2009-TIOL-150-HC-MUM] wherein it was held that the activity of supplying vessels to ONGC for its offshore operations would not get covered under the mining services but would be covered under STG service from May 16, 2008.

The Revenue Authorities submitted that the vessels supplied by the taxpayer would store the oil received from the oil wells and it would be transported to other ports through other vessels. Therefore, the said vessels were used only for storage of crude oil at the production site and accordingly fall within the definition of storage and warehousing service.

The CESTAT prima facie held that the contract between the taxpayer and ONGC is for supply of vessels on charter hire basis where the operation and control of the vessel remains with the taxpayer. The vessels were used both for storage and transportation of oil where activity of storage was incidental to the activity of transportation. Thus, the primary object being that of transportation, the activity of hiring the vessel would fall under STG service. The CESTAT also placed reliance on the decision of the Bombay HC in the case of Indian National Ship Owners Association (cited supra) and the Ministry letter no 334/1/2008-TRU dated February 29, 2008. Also taxpayer being a government company, there is no risk to the Revenue Authorities. Accordingly, pre deposit was waived and stay was granted by the CESTAT.

The Shipping Corporation of India Ltd v CCE& ST (LTU), Mumbai [2013-TIOL-942-CESTAT-MUM]

No segregation can be done for charging service tax and customs duty if a single payment is made for import of machinery and its installation and erection

Taxpayer imported textile machinery from a foreign supplier and paid customs duty on the whole amount mentioned in the invoice. The installation and erection of the said machinery was to be done by the persons deputed by the supplier. The Revenue Authorities contended that the services of installation and erection were liable to service tax and the taxpayer was liable to pay the same on reverse charge basis.

Taxpayer contended that since the foreign supplier had an office in India, he had no liability to discharge service tax on reverse charge basis. Also, it had already discharged customs duty on the whole amount of machinery which included the consideration for installation and erection services.

The Revenue Authorities on the other hand submitted that since service tax and customs duty are separate from each other, the taxpayer is liable to pay service tax on the value of services provided by the foreign supplier.

The CESTAT prima facie observed that there is a single contract between the taxpayer and the foreign supplier which relates both to the supply of machinery and its installation and erection and no separate payment has been charged for the services rendered. Taxpayer has discharged the applicable customs duty on the whole amount (including the value for services rendered) envisaged in the contract. Therefore, prima facie, it is not liable to pay service tax again on the services portion. Accordingly, stay was granted.

Bhavik Terryab v Commissioner of Central Excise, Jaipur -I [2013 (30) STR 435 (CESTAT-DEL)]

III. VAT/ CST

High Court Decisions

Mere depiction of the value of electrical work as a separate entry in a composite civil works contract does not lead to exclusion of such value from the entire contract value eligible for composition scheme

The taxpayer executed a works contract for construction of a new lecture hall complex, Samtel Centre and a boy's hostel. The aforesaid contract also included electrical works. However, for the sake of convenience, the value of electrical works was shown separately in the contract. The taxpayer applied for compounding under the composition scheme under section 7D of the Uttar Pradesh Trade Tax Act, 1948 ("UP TTA"). The compounding with respect to the civil work was accepted by the tax authorities barring the value of electrical works.

The Commissioner of Trade Tax ("CTT") contended that since the values are separately shown in the contract, they do not form a part of the composite value of the contract. Aggrieved by this contention, the taxpayer filed an appeal with the Joint Commissioner (Appeals). The appeal so filed was allowed in the favour of taxpayer. Consequently, the CTT filed an appeal before the Tribunal which was allowed in his favour. The taxpayer finally filed a revision with the Allahabad HC.

The HC has held that the contracts are composite civil contracts in nature and also include electrical works. Merely because the value of the electrical works was shown separately in the contract for convenience, the same cannot be excluded from the composite value fixed for the entire contract. Accordingly, the impugned order of the Tribunal was set aside and directions were given to pass a fresh order under section 7D of the UP TTA, thereby including the values of electrical works in the civil contract

Skyline Engineering Contracts (India) Pvt Ltd v CCT, Lucknow [2013 (061) VST 0465 (All HC)]

Sunglasses eligible for concessional VAT rate as ""Medical Devices"

The taxpayer was a registered dealer under the Maharashtra Value Added Tax Act, 2002 ("MVAT Act") and was dealing in spectacle glasses, spectacles and spectacle frames etc. The taxpayer was paying tax at the rate of 4 percent on sale of spectacles including non prescriptive sunglasses claiming the benefit of concessional tax rate available for "Medical Devices and Implant" under the schedule entry C-107(8) read with the Notification, dated November 23, 2005 ("Notification").

