July 2014

FICCI

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

KPMG cutting through complexity

BMR & Associates

Foreword

I am pleased to enclose the July 2014 issue of FICCI's Tax Updates**.** This contains recent case laws, circulars and notifications pertaining to direct and indirect taxes.

Mr Sidharth Birla, President, FICCI was invited to participate in the Pre-Budget consultations with the Finance Minister on the 6th June, 2014. The key recommendations made by FICCI during the pre-budget discussions were the need for a conducive tax regulatory environment, introduction of policy on retrospective amendments in tax laws, implementation of GST, making improvement in the dispute resolution mechanism for tax matters, extending the scope of investment allowance etc.

The General Budget was presented by the Hon'ble Finance Minister in the Parliament on July 10, 2014. FICCI had organized an Interactive Session with senior Government officials on budget proposals on July 12, 2014 as a part of its National Executive Committee meeting. Dr Arvind Mayaram, Finance Secretary, Mr. Shaktikanta Das, Revenue Secretary, Dr. Gurdial Singh Sandhu, Secretary, Financial Services and Ms. J M S Sundharam, Chairperson, CBEC addressed and interacted with the executive committee members on the budget proposals.

FICCI also organized half - a - day Interactive Sessions on Union Budget 2014-15 on Monday, July 14, 2014 at New Delhi and on Tuesday, 15th July, 2014 at Mumbai. These events focused on the key provisions of the Finance Bill (No. 2), 2014 and the relevant notifications to help the participants in understanding the implications of the changes in the Income Tax, Customs, Central Excise and Service Tax laws and procedures and enable them to seek clarifications from the eminent tax experts. Mr Sunil Gupta, Joint Secretary (TPL), Ministry of Finance, Mr Vinod Kumar, Joint Secretary (TRU), Ministry of Finance and Mr P K Mohanty, Joint Secretary (TRU), Ministry of Finance addressed and interacted with the participants at Delhi and Mr V S Krishnan, Chief Commissioner of Central Excise and Mr Sushil Solanki, Commissioner of Service Tax deliberated on various issues at the session held at Mumbai .

On the taxation regime, the Delhi Tribunal in the case of Nortel Networks India International Inc. held that since the hardware supplied by the taxpayer was installed by an Indian subsidiary and the contracts were pre-negotiated by it, the Indian subsidiary constituted a fixed place of business and dependent agent Permanent Establishment (PE) of the taxpayer in India under the India-USA tax treaty. Further the Tribunal held that since the accounts of the taxpayer have no sanctity and the same were not audited, resorting to Rule 10 of the Income-tax Rules, 1962 would be justified. Accordingly, an attribution of 50 per cent of the profits to the activities of PE in India would be a reasonable attribution in the taxpayer's case.

In a Customs matter, the Tribunal has held that the concessional rate of duty available to Liquefied Petroleum Gases (LPG) would be available to propane and butane also since petroleum gases is a generic term and covers wide range of gases or mixture of such gases. The concession cannot be restricted to LPG used as fuel but would be applicable to all types of Liquefied Petroleum Gases.

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

No sub-contract relationship arose between a taxpayer AOP and its member entities during project execution, hence provisions of Section 194C is not applicable

The taxpayer is an Association of Persons (AOP) which comprises two entities, viz. SMC Infrastructure Pvt. Ltd., a company, and Ambika Enterprises, a propriety firm. The association was formed for the purpose of bidding for the contract of the Thane Municipal Corporation. The association, which placed its bid, was eventually awarded the contract on 16 November 2004, which was made by the two aforesaid entities. The work was carried out by these two entities and the amount received after work carried out was handed over to the entities in order to enable them to execute the contract. The taxpayer neither kept any commission nor any profit. The lower authorities held that the relationship between the taxpayer and the two entities resulted in a sub-contract relationship, and therefore the provisions of Section 194C would be applicable. However, the Tribunal reversed the order of lower authorities. Aggrieved by the same, Revenue filed an appeal before the Bombay High Court.

Before the Bombay High Court, Revenue argued that the Tribunal merely relied upon the absence of a written contract to hold that there was no sub-contract relationship between the taxpayer and the two entities. Rejecting Revenue's contentions, the High Court observed that it is the association comprising two entities joined together for the purpose of executing the project, and under such circumstances no inference of any sub-contractor relationship could be drawn.

