January 2013

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

Foreword

Kindly accept my sincere best wishes for a happy, healthy and successful new year.

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

In the run up to the budget, FICCI was invited by the National Manufacturing Competitiveness Council (NMCC) to seek its views on improving the competitiveness of the Indian industry.

The third meeting of the Advisory Group on International Taxation & Transfer Pricing was held on 20th December, 2012 under the Chairmanship of Mr. Sumit Bose, Secretary (Revenue), Ministry of Finance. Government of India had set up the Advisory Group to put in place a consultation mechanism to take the views of the stakeholders on issues involving international taxation and transfer pricing. It was also intended to serve as a forum to find ways and means to reduce tax litigation and to bring certainty in areas of international taxation and transfer pricing. FICCI informed the Group it is important that Government should lay down its position papers and guidelines on contentious issues. Further, Government should share and discuss its views/positions on articles in Double Taxation Avoidance Agreements and transfer pricing provisions before forming and finalizing India's view.

A meeting of the Advisory Group on Indirect Taxes was also held on 26th December, 2012, under the Chairmanship of Mr. Sumit Bose, Secretary (Revenue), Ministry of Finance. FICCI requested that the process of adjudication of pending disputes should be expedited by fixing statutory timelines.

On the taxation regime, the Mumbai Tribunal in the case of WNS North America examined the question whether reimbursement of lease line charges received by the assessee is taxable as 'royalty' in terms of India US tax treaty. It has held that any amendment carried out to the provisions of the Act with retrospective effect

shall no doubt have the effect of altering the provisions of the Act, but will not automatically alter the analogous provisions of the tax treaty. The Tribunal also observed that any amendment to the tax treaty can be made bilaterally, only by means of deliberations between the two countries who signed it and reimbursement of lease line charges by WNS India to the assessee could not be treated as royalty chargeable to tax in India.

The Karnataka High Court has in a recent judgment held that recharge cards, recharge pins etc. have no intrinsic value of their own and are never sold as goods independent from the cellular mobile telephone services being provided and are thus not liable to sales tax / VAT.

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

High Court Decisions

Services provided by a non-resident in connection with business of exploration of mineral oil, etc is taxable under Section 44BB of the Act

The taxpayer, a company incorporated in the United Kingdom, was engaged in the business of providing geophysical services to oil and gas exploration industry, conducting electromagnetic surveys and processing and interpretation of data. The taxpayer was awarded contracts by two non-resident companies for procuring, processing and interpreting the data in respect of an offshore exploration block in India, and was paid for these services.

The taxpayer contented that, as the services rendered by it are in connection with the business of exploration of mineral oil, the provisions of Section 44BB of the Act should be applied while computing its taxable income.

The issue for consideration before the Delhi High Court, inter alia, was whether the taxpayer was to be assessed under the provisions of Section 44BB or Section 44DA of the Act.

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

- If a special provision is made in respect of certain matter, then that matter should be excluded from the general provision. Further, in an enactment, if two provisions exist, which cannot be reconciled with each other, they should be so interpreted that if possible, effect should be given to both;
- If Section 44DA of the Act covers all types of services rendered by the non-resident, it would reduce section 44BB, which deals with a specific situation, as useless, and would be opposed to the very essence of the rule of harmonious construction;
- Section 44DA of the Act requires that the foreign company should carry on business in India through a Permanent Establishment (PE) situated therein and the rights, property or contract in respect of which the royalty or FTS is paid should be effectively connected with the PE. However, such requirement has not been spelt out in Section 44BB of the Act;
- Accordingly, in the instant case, profits shall be computed in accordance with the provisions of Section 44BB of the Act and not

under Section 44DA of the Act.

DIT v. OHM Ltd [W.P.(C) 6830/2011, dated 6 December 2012]

Special Bench decision holding that Section 40(a)(ia) disallowance applies only to amounts 'payable' as at 31 March temporarily suspended by Andhra Pradesh High Court

The Special Bench of the Tribunal had held that as Section 40(a)(ia) of the Act refers only to the amount 'payable', it was only the outstanding amount or the provision for expense as of 31 March that would be liable for disallowance if tax was not deducted at source and not the amounts already paid during the year.

On the department's appeal to the High Court, the High Court directed an interim suspension of the Special Bench's verdict.

CIT v. Merilyn Shipping & Transports (I.T.T.A.M.P.No.908 of 2012 dated 8 October 2012)

TDS shortfall does not attract expense disallowance under Section 40(a)(ia) of the Act

The taxpayer for certain payments had deducted tax under Section 194C of the Act at the rate of 1 percent, whereas the AO contended that the taxpayer ought to have deducted tax under Section 194I of the Act at the rate of 10 percent. The AO disallowed the payments proportionately by invoking provisions of Section 40(a)(ia) of the Act.

The Tribunal held that conditions laid down under Section 40(a)(ia) of the Act for disallowing any payment is that tax is deductible at source and such tax has not been deducted. Only if both the conditions are satisfied then such payment can be disallowed under Section 40(a)(ia) of the Act. However, where tax is deducted by the taxpayer, even under a bona fide wrong impression, under wrong provisions of tax deduction at source, the provisions of Section 40(a)(ia) of the Act cannot be invoked. There is nothing in Section 40(a)(ia) of the Act to treat a taxpayer as a defaulter when there is a shortfall in deduction. If there is any shortfall due to any difference of opinion as to the taxability of any item, or the nature of payments falling under various tax deduction at source provisions, the taxpayer can be declared to be a taxpayer in default under Section 201 of the Act, but no disallowance can be made by invoking the provisions of section 40(a)(ia) of the Act.

The Calcutta High Court affirmed the Tribunal's Order and dismissed the revenue's appeal against the said order of the Tribunal, as no substantial question of law arose from the Tribunal's order.

CIT v. S. K. Tekriwal (ITAT No. 183 of 2012 dated 3 December 2012, Calcutta High Court)

High Court gives directions to the income tax department on withholding tax mismatches and adjustment of refunds against arrears of demand

The Delhi High Court, on its own motion, has issued interim directions to the income-tax authorities in respect of harassment

faced by several taxpayers due to errors in the tax deducted at source (TDS) system. The High Court took judicial notice of a letter filed by an aggrieved taxpayer and converted the letter into a public interest writ petition. Further, it appointed senior counsel to assist it in identifying the full gamut of challenges faced by taxpayers, either on account of adjustment of refunds against tax arrears due to errors in the TDS returns or in receiving credit and adjusting refunds against arrears of other assessment years. The High Court has given an interim direction that TDS credit should not be denied for small and non-material mismatch between Form 26AS (form published by income tax department highlighting the taxes paid by the taxpayer) and return of income. It has also directed the AO that before rejecting the claim for TDS reflected in Form 26AS, notice for rectification of mistake should be served on the taxpayer and the taxpayer be given an opportunity to respond to the notice.

Further to this, the tax department has now instructed its officers to follow a detailed step-by-step process internally for adjustment of refunds against outstanding demands. The process outlined in this instruction is largely in-keeping with the directions given by the High Court.