The taxpayer made an application to the Commissioner of Sales Tax ("CoST"), seeking clarity on the disputed question that whether protective non prescription sun glasses are taxable at the rate of 4 percent under the head 'Medical Devices & implants' under entry C-107(8) read with the Notification or the tax is leviable at the residuary rate of 12.5 percent. Through an order, the CoST held that the non prescription sunglasses though covered under the said Notification under the entry "Spectacles, Correctives, Protective or other" cannot be considered to be medical devices and thus would attract 12.5 percent rate of tax.

The matter finally reached before the HC where it was held that the Notification specifically covered protective sunglasses and nowhere provided for the requirement that such protective sunglasses were supposed to be medically prescribed. Hence, tax should be demanded at the rate of 4 percent only. Further, it was held that items specifically covered under the

Notification were not open to interpretation that whether they would be eligible to claim benefit under the Notification or not. The matter was decided in favour of the taxpayer.

The Additional Commissioner of Sales Tax, VAT-III, Mumbai v M/s Chedda Marketting (2013-TIOL-509-Mum- HC)

Issuance of Form C to a dealer cannot be denied on the ground that the contract agreement between the parties did not stipulate for issue of the form

The taxpayer was awarded a contract by the North Eastern Electric Power Corporation Ltd ("NEEPCO") for supply, design, fabrication and erection of pen stock steel liner and all hydro mechanical works/ equipments under Kameng Hydro Electrical Project ("Project"). NEEPCO was registered dealer under the Central Sales Tax Act, 1956 ("CST Act").

After the contract was awarded, the Project was certified as mega project by the Government of India and NEEPCO requested the taxpayer to avail of the admissible benefits of taxes and duties. The taxpayer with due intimation to NEEPCO set up a factory in West Bengal and started sending pen stock steel liners. The taxpayer charged CST at two per cent and availed the benefit under section 8(1) of the CST Act. The taxpayer requested NEEPCO to issue Form C with regard to the supplies made as they were to be produced before the sales tax authorities. In response, NEEPCO informed the taxpayer that the forms could not be issued as there was no provision in the contract agreement for issue of the forms. Aggrieved by the same, the taxpayer filed a writ petition before the HC.

The HC while allowing the writ filed by the taxpayer observed that NEEPCO was statutorily bound under the CST Act to issue Form C to the taxpayer and it could not refuse to issue Form C to the taxpayer on the basis that the contract agreement did not stipulate for issue of the forms. Thus, NEEPCO was directed to issue the required Form C to the taxpayer.

OMIL-JSC-JV v UOI [2013 (61) VST 370 (HC Gauhati)]

Franchise services are liable to service tax and not VAT as franchise is a representational right to sell or manufacture goods or to provide service and transfer of right to use the trademark is not to the exclusion of the taxpayer who retains the right to transfer the same to others

The taxpayer was engaged in marketing, trading, export and import of jewellery, gold ornaments, diamond ornaments, platinum ornaments, watches, etc under the name of 'Malabar Gold'. The taxpayer paid service tax on the royalty received from the franchisee companies during the relevant period under the taxable category of "Franchise Services" under section 65(47) of the Finance Act, 1994 ("Finance Act"). The sales tax authorities issued Show Cause Notice ("SCN") to the taxpayer wherein they sought to levy VAT on the royalty received from franchisees for use of trade mark under Entry Sl No 68 of the Third Schedule to the Kerala Value Added Tax Act, 2003 ("KVAT Act") wherein tax was leviable on 'intangible goods'. The Commercial Tax Officer ("CTO") confirmed the demand under the SCN. The Single Bench of the HC upheld the order of the CTO.