CIT v. SMC Ambika JV [TS-362-HC-2014(BOM)]

High Court allows writ, directs Revenue to pay 'compensation' for a delay of 11 years in the payment of interest on refund due to a taxpayer, under Section 214 of the Act

For Assessment Year (AY) 1984-85, the taxpayer paid advance tax of INR2.25 million and had TDS credit of INR50,000. The taxpayer's income was finally assessed under the head 'Long Term Capital Gains' for a sum of INR0.328 million. Thus, the taxpayer became eligible for a refund of an amount of INR1.97 million with interest under Section 214 of the Act. Vide refund order dated 22 December 1998, it was determined that the taxpayer was entitled to a refund of INR1.97 million. The taxpayer was also entitled to be paid interest under Section 214 of the Act for the period 1 April 1984 to 31 March 1987 (i.e. date of assessment order) as per the applicable rates, which arrived at INR0.83 million. However, the taxpayer also claimed compensation payment on account of delay in payment of interest from 31 March 1987 to 22 December 1998. However, such claim was rejected by the AO on the ground that there was no provision in the Act to grant interest on interest. Aggrieved, the taxpayer filed a writ petition before the Andhra Pradesh High Court.

The Andhra Pradesh High Court observed that the taxpayer's case was covered by the Supreme Court ruling in the case of Sandvik Asia Ltd. v. CIT [2006] 280 ITR 643 (SC). Following Supreme Court ruling in the case of Sandvik Asia Limited, the High Court allowed the taxpayer's writ petition directing Revenue to pay simple interest at the rate of nine per cent per annum for the period i.e., from 31 March 1987 to 22 December 1998. The High Court further directed revenue to pay such compensation amount within a period of two months from the date of receipt of this order, failing which the revenue shall pay penal interest at the rate of 15 per annum for the above said period.

The Sirpur Paper Mills Ltd. v. JCIT [TS-359-HC-2014(AP)]

A final assessment order passed after the TPO's order, without issuing a draft assessment order, is invalid and not in accordance with Section 144C

The taxpayer has entered into international transactions for AY 2009-10. The transfer pricing assessment of international transactions was referred to a Transfer Pricing Officer (TPO) and the TPO passed his order on January 30 2013. Thereafter, the AO, instead of passing the draft assessment order [as specified under Section 144(C)] directly passed a final assessment order under Section 143(3) of the Act. The assessment order was passed on 26 March 2013. The AO also raised the tax demand and imposed penalty on the taxpayer. After realizing his mistake of passing a final assessment order instead of the draft assessment order, the AO issued a corrigendum on 15 April 2013. The corrigendum stated that the order passed on 26.02013 under Section 143C of the Act has to be read and treated as a draft assessment order. The AO also granted 30 days' time to respond to the taxpayer. The taxpayer made reference to the Dispute Resolution Panel (DRP). However, the DRP refused to issue any directions on the grounds that the order passed by AO was final, and hence the DRP did not have any jurisdiction. Aggrieved by the same, the taxpayer filed a writ petition before the Madras High Court.

The Madras High Court quashed the assessment order and the corrigendum, since it was barred by a time limitation. The High Court observed that as per Section 144C of the Act the AO has no right to pass final assessment order pursuant to the TPO's recommendations. Relying on the Supreme Court ruling in the case of Deepak Agro Foods v. State of Rajasthan and others [2008] 16 VST 454 (SC), the High Court observed that if an order is passed beyond the statutory period prescribed, such order is a nullity and has no force of law. Accordingly, the High Court in the taxpayer's case concluded that the order passed by the AO lacked jurisdiction especially when it was beyond a period of limitation prescribed by the statute. Further, High Court also held that when there is a statutory violation in not following the procedures prescribed, such an order could not be cured by merely issuing a corrigendum. The High Court inter alia relied on the decision of Andhra Pradesh High Court in Zuari Cement Limited v. ACIT (WP No. 5557 of 2012 dated 21 February 2013) that dealt with similar issue.

Vijay Television Pvt. Ltd. v. DRP [2014] 46 taxmann.com 100 (Mad)

Where the taxpayer had not collected and deposited service tax but on being pointed out, deposited the same; amount being expended by the taxpayer in the course of business was allowable as business expenditure

During the course of assessment proceedings, the service tax authorities raised an audit objection pointing out that the taxpayer had not collected the service tax on mechanical erection and installation of plant and machinery, structure work, piping work and contract works for the period from financial years 2003-04 to 2006-07, and a demand of service tax was raised and interest thereon. The taxpayer accepted the audit objection and paid up the said amount and claimed deduction thereof as business expenditure. The stand of the revenue was that this amount having been expended by the taxpayer for infraction of law, the deduction thereof was not available. The Commissioner of Income-tax (Appeals) [CIT(A)] as well as the Tribunal accepted the claim of the taxpayer. Aggrieved by the same, Revenue filed an appeal before the Gujarat High Court.

The Gujarat High Court upheld the view taken by CIT(A) and the Tribunal. The High Court held that the amount was expended by the taxpayer during the course of business, wholly and exclusively for the purpose of business. If the taxpayer had taken proper steps and charged service tax to the service recipients and deposited with the Government, there was no question of the taxpayer expending such sum. It is only because the taxpayer failed to do so, that he had to expend the said amount, though it was not his primary liability. Be that as it may, this cannot be stated to be a penalty for the infraction of law. Further, it also held that payment of interest is compensatory in nature and would not partake of the character of penalty.