Court on its motion v. CIT – W.P. (C) 2659/2012 and CPC Instruction No. 1, dated 27 November 2012-F.No DIT(S)-III/CPC/2012-13

High Court confirms allowability of hypothetical tax as a deduction from taxable income

Employers of globally mobile employees usually enter into a 'tax equalization agreement' agreeing to bear the incremental tax costs arising from an international assignment. A tax equalization agreement protects international employees from additional tax costs arising in multiple tax jurisdictions. As a part of this agreement, the home country tax that the employee would normally bear had he remained in his home country (also commonly referred to as 'hypothetical tax') is reduced from the employee's salary. Thereafter, the entire actual taxes (in home and host countries) are paid by the employer (partially funded by the hypothetical taxes deducted from the employees' salary).

The Bombay High Court recently confirmed the permissibility of a reduction (withholding or deduction) in respect of the hypothetical tax from a taxpayer's salary. It has therefore held that only the differential tax actually borne by the employer after the adjustment of hypothetical tax is liable to be treated as an "addition" to taxable income.

CIT v. Jayadev H. Raja [ITA No 87 of 2000 for Assessment Year (AY 1994-95)]

Tribunal Decisions

Retrospective amendment to the definition of a term under the Act will not automatically alter the analogous provision of the tax treaty

The taxpayer, a company incorporated in the United States of America, for and on behalf of one of its group companies, WNS India, made payments to certain international telecom operators and thereafter recovered the same from WNS India, without any mark-up.

FICCI

Among others, the issue for consideration before the Mumbai Tribunal was whether the reimbursement of expenses to the taxpayer by WNS India would be termed as 'Royalty' under Section 9(1)(vi) of the Act read with Article 12 of the India-USA tax treaty.

Based on the facts of the case, the Tribunal held that the reimbursement of lease line charges by WNS India to the taxpayer could not be treated as 'Royalty', chargeable to tax in India. While rendering its judgment, the Tribunal has also discussed the effect of retrospective amendments made in the Act on the tax treaty. The key observations of the Tribunal are as follows:

- Any amendment carried out to the provisions of the Act with retrospective effect shall no doubt have the effect of altering the provisions of the Act, but will not automatically alter the analogous provisions of the tax treaty;
- If the provisions in the tax treaty directly recognize the provisions of the domestic law, the retrospective amendment in the Act shall also apply under the tax treaty;
- If there is some provision in the tax treaty, contrary to the domestic law, then such contrary provision of the tax treaty shall override the provision in the domestic law in the computation of income as per the tax treaty;
- If the retrospective amendment is in the realm of a provision for which no contrary provision exist in the tax treaty, then such amendment will have effect under the tax treaty and vice versa;
- If a particular term has been specifically defined in the tax treaty, the amendment to the definition of such term under the Act would have no bearing on the interpretation of such term in the context of the tax treaty; and
- Any amendment to the tax treaty can be made bilaterally, only by means of deliberations between the two countries who signed it.

WNS North America Inc. v. ADIT [2012] 28 taxmann.com 173 (Mum)

Non-compete fees paid to run the business effectively are allowed as revenue expenditure

Intervet International B.V. Netherlands and its Indian subsidiary company Infaar India Ltd., acquired 75 and 25 percent shares respectively of a company which was later renamed as Intervet India Ltd (taxpayer). The taxpayer entered into two separate non-compete agreements with its own two directors who were at the helm of affairs and operations. The taxpayer had amortised the non-compete payments over a period of five years in the books of account, since the restrictive covenant was for a period of five years. However, while computing its taxable income, the taxpayer claimed the entire amount as revenue expenditure. The Assessing Officer (AO) concluded that the payment of non-compete fees was linked to transfer of shares of the taxpayer and was a part of the

total sale consideration. Also, the payment was in the nature of commission paid to ensure the sale of shares and hence disallowed the expenditure incurred as non-compete fees.

The Mumbai Tribunal observed that the non-compete agreement was a stand-alone agreement and nothing was mentioned about the non-compete fees in the share purchase agreement. The taxpayer had paid the non-compete fees to ward-off a potential threat to its business and with a view to protect its business interest till such time as the taxpayer stabilises its operation. The non-compete fees had nothing to do with acquisition of shares or payment of commission for facilitating the acquisition. Reliance was placed on the Decision of Supreme Court in the case of CIT v. Coal Shipments Pvt. Ltd. [1971] 82 ITR 902 (SC) and the Decision of Madras High Court in the case of CIT v. Late G. Naidu & Others [1957] 165 ITR 63 (Mad). Further, such payment is also to be seen from the context of commercial and business expediency. If the outgoing expenditure is intrinsically related to carrying on or conducting the business that it can be regarded as an integral part of the profit earning process, and not for any acquisition of an asset or a right of permanent character, and incurring of the expenditure is a condition for carrying on the business, then such an expenditure may be regarded as revenue expenditure. Thus, the Tribunal held that the payment was wholly out of commercial expediency and, therefore, wholly and exclusively for the purpose of business. Thus, the payment of non-compete fees is prima-facie a revenue expenditure. In coming to this conclusion, the Tribunal distinguished the case of Tecumseh (I) P. Ltd. v. ACIT [TS-39-ITAT-2010(Del)] and relied on Carborandum Universal Ltd. v. JCIT [2012] 26 taxmann.com 268 (Mad).

DCIT v. Intervet (India) Ltd. (ITA No. 315/Hyd/2003)

Depreciation to be allowed on payment for acquiring clientele though called as ‘goodwill’ in books

The taxpayer, a share broker, purchased the entire clientele of AFC for a consideration. The taxpayer booked this amount as purchase of goodwill and claimed depreciation thereon. The AO held that the payment is not eligible for depreciation under Section 32(1)(ii) of the Act. The AO was of the opinion that the clients were ‘tangible’ and did not depreciate over a period of time due to damage, wear and tear and obsolescence. Also, the question of depreciation on such an asset, whether tangible or intangible, does not arise as it had not been put to use by the taxpayer.

As per Mumbai Tribunal’s observation, Section 32(1)(ii) of the Act suggests that certain intangible assets on which depreciation could be claimed are know-how, patents, copyrights, trademarks, licenses, franchises or any other business or commercial rights of a similar nature. The phrase ‘any other business or commercial rights of similar nature’ by itself would include all kinds of commercial rights. The taxpayer had got a right over clients of AFC and the right was used as a tool to carry on the business by the taxpayer. Applying the rule of ejusdem generis, the Tribunal held that depreciation was allowable on the said payments for acquisition of clientele. In coming to this conclusion, the Tribunal had

placed reliance on the decision in the case of Areva T&D India Ltd. v. DCIT [2012] 345 ITR 421 (Del) and DCIT v. Weinzman Forex Ltd. [ITA 3571/Mum/2011].