Aggrieved by the order of the Single bench, the taxpayer filed appeal before the Division Bench of the HC. The taxpayer submitted that there was no transfer of trade mark to the franchisees and once a transaction is covered under the provisions of the Finance Act, then the same cannot be held liable to tax under the KVAT Act. The taxpayer further submitted that under Entry Sl No 68 of the Third Schedule under KVAT Act, trade mark was not specifically included among the 'intangible goods' and it was only confined to copyright, patent and REP license. On the other hand, the sales tax authorities submitted that there was transfer of right to use the trade mark and Entry Sl No 68 shall apply to intangible properties including trade mark which would come under Item (4) of 'Others'.

The Kerala HC while allowing the appeal filed by the taxpayer observed that there was only a license to use the trade mark and the transfer of its use was not to the exclusion of the taxpayer who retains the right to transfer the same to others also. The HC further observed that franchise is a representational right to sell or manufacture goods or to provide service or undertake any process identified with franchisor. Thus, franchise services were held liable only to service tax and not to VAT.

Malabar Gold Private Limited v CTO, Kozhikode [2013 TIOL 512 (Ker HC)]

IV. CUSTOMS

Tribunal Decisions

Exemption under Notification No 21/2002–Cus available only when both the conditions ie one with respect to use and other with respect to user are satisfied - Taxpayer (importer) used the imported machinery for a road construction project and then shifted it to a new road construction project which was not executed by him and thus satisfied only one condition – Exemption not available

The taxpayer was a joint venture and it imported stone crushers and cleared without payment of duty by availing the duty exemption benefit under Sl No 230 of Notification No 21/2002 dated March 01, 2002 ("Notification No 21/2002"). The benefit of duty exemption on stone crusher imported under Notification No 21/2002 was subject to the taxpayer's undertaking that the stone crusher would be used exclusively for construction of roads and the taxpayer will not sell or otherwise dispose of the goods in any manner for a period of five years from the date of import. However, after 1 year of use, the taxpayer diverted the stone crusher (before the stipulated period of five years) to another road site not constructed by the taxpayer but one of the partners of the joint venture.

The availment of benefit of Notification No 21/2002 was challenged by the Revenue Authorities on the ground that a specified end-user can only claim the benefit of Notification No 21/2002 and that the equipment was transferred to the taxpayer's partner for use elsewhere than in the approved project. It was also contended that the Notification has to be interpreted strictly and any violation of the Notification would result in denial of exemption.

The taxpayer argued that it used the imported equipment in the construction of roads for a period of one year or so after importation, therefore, they have substantially complied with the conditions of the Notification. It was further argued that the imported equipment was neither sold nor disposed off and rather, it allowed one of the consortium partners to use the equipment for construction of roads namely the specified purpose.

The CESTAT held that Notification No 21/2002 provides for dual conditions for availment of benefit. One is with regard to the user and the other one is with regard to the use. In the present case, the imported equipments were diverted for use elsewhere than for the project for which contract was awarded and the user was also different. Thus the taxpayer violated the Notification by transferring/alienating the equipments within a period of five years contrary to the undertaking given by it. Thus, the CESTAT decided against the taxpayer

Ashoka Buildcon-Valecha Engineering Ltd v CC (Import), Mumbai [2013 (292) ELT 364 (CESTAT-MUM)]

Refund of SAD under Notification No 102/2007-Cus cannot be denied on the ground that goods for subsequent sale are purchased from SEZ and not from outside India

The taxpayer had procured goods from SEZ, for subsequent sale and paid custom duties including additional duty of customs leviable thereof under section 3(5) of the Customs Tariff Act, 1975 ("SAD") at the time of clearance. Notification No102/2007-Cus dated September 14, 2007 ("Notification No 102/2007") exempts the goods imported for subsequent sale from levy of SAD by way of refund. The taxpayer sought to claim the benefit of Notification No 102/ 2007.

The refund claim of the taxpayer was challenged by the Revenue Authorities. The case of the Revenue Authorities was section 30 of the Special Economic Zone Act, 2005 ("SEZ Act") provides that goods that are removed from SEZ to domestic tariff area ("DTA") shall be chargeable to duties of customs, as leviable on such goods when imported and Notification No 102/2007 grants exemption of SAD on goods when imported into India for subsequent sale. According to the Revenue Authorities, SEZ is not a place outside India for the purpose of construing the term import under the Customs Act, 1962. Therefore, the goods cleared from SEZ to DTA cannot be treated as import for the purpose of Customs Act.