CIT v. Kaypee Mechanical India (P) Ltd. [2014] 45 taxmann.com 363 (Gujarat)

The Delhi High Court rules that transfer pricing reference does not curtail the test of deductibility of expenses under Section 37 of the Act. Further, cost-to-cost reimbursement transactions should also be benchmarked from an arm's length perspective.

The taxpayer, an Indian company, reported several international transactions including (i) payment of referral fees to associated enterprises (AEs); and (ii) reimbursement to AEs for the costs incurred by them for certain coordination and liaison services provided to the taxpayer. The TPO disallowed reimbursement of expenses transaction by determining its arm's length price (ALP) as nil, and held that no intra-group services existed in this case as the taxpayer was unable to file any evidence to support the specific need for such services and the benefits that were actually accrued from them. No benchmarking or transfer pricing analysis was conducted to substantiate the arm's length nature of such transactions. The TPO also noted that the taxpayer may have received only incidental benefit from the global relationship between the AEs and clients. As regards the payment of the referral fees, the TPO concluded it to be at arm's length. However, the AO disallowed the same under Section 37 of the Act, stating that the taxpayer failed to demonstrate the genuineness of the transaction, the receipt of any such services, and the business purpose of the same. The DRP upheld the adjustments made by the AO. The Tribunal reversed the findings of the AO/TPO on both of the above-mentioned transactions.

On appeal, the High Court held as follows:

- The High Court observed that whether a third party, in an uncontrolled transaction with the taxpayer, would have charged amounts lower, equal to or greater than the amounts claimed by the AEs, has to be tested under the various methods prescribed in Section 92C of the Act. The argument of the taxpayer that it only reimbursed the cost incurred, while an uncontrolled transaction would involve an additional element of profit, is not tenable. This being a transaction between related parties, whether the cost itself is inflated or not is a matter to be tested under a comprehensive transfer pricing analysis. The High Court also noted that the application of Section 92(3) of the Act is not a logical inference from the fact that the AEs have only asked for reimbursement of costs.

- The jurisdiction of the AO under Section 37, and that of the TPO under Section 92CA of the Act, are distinct. The High Court noted that the authority of the TPO is to conduct a TP analysis to determine the ALP, and not to determine whether there is a service or not from which the taxpayer benefits. That aspect of the exercise is left to the AO under Section 37 of the Act.

- In reference to the referral fee transaction, the High Court noted that the TPO determines whether the transaction value represents the ALP or not (including whether the ALP is nil), while the AO makes the decision as to the validity of the deduction under Section 37. This would include the decision as to whether the expenditure was 'laid out or expended wholly and exclusively for the purposes of the business' as the same is a fact determination or verification to be undertaken by the AO. The authority of the AO under Section 37 is not curtailed in any manner by a reference under Section 92C of the Act.

- The findings of the Tribunal on both the transactions were set aside, and the matter was remanded to the file of the AO, for an ALP assessment by the TPO, followed by the AO's assessment order in accordance with law.

Cushman and Wakefield (India) Pvt. Ltd. [ITA 475/2012/Delhi HC]

Tribunal Decisions

Indian group company held to constitute a PE under the India-U.S. tax treaty

The taxpayer, incorporated in the USA, is a part of a group engaged in the supply of hardware and software products to telecom companies. An Indian group company entered into a contract with a customer in India for the supply (including installation, testing and commissioning) of hardware equipment. Immediately thereafter, the Indian company assigned the supply part of the contract to the taxpayer without any consideration. A Canadian group company also had a Liaison Office (LO) in India.

The taxpayer purchased the equipment from a group company outside India and supplied it to the customer in India at a substantial loss.

Based on the facts of the case, the Income-tax authorities in India held that the Indian company and the LO constituted a PE of the taxpayer in India under the India-USA tax treaty. Further, based on Rule 10 of the Income-tax Rules, 1962 (the Rules), the Income-tax authorities applied the global gross profit margins of the group to the consideration for the supply of equipment and computed profits attributable to the PE.

On appeal, the Income-tax Appellate Tribunal (the Tribunal), based on facts, held that the Indian Company/the LO constituted a fixed place PE/dependent agent PE of the taxpayer in India. The following are the observations of the Tribunal:

PE

- The contract was a turnkey and indivisible contract for supply, installation, testing, commissioning etc. The compensation received for the sale of equipment represented the payment for a work contract.

- The Indian company was responsible for negotiating and securing contracts. Further, the Indian company also undertook the installation and commissioning. The LO was also rendering service to the taxpayer.

- The entire business activity of the taxpayer is managed by the Indian Company and hence, constitutes a PE.