India Capital Markets P. Ltd. v. DCIT (ITA.No.2948/Mum/2010 dated 12 December 2012)

Section 14A does not apply to shares held as stock-in-trade

The taxpayer was engaged in the business of exporting goods and dealing in shares and securities. For Assessment Year (AY) 2008-09, the taxpayer claimed exemption for dividend income and disallowed expenses relatable to dividend income at the rate of 1 percent of dividend. The AO made a disallowance under Section 14A of the Act read with Rule 8D of the Rules. The Commissioner of Income-tax (Appeals) [CIT(A)] confirmed the action of the AO and the taxpayer was in appeal before Tribunal.

Before the Ahmedabad Tribunal, the taxpayer contended that shares were held as stock in trade and dividend was only an incidental income. The taxpayer was holding shares which were offered as a margin for its derivative business. The taxpayer also contended that it had sufficient interest-free funds for investment in shares. It claimed that borrowings were for its Future and Options business, and hence, interest could not be apportioned to dividend income under Rule 8D. Relying on CCI Ltd. v. JCIT [2012] 71 DTR (Kar) 141 and Apoorva Patni v. ACIT [2012] 24 taxmann.com 223 (Pune), the Tribunal deleted the disallowance under Section 14A read with Rule 8D in respect of dividend income in respect of the shares which was held as stock in trade.

Ethio Plastics Private Ltd. v. DCIT (ITA No.848/Ahd/2012 dated 10 December 2012)

No notional foreign exchange fluctuation gain arises on account of conversion of foreign exchange deposit placed with the wholly owned subsidiary outside India as shareholder's deposit, as the said deposit is not a monetary item under AS 11

The taxpayer is a public limited company engaged in the business of hoteliering. The taxpayer had set up a wholly owned subsidiary, Taj International Hongkong Ltd (TIHK), to acquire hotel properties outside India and/or to invest in the share capital of companies owning hotel outside India. The taxpayer had placed certain amount as shareholders' deposit in its subsidiary TIHK. As per the approval from Researve Bank of India (RBI), the taxpayer was given the option to either convert the shareholders' deposit into equity within a period of ten years, or to bring the funds back to India after ten years. The taxpayer claimed that the shareholders' deposit with TIHK was a long-term investment akin to equity and it was liable to be recognized at the exchange rate prevailing on the transaction date. However, the AO rejected the taxpayer's claim on the grounds that Accounting Standard (AS) -11 requires monetary items to be reported / recognized at the exchange rate prevailing on the last date of the relevant previous year and shareholder's deposit placed with TIHK is in the nature of a monetary item. Accordingly, the AO converted the amount of shareholders'

deposit outstanding as on the last dates of the relevant previous years at the exchange rate prevailing on such last date and brought to tax the resultant gain arising from fluctuation in the foreign exchange rate.

The Mumbai Tribunal observed that as per the classification made in AS-11, monetary items mainly include amounts held on current account, such as cash receivables, payables etc. while non-monetary items include amounts held on capital account, such as fixed assets, investment in shares etc. In the present case, the shareholders' deposit represented the amount held by the taxpayer on capital account, inasmuch as it was convertible into equity shares within a period of ten years and if not converted, it was liable to be refunded to the taxpayer only after a period of ten years. Thus, it was held that the said amount was in the nature of a non-monetary item which was required to be reported / recognized at the exchange rate prevailing on the date of relevant transaction as per AS-11 and no foreign exchange fluctuation gain would arise on account of the same.

DCIT v. The Indian Hotels Company Limited [TS-843-ITAT-2012 (Mum)]

Capitalising the interest expenditure claimed as a deduction in earlier years to comply with the requirement of AS-10 by crediting profit and loss account is not chargeable to tax under Section 41(1) of the Act

During the Previous Years (PY) relevant to Assessment Years (AY)1991-92, 1992-93 and 1993-94, the taxpayer had incurred interest expenditure on capital borrowed for the purpose of construction of fixed assets in respect of two hotel projects and the said expenditure debited to the profit & loss account was claimed as a deduction. However, in the AY 1994-1995, the taxpayer changed its method of accounting for recording such interest. Accordingly, the interest charged in earlier years was reversed in the books of account and the same was considered as part of cost of the fixed asset to meet with the requirements of AS-10. Interest reversed was treated as income of the taxpayer in its books but it was excluded while computing the total income. The AO rejected this treatment and included the amount of interest reversed by the taxpayer to profit & loss account as a part of its total income. The CIT(A) confirmed the AO's action on the grounds that the reversal of expenditure is chargeable in terms of provisions of Section 41(1) of the Act.

The Mumbai Tribunal observed that it is just a case of capitalising the interest expenditure to comply with the monetary requirements of AS-10 by passing the necessary entries in the books of account. This has not resulted in any advantage or benefit to the taxpayer either by way of remission or cessation of any liability or in any other manner. Therefore, it cannot be said that there was any such remission or cessation of any liability by universal act by the taxpayer so as to invoke provisions of Section 41(1) of the Act. Inter alia, it was also observed by the Tribunal that depreciation on the interest amount capitalized was also not claimed by the taxpayer.

DCIT v. The Indian Hotels Company Limited [TS-843-ITAT-2012 (Mum)]

Applicability of Section 50C of the Act to lease transaction

The taxpayer had taken a plot of land on lease for 95 years. The taxpayer had paid premium and showed the same as an asset under the head 'leasehold assets' in the balance sheet. The taxpayer agreed to alienate a part of the land for INR 20 million, subject to sub-plotting and consent of Lessor. Applying the provisions of Section 50C of the Act, the AO adopted INR 24 million being the market value of the plot of land as full value of consideration for computing capital gains.

The taxpayer contended that he had transferred only leasehold right in property and Section 50C of the Act would not be applicable, as the section is applicable for 'land and building' and not 'right in the land and building' as held in the case of Atul G Puranik [TS-197-ITAT-2011(Mum)].

The Tribunal held that mere transfer of leasehold rights does not attract Section 50C of the Act; but prima facie, the taxpayer had more than 'leasehold rights' on the plot of land. Distinguishing the decision in case of Atul G Puranik, the Tribunal directed the AO to examine the extent of rights over the land and applicability of Section 50C of the Act.

Shavo Norgren (P) Ltd v. DCIT. [ITA No.8101/Mum/2011]

Waiver of loan for acquisition of depreciable asset

The taxpayer acquired machinery during Financial Year (FY) 1996. The funds for acquisition were provided by one of the group company and the taxpayer was liable to pay the same to the Group Company. The taxpayer claimed depreciation on the machinery for AY 1997-98 and subsequent years. In FY 2000, as a part of group reorganization, the amount payable by the taxpayer was waived off by the Group and was treated by the taxpayer as capital receipt not liable to tax. The taxpayer did not consider any impact of such waiver on actual cost / Written Down Value (WDV) of the machinery and continued to claim depreciation without any adjustment.

The claim of depreciation was allowed upto AY 2003-04. However, during assessment for AY 2004-05, the AO realized the fact of waiver of loan. According to the AO, on the waiver of loan, the WDV of the plant & machinery had to be reworked by reducing from the opening WDV, the amount of loan which had been waived. Therefore, he disallowed the claim for AY 2004-05 and subsequent years. The AO also reopened assessment for AY 2001-02 to AY 20003-04 for disallowing the claim for depreciation.