The Revenue Authorities relied upon the HC decisions in case of Essar Steel reported as [2010 (249) ELT 3 (Guj)] and Biocon Ltd reported as [2011 (267) ELT 28 (Kar)] for the proposition that provisions of Customs Act do not envisage movement of goods from domestic tariff area to SEZ to be a taxable event and reverse would apply in this case.

The taxpayer argued that it has paid SAD on the goods cleared from SEZ unit and it also paid at the time of resale of goods. Therefore, refund of SAD must be allowed to them.

The CESTAT held that SAD was imposed and is collected in order to compensate for VAT or CST not payable on the imported goods as against the domestic goods. It held that the Notification No 102/2007 has to be read holistically with the provisions of section 30 of SEZ Act. It would mean that when the goods move from SEZ to DTA, SAD is leviable on such goods as such movement is considered as "when imported to India". Therefore, the benefit of Notification No 102/2007 cannot be denied to the taxpayer, for the reason that when the goods move from SEZ to DTA, leviability of SAD, subsequent sale and payment of VAT is not in doubt. It was further held that the benefit of refund of the SAD as per Notification No 102/2007 cannot be denied to them only on the ground that movement of goods is from SEZ and it cannot be construed as import of goods.

Adinath Trade Link v Commissioner of Customs, Kandla [2013-TIOL-874-CESTAT-AHM]

V. CENTRAL EXCISE

High Court Decisions

Extended period of limitation can't be invoked when taxpayer claimed excise duty exemption under Notification No 108/95-CE on the ground that supplies were made to a 'notified project' as initially confirmed by the buyer and later it was found that the project is not a 'notified' one

The taxpayer supplied goods to Transmission Corporation of Andhra Pradesh ("TCAP"), a project financed by Japan Bank of International Corporation ("JBIC") during the period July 2001 to December 2001 by availing exemption under Notification No 108/95 – CE dated August 28, 1995 ("NN 108/95)*. Accordingly no excise duty was paid on supplies made to TCAP on the ground that JBIC is an international organization and benefit under NN 108/95 is available to the taxpayer. Further on the date on which supplies were made, both taxpayer and TCAP proceeded on the footing that JBIC was an international organization and the taxpayer was entitled to the benefit of the notification.

Later on vide letter dated January 4, 2002 TCAP communicated to the taxpayer that JBIC was not a notified international organization and the benefit under the above mentioned notification shall not be available to the taxpayer. Based on the foregoing, the Revenue Authorities invoked the extended period of limitation and demanded the applicable excise duty and imposed penalty on the supplies made by taxpayer on which excise exemption under NN 108/95 was claimed. Eventually, the matter reached the HC.

After going through the facts, the HC held that taxpayer can't be held guilty for nonpayment of duty when TCAP represented to him that JBIC was a notified organization and subsequently TCAP itself found that such representation is wrong. Accordingly, the Court held that the demand of duty and penalty for the period beyond the normal period can't be invoked.

*(*Under this notification, all the supplies were exempt from payment of excise duty if such supplies were made to United Nations or an international organization for their official use or supplied to the projects financed by the said United Nations or an international organization and approved by the Government of India)*

CCE v EMI Transmission Ltd [2013 (292) ELT 329 (HC-MUM)]

Tribunal Decisions

In the absence of any evidence, mere fact that dealer has charged the price in excess of MRP of the product from the end customer doesn't mean that additional consideration has been passed on to the manufacturer by the dealer and manufacture can't be held guilty for evasion of excise duty

The taxpayer was in the business of manufacture of 'colour television sets' and were discharging the central excise duty on Maximum Retail Price ("MRP") affixed on the Television ("TV") sets. These TV sets were further sold to the dealers for onwards sale to end customer. The Revenue Authorities found that in some cases, some of the dealers were selling the TV sets at a price higher than MRP.