Apportionment of profit

- The profit of the taxpayer from the supply of equipment, computed by reference to the gross profit rate of the group and further allowance for selling, general marketing expenses and research and development expenses is acceptable.

- Since the accounts of the taxpayer have no sanctity and the same were not audited, resorting to Rule 10 of the Rules would be justified.

- Fifty per cent of the resulting profit is attributable to the PE.

Nortel Networks India International Inc. v. DDIT (ITA Nos.1119, 1120 & 1121 of 2010)

Payment made to full time consultant doctors qualify for tax deduction under Section 194J of the Act (for professional services) and not under Section 192 of the Act (for salary)

The taxpayer is a multi-specialty hospital engaged in providing healthcare services under the name 'Global Hospitals'. The taxpayer deducted tax at source for payments made to doctors under Section 194J, treating them as consultants and not as employees. The AO was of the view that the taxpayer ought to have deducted the tax under Section 192 instead of Section 194J of the

Act. The AO observed that the full time consultant doctors were full time employees of the hospital and they were subjected to all services rules and Regulations framed by the hospital. The AO finally concluded that there existed an employer and employee relationship between the taxpayer and the doctors, and payments made to full time consultant doctors i.e., the first category of doctors were within the purview of Section 192 of the Act. Thus, the taxpayer was treated as assessee in default under Section 201(1) of the Act.

The Hyderabad Tribunal after perusing the service agreements between the taxpayers and doctors observed that there was nothing on record to show that the full time consultant doctors were subject to same service conditions like other resident doctors or other full time employees of the hospital. The Tribunal held that there was nothing on record to prove that full time consultant doctors were either provided with specific working hours or subject to any rules and regulations of taxpayer hospital, hence no employer-employee relationship could be deduced. Thus, absent employer-employee relationship between the taxpayer and doctors, payments to full time consultant doctors qualifies for tax deduction under Section 194J (for professional services) and not under Section 192 of the Act (for salary). The Tribunal *inter alia* relied on the decision of the co-ordinate bench in the case of DCIT v. Yashodha Super Speciality Hospital [2010] 133 TTJ 17(Hyd).

Ravindranath GE Medical Associates Pvt. Ltd. v. DCIT [TS-344-ITAT-2014(HYD)]

TDS liability cannot be fastened due to retrospective amendment

The taxpayer, an Indian company, is engaged in the business of distributing cable signals. It receives satellite signals from various channel companies like Star Den Media Ltd., Zee Turner Limited, M.S.M. Discovery P. Ltd., U.T.V. Global Broadcasting P. Ltd. etc. in the capacity of a Multi System Operator. The taxpayer is liable to make payment to the above said companies for receiving the signals. During the course of assessment proceedings for AY 2009-10, the AO held that the amount paid to various companies for receiving signals as 'pay channel charges' is royalty and the same is liable for tax deduction at source under Section 194J of the Act. Thus, the AO disallowed pay channel charges under Section 40(a)(ia) of the Act.

The Cochin Tribunal referred to the explanation 6 to Section 9(1)(vi), inserted by Finance Act, 2012 with retrospective effect from 1 June 1976, which states that the expression 'process' includes and shall be deemed to have always included transmission by satellite, cable, or by any other similar technology. The Tribunal observed that explanation 6 starts with the words 'for removal of doubts', and hence the said explanation is clarificatory. Thus, the Tribunal held that the payment made by taxpayer as 'Pay Channel Charges' is 'royalty', by virtue of Explanation 6 to Section 9(1)(vi) of the Act. Notwithstanding this, the Tribunal further held that the taxpayer could not be held to be liable to deduct tax at source relying on the subsequent amendments made in the Act with retrospective effect.

Kerala Vision Ltd. v. ACIT [TS-342-ITAT-2014(COCH)]

Transfer under family arrangement

Three brothers transferred shares held/loans given by them, to a private limited company equally owned by them, pursuant to a family arrangement to equalize their holding and to avoid future disputes. The Tribunal upheld that transfer of shares/assignment of loans under a family arrangement to a private limited cannot be regarded as being without consideration, and therefore is not a gift, and therefore the private limited company is not entitled to the period of holding of the previous owner.