The Tribunal held that the concept of 'actual cost' as defined under Section 43(1) of the Act could be applied only in year of purchase of assets. Therefore, the actual cost of asset recorded in the year of purchase could not be disturbed in the year of waiver. The intention of the Legislature behind allowing depreciation on block of

assets was to overcome the cumbersome process of dealing with each asset separately. The merger of various assets into the block of asset can be altered only when the eventuality contained in Section 43(6)(c) of the Act takes place, viz., when a particular asset is sold, discarded or destroyed in the PY (other than the previous year in which first brought in use). In the present case, the relevant assets were neither purchased during the previous year nor was there sale, discarding or demolishing or destruction of those assets during such year. Therefore, the Tribunal held that there was no reason to alter the WDV as proposed by the AO. As a result, the Tribunal held that the disallowance of depreciation cannot be sustained.

The Tribunal acknowledged that there was a lacuna, in law, inasmuch as on one hand taxpayer got waiver of monies payable on purchase of machinery and claimed such receipt to be not taxable in view of it being a capital receipt and on other hand taxpayer claimed depreciation on value of machinery for which it did not incur any cost.

Akzo Nobel Coatings India (P.) Ltd. v. DCIT [2012] 28 taxmann.com 82 (Bang)

Deduction of interest on housing loan against income from house property does not preclude the tax-payer to include the same interest in the cost of acquisition of the house property at the time of computing capital gains on sale of such house property

Recently, the Chennai Tribunal held that the interest paid on loan taken for acquiring a house is deductible when computing the capital gains arising to the taxpayer on the sale of the house, despite it being already allowed as a deduction while computing income from house property. The computation provisions under the relevant heads of income – i.e. 'Income from house property' and 'capital gains', are different and the taxpayer was not prevented from claiming that the interest on housing loan formed part of the 'cost of acquisition' while determining the taxable capital gains.

ACIT v. Shri C Ramabrahmam (ITA No 943/Mds/2012)

Notifications/Circulars/ Press releases

Amendment to valuation rules prescribed under Section 56(2) of the Act

The CBDT has issued notification No. 52/2012 amending rules 11 and 11UA of the Rules. Rule 11UA deals with determination of Fair Market Value (FMV) for the purpose of Section 56 of the Act and Rule 11 defines certain terms used in Rule 11UA.

Section 56(2)(vii) and (viia) of the Act provided that the taxpayer receiving specified properties without consideration or at a consideration lower than the FMV should be liable to tax on the difference

between the FMV and the consideration. Section 56(2)(viib) of the Act provides that a closely held company issuing shares to resident persons at a value higher than its fair value should be liable to pay tax on excess of consideration over the FMV of its shares.

The amended rule additionally provides for

- Option of discounted cash flow method for valuation under Section 56(2)(viib) of the Act
- Requirement of audited financials as on date of transaction, as against latest available audited financials, for valuation.

Notification No. 52/2012, dated 29 November 2012

Quantum of exemption available to minor child to be determined independently even if income clubbed with parent

In this case, the taxpayer had invested the long term capital gains arising to him and his minor children, in specified bonds, in order to claim an exemption from tax on these gains. The Kolkata Tribunal has held that the exemption available to a minor child in respect of the income which is clubbed in the hands of the parent is to be independently allowed to the minor child. As per the tax provisions, the income of a minor child (after allowing all exemptions/deductions) is required to be computed and then included in the income of a parent, and thereafter assessed to tax.

DCIT v. Shankar Sharma [ITA No 951, 963/Kol /2011]

Equity savings scheme providing tax benefits to small first investors in specified investments notified

The Central Government has recently notified the Rajiv Gandhi Equity Savings Scheme, 2012 [RGESS or the Scheme], that has been framed pursuant to the insertion of a new provision, introduced in the Finance Act, 2012. As per the said new provision, a one-time deduction can be claimed from taxable income, in respect of qualifying investments made under this Scheme by a resident individual, whose gross total income does not exceed INR 1 million for the relevant FY. The deduction is available to the extent of 50 percent of the amount invested in qualifying investment under this Scheme, capped to a maximum deduction of INR 25,000. The investments in the Scheme are subject to a lock-in period of three years. Once the deduction under the new provision has been claimed in respect of any one FY, no deduction under the same provision can be claimed subsequently in any other FY.

The scheme notified details of the procedure for investment, holding period conditions, the securities that will qualify for the deduction and who can invest, among other conditions.

Notification No 51/2012 F.No. 142/35/2012-TPL dated 23 November 2012

EPFO issues revised FAQs on International Workers

In October 2008, GOI made fundamental changes in the Employees' Provident Funds Scheme, 1952 (EPFS) and Employees' Pension Scheme, 1995 (EPS) by bringing International Workers (IWs) under the purview of the Indian social security regime. In September 2010, these provisions were amended to restrict the withdrawal of Provident Fund (PF), subject to conditions, (such as attaining the age of 58), amongst other changes.

The Employees' Provident Fund Organisation (EPFO) has from time-to-time updated the Frequently Asked Questions (FAQs) on IWs on its website. Recently, the EPFO has issued an updated version of FAQs on IWs. One of the important clarifications in the revised FAQs is that IWs who are covered under an SSA that India has signed with other countries and that are in force can withdraw their PF accumulations immediately on cessation of employment in establishments covered under the EPF Act in India. Such IWs will not have to wait until 58 years of age to withdraw their PF accumulations. Further, IW's covered under an SSA with India will also be eligible to avail the 'withdrawal benefit' under the EPS scheme, but only if the IW is not entitled to pension on totalisation of contributory periods under the SSA.

Further, the revised FAQs also consider the inclusion of a foreign citizen in the definition of excluded employee if the following conditions are satisfied:

- The foreign national contributes to the social security programme of his country of origin as a citizen or a resident;
- India has entered into a bilateral comprehensive economic agreement with such country prior to 1 October 2008;
- The bilateral agreement has a clause on social security which specifically exempts natural persons of either country from contributing to the social security fund of the host country.

Source:http://www.epfindia.com/IntWorkersNew/IWU_UpdtdFAQs_19112012.pdf

India signs Social Security Agreements with Sweden and Japan

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

The SSA's envisage the following benefits:

- Exemption from Social Security Contribution in the host country
- Export of Benefits
- Totalisation of contributory periods

In addition, the India-Japan SSA specifically makes mention of the lump-sum withdrawal of Provident Fund and Pension Fund accumulations, subject to conditions.

It may be noted that the provisions of the Indian Provident Fund and Pension Fund Schemes were modified recently, to permit lump-sum withdrawal, subject to conditions, by IWs covered under an SSA signed by India with other countries.

Source: http://www.mofa.go.jp/mofaj/gaiko/treaty/ shomei_75.html and http://pib.nic.in/newsite/ erelease.aspx?relid=89465

EPFO issued guidelines on audit process and meaning of basic wages that were put on hold shortly after

The EPFO recently issued certain guidelines to PF officers on PF audit proceedings. This also clarified the definition of 'basic wages' in respect of which PF contributions are due.