Basis these facts the Revenue Authorities alleged that the goods are sold by the dealers at a price higher than MRP, hence the additional consideration has been passed by these dealers to the taxpayer. Basis this, the Revenue Authorities contended that the taxpayer has short paid excise duty on additional consideration so received and it was liable to pay the differential duty amount and also the penalty on identical amount. However no evidences were put on record which proved that the additional consideration passed on to the taxpayer by dealer.

The matter reached the Customs, Excise Service Tax Appellate Tribunal ("CESTAT") where it was held that in the absence of evidence showing that the higher price charged by the dealer has been passed to the taxpayer, the Revenue Authorities can not allege that taxpayer has evaded the payment of duty. It was also held that even if the dealers have charged the price more than MRP, it is they who have committed the offence not the taxpayer. On this basis, the duty demand against the taxpayer was quashed.

CCE v Oscar Marketing Co Pvt Ltd [2013 (292) ELT 545 (CESTAT – DEL)]

Extended period of limitation can be invoked whenever there is short levy or no levy of duty with an intention to evade payment of duty and where suppression or willful omission is either admitted by the

taxpayer or demonstrated by the Revenue Authorities

In the present case, the issue referred for consideration of the Larger Bench was whether a SCN issued after six months from the date of visit of Revenue Authorities or the date of completion of investigations (as reflected in the SCN) is barred by limitation in terms of section 11A of the Central Excise Act, 1944 ("Excise Act"). In this case, the SCN sought to invoke the extended period of limitation of five years.

During the course of the proceedings, the CESTAT referred to the judgment pronounced by the Gujarat HC in the case of CCE v Neminath Fabrics Pvt Ltd [2010 (256) ELT 369 (Guj)] wherein the Court held that invocation of extended period of limitation would be justified where there is non-levy or short levy of duty with an intention to evade payment of duty, or in any of the circumstances enumerated in the proviso to section 11A (i) of the Excise Act. It was further held that the proviso cannot be interpreted to mean that the extended period of limitation cannot be legitimately invoked merely because Revenue Authorities had knowledge of the suppression of facts.

Since the facts of the present case were squarely covered by the ratio of above judgment, the Larger Bench of the CESTAT held that invocation of extended period of limitation in the impugned matters was legitimate.

Union Quality Plastic Ltd v CCE & CST, Vapi and Daman [2013-TIOL-1072-CESTAT-AHM-LB]

Notification & Circulars

New service tax notification dealing with service tax exemption for services to SEZ

This notification has been issued in supersession of the earlier Notification No 40/ 2012-ST pertaining to exemption on services provided to SEZ authorised operations. Under the erstwhile SEZ Notification, for entities having operations within and outside the SEZ, upfront exemption was confined to services specified under Rules 4 and 5 of the Place of Provision of Service Rules, 2012. Entities engaged wholly in SEZ operations were alone entitled to upfront exemption on all services. Under the new notification, all entities are eligible to avail upfront exemption from payment of service tax on all taxable services received and used exclusively in the authorized operations of the SEZ developer/ unit.

Service Tax Notification No12/2013 dated July 1, 2013

Exemption for Liquefied Natural Gas (LNG) and Natural Gas (NG) from whole of customs duty when imported by "any importer" for supply to a power generating company

The Central Government has liberalized the import duty regime for import of LNG and NG for the purposes of power generation – now any importer can import LNG and NG free of customs duty if such imports are meant for supply to a 'generating company' [as defined in section 2(28) of the Electricity Act, 2003] for power generation (subject to submission of bank guarantee, undertaking and end-use certification).

Notification No 36/2013-Cus dated July 22, 2013

Clarification issued for excise duty applicable on Sedan cars like Maruti SX4, Honda Civic, Toyota Corolla Altis under Notification No 12/2013-CE dated March 1, 2013

CBEC has clarified vide this Circular on applicability of higher excise duty levied on SUVs to sedans such as Maruti SX4, Toyota Corolla Altis & Honda Civic. The CBEC has emphasized that to attract the higher excise duty, the vehicle must be popularly known as SUV & not known as SUV in trade & parlance. Thus, higher excise duty would not apply to above vehicles.

Central Excise Circular No 972/06/2013-CX dated July 24, 2013