Bilakhia Holdings P. Ltd. [TS-319-ITAT-2014(Ahd)]

The Mumbai Tribunal confirms concealment penalty under Section 271(1)(c) of the Act and also rules on the validity of revised return

The taxpayer is a joint venture between two companies and entered into a software development service agreement with one of the joint venture partners to provide software related services. The TPO accepted all transactions to be at arm's length except reimbursement of market services availed, (similar to two preceding years). The TPO was of the opinion that the taxpayer was not required to undertake any marketing function as per the master service agreement and that both the parties had a clearly demarcated role to play for which they were compensated. Accordingly, the TPO held that there was no valid reason for the joint venture partner to allocate any part of the cost incurred by it to perform the role agreed by it, which is the marketing function. The TPO accordingly determined the ALP of the reimbursement of market services availed as zero and proposed to make TP adjustments. The taxpayer had pointed out to the TPO that it had revised its return of income for the AY 2003-04 and AY 2004-05 on 29 March 2006 and 14 December 2007 respectively, disallowing the entire marketing expense claimed in the original return, and therefore, there was no question of any TP adjustment under Section 92CA of the Act. The TPO rejected this claim observing that the taxpayer had failed to file a revised Form 3CEB in line with the revised returns. Further, in the regular assessment the AO disallowed the claim of the taxpayer for enhanced deduction under Section 10A on disallowance of reimbursement of marketing services in view of the provisions of Section 92C(4) of the Act. The AO did not give cognize to the revised returns or the suo motu disallowance of the reimbursement of marketing services. Penalty under Section 271(1)(c) of the Act was accordingly levied at 100 per cent of the tax on the amount initially claimed as marketing expense. The CIT(A) upheld the AO's order.

The Tribunal held as follows:

- The joint venture partner markets the taxpayer's capabilities, which is precisely what it is required to do under its arrangement with the taxpayer. Accordingly, it was held that there was no question of any reimbursement by the taxpayer to the joint venture partner for the marketing services provided.

- The taxpayer had failed to demonstrate the service it received or the benefit it received from receipt of such marketing services. No separate documentation; the cost allocation as made and incurred by the taxpayer was submitted to the TPO.

- Since the return was revised only after a reference was made to the TPO, the revision was made in anticipation of the proposed adjustment with a motive to avoid the adjustment, and thereby the disallowance of Section 10A benefit on the amount of TP adjustment.

- If anything wrong is discovered in Form 3CEB filed, the same needs to be withdrawn and replaced by a revised Form 3CEB to give a correct picture although there is no specific provision in the Act for the same.

- Since the taxpayer failed to demonstrate that any service was in fact rendered, the foreign exchange to that extent stands lost to the country, warranting a denial of deduction under Section 10A to which the amount may otherwise be eligible.

- With regard to the taxpayer's plea that there has been a complete disclosure of material facts, the Tribunal observed that the taxpayer failed to demonstrate any business purpose of its relevant international transaction. It is only by way of reference to and inquiry by the TPO, which brings forth the complete absence of business purpose, leading to its valuation at nil and, resultantly, a retraction by the taxpayer. The disclosure per the audit report under Section 92E of the Act forming part of its return is thus both false and misleading.

- Since the Tribunal had concluded that the withdrawal or revision was not voluntary, but with a sole objective to avoid the rigour of the Section 92C(4) of the Act, the penalty proceedings against the taxpayer were justified.

- The Tribunal concluded that the findings of the CIT(A) are comprehensive and correct in fact and law. The appeal of the taxpayer was rejected.

Deloitte Consulting India Pvt. Ltd. v. ACIT (ITA Nos. 7650 &7651/Mum/2013)

The Hyderabad Tribunal accepts revised return making suo moto adjustment as valid; however, it denied the plus/minus five per cent benefit on the adjusted ALP

The taxpayer entered into an international transaction of exporting sub-assembly and components from its Export Oriented Manufacturing Unit (EOU) to its AE for AY 2007-08 and 2008-09. The taxpayer also rendered Software Engineering Services to its AE (CADEM Segment). A revised return, for AY 2007-08 was filed by the taxpayer under Section 139(5) of the Act making a suo moto TP adjustment of INR32.17 million in respect of EOU. The TPO made adjustments to the sale of sub-assembly components and to the CADEM segment without considering the revised return filed by the taxpayer. The taxpayer's objections before the DRP were rejected and accordingly, the AO passed a consequential order making adjustments to the income returned. Aggrieved, the taxpayer filed an appeal before the Tribunal.

The Tribunal relied on its ruling in taxpayer's own case for AY 2006-2007 and held as under:

- **Acceptance of revised return along with TP report** – The original return filed by the taxpayer cannot be considered as a valid return, as it did not contain statutorily prescribed TP documentation and the value of international transactions as per books of accounts. The revised return enclosing the TP documentation and declaring higher value of international transactions considering suo moto adjustment cannot be rejected and the same is valid under Section 139(5) of the Act. The extent of declaration of international transaction and suo moto adjustment can be certainly treated as omission or wrong statement in the original return as per Section 139(5) of the Act.

- **TPO's adjustments ignoring suo moto adjustment** – The TPO/DRP cannot ignore the suo moto adjustment for arriving at the profit margins realised by the taxpayer for the purpose of Rule 10B(e)(v) of the Rules.