The guidelines made reference to a seven-year limitation period on investigations into PF defaults and lump sum assessments of establishments that hire migratory workers on a short-term basis.

The clarification of 'basic wages' in these guidelines caused a lot of uncertainty in the industry. Keeping this in view, the Ministry of Labour and Employment and the EPFO have decided to keep these guidelines in abeyance. This would be a relief for employers and employees, since the interpretation of the term 'basic wages' has been a matter of litigation in the past and is still in litigation currently.

Source: http://www.epfindia.com/Circulars/Y2012-13/CirQJA_345.pdf and http: //www.epfindia.com/ Circulars/Y2012-13/Comp_21224.pdf

II. SERVICE TAX

Supreme Court Decisions

Benefit of works contract composition scheme under service tax is not available for ongoing projects as on 01.06.2007; CBEC Circular dated 4.1.2008 is in conformity with Rule 3(3) of Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 and is thus valid

The tax payer had executed various contracts, which were in the nature of composite construction contracts. The tax payer had paid Sales Tax/ VAT on those contracts prior to 01.06.2007. The tax payer challenged the validity of the CBEC Circular dated 4.1.2008, which disallowed availment of works contract composition scheme under service tax for ongoing contracts (as on 1.6.2007) on the ground that this would result in gross discrimination between tax payers who had paid tax prior to 1.6.2007 and those who did not pay any tax prior to 1.6.2007 and accordingly would now be paying tax at a lower rate. It was further argued that the aforementioned Circular is contrary to the provisions of Rule 3 (3) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, which states that the provider of taxable service who opts to pay service tax under the composition scheme shall exercise such option prior to payment of service tax. The tax payer's contentions were rejected by the Andhra Pradesh HC and the matter reached the Supreme Court of India.

The Supreme Court noted that the aforementioned Circular is explanatory in nature and that even without giving effect to the said Circular, the provisions of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 would remain in force which would not permit the tax payer to change the method with regard to payment of service tax. The Supreme Court upheld the decision passed by the High Court and emphasized that the aforementioned Circular only provides guidelines as to how the provisions of Rule 3 (3) of the 2007 Rules are to be interpreted.

Nagarjuna Construction Ltd v Union of India [2012-TIOL-107-SC-ST]

Tribunal Decisions

Lease rentals paid by the tax payer were not in relation to receiving services under the taxable category of 'supply of tangible goods' since the tax payer had right of possession and effective control over the aircrafts leased

In this case, the tax payer was engaged in providing aviation cargo services for the purpose of which they needed aircrafts. The tax payer entered into 'operating lease agreement' with M/s EAT, Brussels whereunder the tax payer was handed over the aircrafts for the purpose of operating the same. Further, the tax payer was

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responsible for the entire control, possession, maintenance, repair, running and obtaining insurance of the aircrafts.

Revenue Authorities raised a demand on the tax payer contending that the lease of the aircrafts would fall under the taxable category of 'supply of tangible goods' and hence tax payer was liable to pay tax on the lease rentals under reverse charge mechanism.

The CESTAT took a prima facie conclusion favorable to the tax payer and held that on a reading of the definition of 'supply of tangible goods' as provided under Section 65(105)(zzzzj) of the Finance Act, 1994 it emerges that the lease rentals paid by the tax payer were not in relation to receiving services under the taxable category of 'supply of tangible goods' since the tax payer had right of possession and effective control over the aircrafts leased. Basis the foregoing, the CESTAT granted a stay to the tax payer till the appeal is finally heard and disposed off.

Blue Dart Aviation Ltd v CST, Chennai 2012 (28) STR 386 (Tri – Chennai)

Consulting engineering services availed by tax payer in relation to modernization of captive power plant used in manufacture of paper (that also led to earning of carbon credits to the tax payer), covered under definition of 'input services' for the purposes of CENVAT Credit Rules

In this case, the dispute was on the eligibility of CENVAT Credit of service tax paid on consultancy services received by the tax payer. The said services were used in modernization of a captive power plant which was used in manufacture of paper (which attracted excise duty). The tax payer additionally entered into an agreement with M/s EDF Trading Ltd., a company incorporated under the laws of England for earning carbon credits (on account of producing lower carbon emissions due to modernization of the power plant). The Revenue Authorities rejected the CENVAT Credit availed by the tax payer on the consultancy services on the ground that the said services were used for earning the carbon credits and hence cannot be regarded as 'input services' in terms of CENVAT Credit Rules, 2004.

The CESTAT held that the consultancy services were used by the tax payer in relation to the captive power plant which was used in manufacture of paper. Additionally, the tax payer earned additional income on account of carbon credits as a result of a separate agreement entered with an England based company. However, the consultancy services were undoubtedly used in relation to the captive power plant which was used to manufacture paper. The consultancy services were used for modernization of the power plant and were in no way connected with earning the carbon credits - as per the CENVAT Credit Rules, the services used in relation to modernization of a factory are eligible for CENVAT Credit. Accordingly, the consultancy services received by the tax payer were eligible 'input services' for the purposes of credit availment.

Shree Bhawani Paper Mills Ltd v CCE, 2012 (28) STR 409 (Tri.-Del)

Services such as 'Architect Service', 'Erection, Commissioning and Installation Services', 'Management Consultancy Services', 'Real Estate Agency Services' 'Consulting Engineer's Services' etc. which were used in the construction of the buildings, shall not qualify as input services vis-a-vis 'Renting of Immovable Property Service'

The tax payer was providing services under the taxable category of 'renting of immovable property services'. The tax payer got buildings constructed through contractors and rented them out to third parties. The tax payer paid service tax under the aforesaid category partly through the PLA account and partly through utilizing CENVAT Credit taken on various services such as architect's services', erection, commissioning and installation services', management consultancy services', real estate agency services', consulting engineer's services', etc which were used in construction of the building. The Revenue Authorities raised a demand on the tax payer contending that aforesaid services would not fall under the definition of 'input services'.

The tax payer relied on various stay orders and other decisions in which CENVAT Credit paid in respect of services used for providing 'commercial or industrial construction services' were allowed by the courts.

The CESTAT while distinguishing the judgments relied on by the tax payer held that the impugned services would be regarded as input services for providing 'commercial or industrial construction services', however since in the present case, the tax payer was providing 'renting of immovable property services', the services in question would not be regarded as 'input services'. Thus, the CESTAT ordered the tax payer to pre deposit a part of demand.

Golflinks Software Park Pvt Ltd v CST [2012-TIOL-1521-CESTAT-BANG]

Amounts paid to Transit Mixer Vehicle (TMV) owners for delivery of Ready Mix Concrete to the construction sites of customers cannot be treated as freight paid to said owners and taxpayer cannot be treated as recipient of Goods Transport Agency ("GTA") services

The tax payer had entered into a contract with owners of TMVs for delivery of Ready Mix Concrete to the construction sites of the customers. The Revenue Authorities treated the tax payer as recipient of GTA service from the said owners of TMVs and confirmed the demand of service tax.

The CESTAT prima facie reached a conclusion favorable to the tax payer and held that the TMVs are obtained by the tax payer on a lease basis and they serve not merely the purpose of transporting the Ready Mix Concrete but they are also used for "mixing" the said Ready Mix Concrete and accordingly, the amounts paid by the tax payer to the TMV owners cannot be treated as freight.

Larsen & Tourbo Ltd v CCE, Hyderabad [2012-TIOL-1520-CESTAT-BANG]

Electricity charges collected from

tenants are not included in value of taxable service as electricity is ‘goods’; said charges may not form part of taxable value in terms of Notification No. 12/2003-ST

The tax payer was collecting rent and paying service tax under the category of ‘Renting of Immovable Property Service’. The Revenue Authorities were of the view that electricity charges recovered from the tenants’ form part of the consideration for such service.

The tax payer argued that supply of electricity is supply of ‘goods' and the same is exempted as per Notification No. 12/2003-ST wherein it has been clarified that supply of goods shall not form part of the value of taxable service.

The CESTAT prima facie agreed with the contention and waived the requirement of pre-deposit.

Econ Hinjewadi Infrastructure (P) Ltd v CCE, Pune -III [2012-TIOL-1688-MUM)]

Notification & Circulars

Restoration of service specific accounting codes for payment of service tax

Service Tax Circular No165/16/2012-ST was issued regarding restoration of service specific accounting codes for payment of service tax

Circular No. 165/16/2012-ST, dated November 20, 2012

III. VAT/ CST

High Court Decisions

Recharge Cards, Recharge Pins, etc have no intrinsic value of their own and are never sold as goods independent from the Cellular Mobile Telephone services being provided and thus not liable to sales tax/ VAT

The tax payer was granted a license by the Department of Telecommunications, Govt. of India, to maintain, operate and provide Cellular Mobile Telephone services to the subscribers. A consignment of Recharge Cards, Recharge Pins, etc being transported through courier by the tax payer in the course of its business was intercepted by the Revenue Authorities and penalty was imposed for failure to furnish the documents as contemplated under Section 53(2)(b) of the Karnataka VAT Act, 2003. An appeal filed before the Jt. Commissioner of Commercial Taxes (Appeals) was decided in favour of the tax payer but subsequently, the Revisional Authority, on verification of the records, set aside the order and restored the penalty imposed earlier. Aggrieved of the same, an appeal was filed before the Karnataka HC.

The tax payer contended that the amount received from the subscribers towards the Recharge Cards formed part of the taxable value for the levy of service tax and appropriate service tax was being paid from time to time. Further, Recharge cards, Recharge Pins were a part and parcel of the services being provided by them and the

dominant position of the transaction was to provide service and not to sell materials and as such, no VAT was leviable on the transaction. Moreover, pricing-cum-delivery challans (containing date, code, prescription, quantity, cost of the goods, and service tax particulars) were accompanying the goods vehicle. The Revenue Authorities alleged that documents furnished were not substantial and since the Recharge Cards were being sold at their face value, VAT was payable. The Court noted the findings of the Supreme Court in the case of Idea Mobile Communication Ltd. [2012 (72) KLJ 65 (SC)] on which reliance was placed by the tax payer. The Court decided the appeal in favour of the tax payer after agreeing with the Supreme Court's observations that SIM Cards have no intrinsic value of their own and they are supplied to the customers for providing telephone service to the customers.

Bharti Televentures Ltd v State of Karnataka [2012-VIL-91-Kar]

Coal, alum, caustic soda and other consumables used for generation of electricity (in the Captive Thermal Plant) which is further used for manufacturing finished product (aluminum, aluminum ingots and sheets, etc) qualify as 'inputs' under Section 2(25) of the Orissa Value Added Tax Act ("OVAT")

The tax payer, a Central Government PSU under the administrative control of Ministry of Mines, Government of India, claimed input tax credit of coal, alum, caustic soda, etc used for generation of electricity in their captive power plant which was further used in the process of manufacturing aluminum. The credit was disallowed by the Revenue Authorities on the ground that the finished product, ie electricity was exempt from OVAT.

The tax payer contended that the materials were being used for generation of electricity which was further used for converting alumina to metallic aluminum through an electrolysis process and without electricity, the aluminum manufacturing was not possible. Further, aluminum, aluminum ingots, etc (and not electricity) were the final products and 4 percent VAT was being paid on their sales. Moreover, 'input' was defined under the OVAT to include consumables directly used in the processing or manufacturing of goods and the expression "in the manufacture of goods" should normally encompass the entire process carried on for the conversion of raw material into finished goods.

The Revenue Authorities contended that electricity generated was a finished product itself and it was not integrally connected with the manufacturing of aluminum.

The HC distinguished between expressions "directly go into the composition of the finished products" and "directly used for manufacturing or processing of finished products" and held that to qualify as 'inputs', it was not necessary that the inputs should directly go into the composition of finished product. Applying the 'test of essentiality' and 'test of dependency', the HC dropped the demand and allowed the input tax credit on the materials in question.

National Aluminum Company Limited v DCCT, Bhubaneswar – III Circle [2012-VIL-97-ORI]

Benefit of concessional levy under Orissa Entry Tax Act will be available only if the goods purchased are used as a 'raw material' in the manufacture of a finished product irrespective of the manner in which the finished goods are used or disposed.

The tax payer, a public limited company operating an integrated steel plant in Orissa, was engaged in manufacturing and selling of sponge iron, steel billets and HR Coil. The tax payer purchased raw materials such as iron ore, coke breeze, etc and paid entry tax at the concessional rate. The Revenue Authorities denied the benefit of concessional levy due to the reasons that finished materials so manufactured were branch - transferred outside Orissa and coal consumption in captive power plant for generation of electricity cannot be treated as raw material for production of sponge iron.

The tax payer contended before the HC that neither the relevant rule [Rule 3(4) of the OVAT Rules] nor the relevant declaration form [Form E-15 declaration] contemplated or stipulated the manner in which the goods so manufactured needed to be used or disposed off. Further coal was required to generate electricity which in turn was essential to run the plant to manufacture sponge iron. Electricity generation formed a part of manufacturing activity and thus, coal consumption should be regarded as a raw material. The Revenue Authorities placed reliance on the decision of the Supreme Court in the case of Union of India vs Ahmedabad Electricity Co. Ltd and others [2004 134 STC 24] wherein it was held that coal burnt for producing steam was used only for the ancillary purpose as fuel and during the course of manufacture, raw material should get a new identity either on its own or in conjunction with other raw materials.

The Court held that for claiming the concessional tax rate, it was not necessary that goods manufactured should be sold in Orissa or manufactured goods cannot be branch – transferred outside Orissa but the goods purchased must be used a 'raw material' in manufacturing the finished product. Since coal consumption did not qualify as 'raw material' in terms of the above decision, the tax payer was not entitled to avail the benefit of concessional levy.