- **Correctness of re-computation of operating cost by the TPO** - The taxpayer operates a 100 per cent EOU eligible for deductions under Section 10A/10B of the Act. The taxpayer has also maintained separate books of accounts and the same were accepted under the provision of the Act. Therefore, the action of the TPO in rejecting the segmental information and estimating the operating cost based on proportionate turnover is not valid. The Tribunal directed the TPO/AO to consider the segmental working provided by the taxpayer for the determination of an ALP.

- **Validity of comparables selected by the TPO** – The Tribunal allowed the contention of the taxpayer that the comparables selected by TPO had either different accounting periods than that of the taxpayer or they were functionally not comparable to the taxpayer's business and restored the issue to TPO for re-examination.

- **Availability of plus/minus five per cent benefit** – The Tribunal referred to the provision of Section 92C(2) of the Act and held that the plus/minus five per cent range should be applied only on the actual value of the transactions and any suo moto adjustment made by the taxpayer should not be considered for the threshold determination. The Tribunal also noted that the taxpayer has exercised the plus/minus five per cent option by performing suo moto adjustment to the value of international transactions, therefore the taxpayer cannot contend that the threshold of five per cent shall be available again, if the TPO's action results in further addition.

Based on the above, Tribunal directed the AO/TPO to recompute the ALP. Further for AY 2008-2009, considering similarity in the fact pattern, the Tribunal remanded the case back to AO/TPO for determination of ALP.

For CADEM segment the Tribunal held as follows:

The Tribunal relied on the co-ordinate bench ruling and directed the TPO to exclude the ten comparable companies objected to by the taxpayer. The Tribunal also directed the TPO to restrict the TP adjustment to the value of the AE transactions only.

As regards to the salary paid to the Marketing Director, the Tribunal directed the AO/TPO to examine the taxpayer's contentions and consider whether any proportionate cost needs to be included in the operating cost.

Tecumseh Products India Pvt. Ltd v. ACIT (ITA.No.2228/ Hyd/2011)

The Delhi Tribunal rejects the TPO's approach of using a PSM for agency services; the taxpayer assumed Minimal risk, performed limited functions

The taxpayer is a wholly owned subsidiary of the Marubeni Corporation, Japan (MCJ), and its operations primarily consist of agency services on behalf of MCJ and other Marubeni group companies. For AY 2008-09 the taxpayer entered into five international transactions and selected the Transactional Net Margin Method (TNMM) with operating profit/operating cost as the Profit Level Indicator (PLI). There was no dispute on four transactions; however, the international transaction in the nature of 'Provision of Agency and Marketing Support Services', was challenged by the AO/TPO and the TPO contended that some vital services provided by the taxpayer to the AE form the backbone of the sourcing services performed in India.

As per the TPO, the taxpayer was making sizeable investments in exploring and analyzing the Indian market and also arranged feasibility studies, industry analysis and project evaluation for potential projects identified by the AEs. The taxpayer also helped the AE in taking sale and purchase decisions. Unique intangibles were developed which gave advantage to its AEs and usage cost was not taken into consideration in receiving compensation. TPO held that the taxpayer was not adequately compensated by its AEs and that PSM must be applied for determining the ALP of the international transactions under this segment. The TPO placed reliance on the Tribunal ruling of Li & Fung (India) Pvt. Ltd. v. DCIT [2012] 143 TTJ 201 (Del). Based thereon, the taxpayer was required to be compensated in the total profits on the Freight On Board (FOB) value of the goods transacted by foreign AEs, in the ratio of 70:30, in favour of the taxpayer, and arrived at a value of INR301.4 million as a share in profits. The DRP upheld the TPO's order. Aggrieved, the taxpayer filed an appeal before the Tribunal.

The Tribunal held as follows:

- The Tribunal stated that the contentions made by the TPO that the taxpayer assuming substantial risks, performing critical functions for its AEs, and allowing the use of its highly-valued intangibles to such AEs are all in air without any bedrock. There was absolutely no evidence to support the findings.

- As the TPO could not provide any evidence of the taxpayer assuming high level of risks or creating unique intangibles, a PSM could no longer be adopted.

- The TPO initially denied the taxpayer's TNMM benchmarking study and carried out its own study, but did not disclose anything about the same. Hence, this issue was restored to the AO/TPO for arriving at the ALP afresh. However, it found strength in the TPO's claim of denying use of multiple year data.

Marubeni Corporation, Japan (ITA No: 5397/Del/2012)

The Delhi Tribunal extends the benefit of 182 days for the determination of residential status for self-employed professionals going abroad

Recently, the Delhi Bench of the Income-tax Appellate Tribunal (the Tribunal), in the case of Jyotinder Singh Randhawa (the taxpayer), granted the benefit of extending stay period from 60 days to 182 days treating an Indian citizen who leaves India for the purpose of employment as a non-resident under the Act. The taxpayer was a self-employed professional.