On the issue where entry tax was proposed to be levied on the returned raw materials and returned finished goods, the HC directed the tax payer to establish that entry tax had already been paid on the sale of the returned goods, failing which the Revenue Authorities could complete the assessment in accordance with law.

Bhusan Power & Steel Limited v State of Orissa [2012-VIL-94-ORI]

Circular dated August 6 and September 22, 2002 under Maharashtra VAT laws (dealing with composition scheme for construction contracts where interest in land or land is also conveyed under the contract) are clarificatory and has not introduced a condition by way of

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restriction which is not found in the statute

Validity of circulars dated August 6 and September 22, 2002 issued under Maharashtra VAT ("MVAT") laws was challenged by the tax payers as being ultra vires the MVAT laws. The said circulars inter alia clarified that the composition scheme for payment of VAT as applicable for construction contracts where interest in land or land is also conveyed under the contract were available for agreements registered after April 1, 2010.

The Bombay HC held that the composition scheme is not ultra vires in imposing a condition to the effect that it shall cover all agreements registered after April 1, 2010. The HC took note of the fact that representations were submitted to the State Government for extending the benefits of the composition scheme to the agreements registered between June 2006 to March 2010 and held that it would not interfere in the working of the State Government as these kinds of decisions were in the domain of the State Government.

Builders Association Of India v State Of Maharashtra [(2012) 55 VST 504 (Bom)]

Hospitals are liable to get themselves registered as dealers under the Kerala Value Added Tax Act, 2003 and to pay tax under the said Act for the medicines and consumables sold to their patients

The tax payer was engaged in rendering of various medical services like diagnostics, doctor's opinion, providing medicines and consumables to patients etc. Revenue Authorities were of view that they should get themselves registered as dealers under the Kerala Value Added Tax Act, 2003 ("KVAT") and pay tax under the said Act for the medicines and consumables sold to their patients. Aggrieved by the same a writ petition was filed before the Kerala HC seeking a declaration that hospitals are not liable to take registration and pay tax under KVAT for supply of medicines and other items meant for treatment. The tax payer also sought a declaration that section 6 of the KVAT Act and the corresponding rules are ultra vires and unconstitutional to the extent it seeks to impose tax on hospitals and compel the tax payers to take registration.

The HC after detailed discussion on the various terms such as "business'', ''dealer'', ''profit motive'' etc concluded that where hospitals are being established by public limited companies which are incorporated with profit motive and in such hospitals medicines and other consumables are sold to a patient and bills are raised, such transactions cannot be outside the ambit of the KVAT Act. While a particular transaction may qualify as not liable to VAT that does not mean that the whole industry in the State can remain outside the ambit of VAT. The HC also upheld the constitutionality of section 6 of the KVAT Act.

Sanjos Parish Hospital v CTO [2012 55 VST 208 (Ker)]

IV. CUSTOMS

High Court Decisions

In interpretation of fiscal status, exemption notification has to be strictly read and it is not permissible to either add or subtract words as found therein

The tax payer entered into a job work arrangement to manufacture pesticide formulations. For the purpose of the arrangement, the tax payer was provided with the two principal raw materials on free of cost basis from outside India. The imported goods were eligible for exemption from payment of customs duty under Notification No.32/97-Cus dated April 1, 1997, subject to the conditions that (i) the imported goods are used for execution of an export order placed on the importer by the supplier of such goods, under a job work arrangement; and (ii) the value addition in the resultant product exported should not be less than 10% of the CIF value of the goods imported.

The Revenue Authorities denied the benefit of exemption under the said notification on the ground that the arrangement would not amount to a job work arrangement as substantial inputs/ raw materials are procured locally by the tax payer/ importer in execution of the export order. The Revenue Authorities adopted the definition of 'job work' from an excise notification which requires a job worker to solely work on goods supplied by the supplier and return the same after the raw material has undergone a manufacturing process.

The CESTAT decided in the favour of the tax payer. On appeal, the Bombay HC also held in favour of the tax payer and observed that it is a well settled principle of interpretation of fiscal statutes that an exemption notification has to be strictly read and it is not permissible to either add or subtract words as found therein. Therefore, the tax payer assessee was entitled to the benefit of exemption under the notification in respect of the imported goods.

CC, Mumbai v Sujag Fine Chemicals India Ltd [2012-TIOL-914-HC-MUM-CUS]

If the credit availed on inputs used in the manufacture of final products is reversed before it is utilised, then, it should be treated as if the tax payer has not availed the credit and that the tax payer is entitled to the benefit of DFIA scheme

The tax payer became entitled to import various inputs under the Duty Free Import Authorisation ("DFIA") scheme to manufacture some goods, with an obligation to export the manufactured goods upto the quantity specified therein.

The tax payer took no credit of duty in respect of duty free import of raw materials and it availed Cenvat credit of duty paid on the consumables which were used in the manufacture of the final product, as it was not possible to identify as to whether the manufactured goods would be cleared for exports or cleared to the domestic market. Immediately after the manufactured final products were exported under the DFIA, the tax payer reversed the Cenvat credit with interest.

The CBEC had clarified that for the purposes of DFIA, the Cenvat credit once availed is to

be treated as availed, even if the said credit without being utilised is reversed or paid back along with interest after the goods are cleared for export. Revenue Authorities relied upon this clarification to deny the benefit of DFIA to the tax payer.
In appeal, the Court observed that in the case of DFIA if the credit availed on inputs used in the manufacture of final products is reversed before it is utilised either by reversing the credit or by cash payment with interest, then, it should be treated as if that the tax payer has not availed the credit and thus concluded that the tax payer is entitled to the benefit of DFIA scheme.

Steelco Gujarat Ltd v Union Of India [2012 (285) ELT 161 (Bom)]

Tribunal Decisions

Limitation of one year for filing of the refund claim of SAD under Notification No. 102/2007 dated September 14, 2007 shall be computed from the date of payment of duty. However, refund claim allowed even filed after the expiry of one year considering the tax payer was acting as per the directions of the Superintendent

The tax payer had imported certain goods and subsequently filed an application for the refund of Special Additional duty ("SAD") in terms of the Notification No. 102/2007 dated September 14, 2007. The tax payer filed the refund claim within a period of one year from the date of final assessment of the bill of entries. The Revenue Authorities rejected the said claim on the ground that the same is time barred in terms of the time period specified under the relevant notification. The tax payer contended that it had received a letter in respect of its other refund claims, from the Superintendent (Refund), ICD stating that the refund claim cannot be processed as final assessment in respect of the relevant bill of entries in not complete. Thus, going by this letter from the Superintendent, the tax payer filed its other refund claims only after the completion of the final assessment and the period of one year was computed from the date of final assessment.

In the said case, the CESTAT observed that the tax payer has acted as per the directions of the Superintendent and thus, cannot be blamed for filing the refund claims after the finalization of the assessments. It was further noted that with respect to the issue in hand, the CBEC had issued a circular clarifying that the period of one year shall be computed from the date of payment of duty. However, considering the facts and circumstances of the present case, the CESTAT allowed the refund claim of the tax payer.

Singla Trading Company v CC, New Delhi [2012 (285) ELT 256 (Tri - Delhi)]

Importer eligible to take the refund of SAD paid on imported goods at the time of subsequent sale of such goods liable to local sales tax even if some process not amounting to manufacture is carried out on the imported goods

The tax payer imported HR/ CR coils and electrical steel of various descriptions and such goods were cleared on the payment of applicable customs duty. Further, the tax

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payer filed refund of Special Additional Duty ("SAD") under Notification No. 102/2007 – Cus dated September 14, 2007. The Revenue Authorities rejected the refund claims filed by the tax payer on the ground that certain cutting and slitting activities were carried out on the said goods before selling the same in market. Thus, identity of the goods was completely lost and it could not be established that the same goods were imported. In this regard, the tax payer submitted that cutting and slitting of the said goods do not amount to manufacture and it was due to sheer market demand that the processing activities were carried out. The tax payer relied upon certain earlier precedents in this regard.

The Revenue Authorities contended that to claim the exemption, the Notification has to be read strictly in terms of the words used in the Notification and if the goods sold are not the same ones which were imported, the benefit of refund cannot be claimed.

The CESTAT decided that the tax payer is eligible for the refund as mere change of the tariff entry after the processing activities do not amount to 'manufacture' and a new marketable commodity has to come into existence for qualification as 'manufacture'. Also, the intention behind the notification is to provide the importers and domestic traders a level playing field for competition and thus where the process does not amount to 'manufacture' and the refund of SAD is not provided to them, then such importers would be in a disadvantageous position. Accordingly, the purpose of the notification would be lost if the tax payer is denied the benefit of refund.

Posco India Delhi Steel Processing Ltd v CC, Kandla [2012-TIOL-1769-CESTAT-AHM]

Notification & Circulars

Specified items required for Air-to-Air Missile System (Project ASTRA) of Ministry of Defence exempted from Customs Duty.

The Government has further amended Notification No. 39/96-Cus. dated July 23, 1996 to grant exemption to import of machinery, equipment, instruments, components, spares, jigs, fixtures, dies, tools, accessories, computer software, raw materials and consumables required for the purpose of Air-to-Air Missile System (Project ASTRA) of the Ministry of Defence from customs duty.

Notification No 58/2012, dated November 19, 2012

V. CENTRAL EXCISE

High Court Decisions

Department cannot recover interest in case of voluntary payment of time barred duty before issuance of show cause notice

The tax payer was engaged in manufacture of excisable goods. After correspondence between the taxpayer and Revenue Authorities, the manufacturer/ taxpayer voluntarily paid the due amount of excise duty. The Revenue Authorities

subsequently issued a show cause notice imposing demand along with interest and penalty. The matter reached the CESTAT on appeal, which ruled in favor of the tax payer. The Revenue Authorities then approached the Gujarat HC on appeal against the said CESTAT order.

The Court took note of Sub-Section 2(B) of the Section 11A of the Central Excise Act which provides that with respect to unpaid or short paid duty, if the manufacturer pays the sum on the basis of his own ascertainment before issuance of notice, then no notice shall be served for in respect of duty so paid. The HC also took note of the fact that in this case, the period of limitation had already expired and when the extended period was not available to the Revenue Authorities, the tax payer was not liable to even pay the basic duty let alone interest. The HC held that in absence of the voluntary payment by the tax payer, recovery of the unpaid duty would not have been possible. It was not the intention of the legislature to further burden the tax payer with payment of interest in case of voluntary payment of duty despite completion of period of limitation.

CCE v Gujarat Narmada Fertilizer Co Ltd [2012 (285) ELT 336 (Guj)]

Cement, steel etc used for civil construction which was necessary for establishing the manufacturing unit; hence they would qualify as ‘capital goods’ on which tax payer can claim credit of duty paid

The tax payer was availing credit on goods like rebar coils, CTD bars, TOR steel, crane with accessories, bulldozer etc by treating them like ‘capital goods’, which was opposed by the Revenue Authorities. The matter reached before the Madras HC on appeal.

The Court relied upon the decision of the Supreme Court in the case of CCE versus Rajasthan Spinning & Weaving Mills Limited and held that a liberal interpretation is required for determining whether particular items are capital goods or not. The Court went on to hold that crane with accessories and loader will come within the meaning of ‘items of machinery or equipment used for production or processing of any goods’ and further items like Rebar coils, CTD bars, TOR steel and cement are used for the purpose of construction of the main plant itself which is necessary for establishing the manufacturing unit and thus eligible to qualify as ‘capital goods’.

CCE v India Cements Ltd [2012 (285) ELT 341 (Mad)]

Steel plates and strips used in fabrication of storage tanks are 'accessories to capital goods' or alternatively inputs and are eligible for CENVAT Credit

The tax payer took credit on steel plates and strips used in fabrication of storage tanks which was challenged by the Revenue Authorities. The matter reached the Karnataka HC on appeal.

The Court held in favour of the tax payer by referring to one of its previous decisions in the case of ICL Sugars Ltd., where it was held that though Rule 57-Q defining ‘capital goods’ did not include a ‘storage tank’ (at

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the relevant time period) it included tubes, pipes and fittings thereof used in the factory – the benefit was extended to storage tanks by holding the same to be a component to the main machinery even though it is embedded to the land.
CCE v Hindalco Industries Ltd [(2012) 37 STT 219 (Kar)]

Rule 26 of Central Excise Rules, 2002 which provides for imposition of penalty, is prima facie in excess of the rule-making power conferred under Section 37 of Central Excise Act, 1944

The tax payer filed a writ petition against the order of Joint Commissioner of Central Excise, Kolkata wherein, inter alia, penalty under Section 11AC of the Central Excise Act was imposed on tax payer and penalty under Rule 26 of Central Excise Rule, 2002 was levied on two of the directors of the tax payer. The penalty under Rule 26 was imposed on account of the fact that the said directors were in possession of/ concerned with transporting, removing, etc of the excisable goods that are liable to confiscation.

The Court held that Rule 26 of Central Excise Rules, 2002 which provides for imposition of penalty on any person who acquires possession of or is in anyway concerned with the transporting, removing, etc of the excisable goods that are liable to confiscation is prima facie ultra vires of Section 11AC and is in excess of rule making power conferred under the Central Excise Act, 1944. Therefore an interim order was issued by the HC restraining the Joint Commissioner of Central Excise from giving any further effect to the penalty imposed.

Prompt Castings Pvt Ltd v Joint CCE, Kolkata-IV [2012 (284) ELT 641 (Cal)]

Notification & Circulars

Specified items required for the Project ASTRA, Ministry of Defence exempted from Excise Duty

The Government has amended the notification no.64/95-Central Excise, dated the 16th March, 1995, thus exempting Equipment and Stores used for the systems and sub-systems of Project ASTRA, Ministry of Defence from Excise Duty

Notification No.39/2012-CE, dated November 19, 2012

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