As per the Act, an individual is said to be resident in a given financial year if his stay exceeds 60 days in that year, together with 365 days or more in the four years preceding that year. Further, the 60 days may be extended to 182 days in case of an Indian citizen who leaves India in any previous year as a member of the crew of an Indian ship or for the purposes of employment.

Jyotinder Singh Randhawa v. ACIT (ITA No. 4895/Del/2012, AY 2009-10)

AAR Ruling

The AAR holds that lump sum contribution to Defined Benefit Superannuation Scheme is not taxable in the hands of individual employees

Recently, the Authority for Advance Rulings (AAR) in the case of Royal Bank of Scotland held that a lump sum Contribution (based on actuarial valuation) by the employer to an employee's Defined Benefit Superannuation Scheme is not taxable in the hands of each employee. In its judgment, the AAR has placed reliance on the Supreme Court ruling in the case of L.W. Russel, and the Delhi High Court rulings in the case of Mehar Singh Sampuran Singh Chawla and Yoshio Kubo.

The Royal Bank of Scotland (AAR No. 964 of 2010)

II. SERVICE TAX

Tribunal Decisions

Onshore terminal for extraction and transportation of gases is not a 'transport terminal' and thus services in relation to the same are liable to service tax

The taxpayer was engaged in construction of an onshore terminal for Reliance Industries Ltd. The definition of 'Commercial and Industrial Construction Service' under section 65(25b) of Finance Act, 1994 specifically excludes services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams. The question for consideration was whether an onshore terminal could be considered as 'transport terminal' and excluded from levy of service tax.

The taxpayer argued that the facility on onshore terminal receives gas from deep-sea and thereafter distributes it through pipelines to various destinations throughout the country. Accordingly, gas is received at the onshore terminal and sent to various places and hence the facility is nothing but transport terminal. Further the term ‘transport terminal’ cannot be restricted to bus terminal or truck terminal, since gases and liquid also gets transported through pipelines and therefore any terminal where the gases / liquid are received and thereafter distributed through pipelines is to be considered as ‘transport terminal’. The taxpayer also contended that there is no specific requirement under the law that the transport terminal should be owned by public authority since even airports and ports are privately owned. The Revenue Authorities relied upon the generic meaning of the term transport terminal and rejected the taxpayer’s claim.

The matter reached before the Mumbai Bench of Central Excise Service Tax Appellate Tribunal (“CESTAT”) which held against the taxpayer. The CESTAT observed that the main function of the onshore terminal was to extract natural gas from wells and remove impurities from the gas to meet sales gas specifications. Further, the facility at onshore terminal also controls and monitors various sub-sea operations and takes necessary steps to safeguard facilities from centralized control room located at such onshore terminal. The CESTAT also referred to the generally understood meaning of transport terminal to mean a facility where passengers or freight are assembled or disbursed, however in the instant case there is no arrival from different destination and dispersal to different destination. It was held that Transport terminal is relevant for transportation by air, sea, road and not for transporting gases through pipelines. The CESTAT relied on the principles of ‘ejusdem generis’ as well as ‘noscitur of sociis’ and held that the term transport terminal is preceded by airports, railways etc. and therefore transport terminals would imply similar thing relating to bus and truck terminals and ultimately held that the onshore terminal shall not qualify as ‘transport terminal’ and thus not excluded from levy of service tax under the category of ‘Commercial and Industrial Construction Service’.

Afcons Infrastructure Limited vs Commissioner of Service Tax, Mumbai II [2014 TIOL 679 CESTAT MUM]]

Renting of Offshore Supply Vessels prior to February 2010 for Oil and LNG exploration in Continental Shelf and Exclusive Economic Zone not liable to service tax

The taxpayer was engaged in business of exploration and production of oil and natural gas and had entered into various ‘Charter Party Agreements’ with owners of Offshore Supply Vessels (“OSVs”). The OSVs were deployed in the Eastern and Western Coast of India in connection with its offshore oil and exploration sites. Effective September 2009, the taxpayer was paying service tax (under reverse charge mechanism) under the heading of transportation of coastal goods. However, the Revenue Authorities contended that the taxpayer was availing ‘Supply of Tangible Goods Service’ (“STGU”) and was liable to pay service tax (under reverse charge mechanism) from May 16, 2008 onwards until September 2009.

The taxpayer argued that in the present case the vessel remained under the control of the owners of OSVs and hence the activity does not come under the purview of ‘Supply of Tangible Goods Service’. The taxpayer further contended that the definition of “India” underwent an amendment on July 7, 2009, and got extended to installation, structures and vessels located in designated areas in Continental Shelf and Exclusive Economic Zone of India. However, the vessels in the instant case are not akin to installation and structures which are certainly identifiable, fixed areas having same degree of permanence and hence applying the principle of ‘noscitur a sociis’, the term vessels used in conjunction with installation and structures applies only to vessels akin to installation and structures and cannot apply to the present case. The taxpayer also argued that since the vessels were not located in India during the entire period of use of such OSVs, they are not liable to pay service tax. The Revenue Authorities rejected the grounds and upheld the levy of service tax.

The matter came up for consideration before the Mumbai bench of CESTAT, which held in favor of the taxpayer. The CESTAT conclude that the taxpayer’s activity falls within the scope of ‘Supply of Tangible Goods Service’ and further relied on the decision Petronet LNG [2013-TIOL-1700-CESTAT DEL] which held that the period of use of the vessel should be interpreted to mean the entire period of use and not a part of it. The CESTAT referred to the definition of 'India' and observed that for the period post July 2009, only installations, structures and vessels in the Continental Shelf of India and Exclusive Economic Zone of India were included in the definition of India. It relied upon the taxpayer’s contention to rely upon the principle of “noscitur a sociis”, whereby the expression 'vessels' should be interpreted to be analogous to installation and structures which are to be stationed in a fixed location while rendering services. However, the OSV’s in question were not stationary/fixed during the term of operations and hence it held that the taxpayer was not liable to pay service tax

Reliance Industries Limited vs Commissioner of Central Excise & Service Tax, LTU, Mumbai [TS 199 Tribunal 2014 ST]

Suo moto credit of service tax paid on cancellation of airline ticket permissible and service tax not applicable on cancellation charges

The taxpayer, an air travel agent, was engaged in booking airline tickets, making application and obtaining VISA for customers. The Revenue Authorities argued that the consideration received by the taxpayer for obtaining VISA for customers was taxable under Business Auxiliary Services. The Revenue Authorities also disputed suo moto adjustment of service tax paid and collected from the customer when air tickets booked had been cancelled and the taxpayer did not get any commission from the airline. The Revenue Authorities also disputed applicability of service tax on cancellation charges, which were part of the airfare retained by the taxpayer. The period in dispute was April 2002 to December 2004.

The Commissioner of Central Excise (Appeals) [“CCE(A)”] upheld the demand and aggrieved by such order, the taxpayer preferred an appeal before the Delhi Bench of CESTAT which decided the case in favour of the taxpayer. The CESTAT observed that the definition of Business Auxiliary Services under service tax regulations do not include services of arranging VISA for their customers and hence the same is not subject to service tax. With regard to suo moto adjustment of service tax paid in respect of cancelled tickets, the CESTAT relied upon the decision of Punjab and Haryana HC in the case of CCE&ST vs Janta Travels (P) Ltd [2009 13 STR 488 P&H], wherein the Court had allowed such suo moto adjustment.

Further, with regard to levy of service tax on cancellation charges received by the taxpayer, the CESTAT observed that the taxpayer received such cancellation charges from the person booking the ticket and not from the airlines, who are the recipient of taxpayer's services

Globe Forex and Travels Limited vs CCE Jaipur [2014 TIOL 688 CESTAT DEL]

III. VAT/ CST/Entry Tax

High Court Decision

No penalty imposable unless *mens rea* attributable to the taxpayer

The taxpayer had purchased machinery against C-form, which was not included in his central sales tax registration certificate. The AO issued a notice proposing to levy penalty at 150 percent of the tax due on the turnover under section 10(b) of the Central Sales Tax Act, 1956 ("CST Act"). The taxpayer filed its reply to the notice stating that all its sales tax affairs were managed by its accounts officer and it had acted under the bona fide belief that the machinery also enjoyed concessional rate of tax and the C-form could be issued by any registered dealer.

The AO reduced the quantum of penalty to 100 percent of the tax due. However, the Appellate Assistant Commissioner after considering the facts of the case and the bona fides of the taxpayer allowed the appeal. The Sales Tax Appellate Tribunal ("STAT") though held that the taxpayer ought to have been careful enough to issue C-forms only in respect of such goods, which were authorised in the certificate issued to it. Accordingly, the STAT reversed the order passed by the Appellate Assistant Commissioner and restored the penalty levied by the AO.

The matter reached before the Madras HC which held the decision in favour of the taxpayer. The HC relied upon the SC decision in the case of State of Tamil Nadu vs Nu-Tread Tyres [2006 148 STC 256] which held that use of the word 'falsely' in the expression 'falsely represents' in section 10(b) of the CST Act implies that the element of mens rea is a necessary component of the offense and in absence of mens rea, resorting to penal provision would not be proper unless it is established that the conduct of the dealer was contumacious or that there was deliberate violation of the statutory provision or willful disregard thereof. The HC observed that there was no such finding in the order of the STAT and accordingly set aside the penalty levy

Shoetek Agencies vs State of Tamil Nadu [(2014) 45 GST 336]

Penalty imposable on goods accompanied by wrong VAT forms

The taxpayer was carrying copper scrap for conversion into copper strips, rods and bars from Belgaum to Bhiwandi through a goods vehicle which was accompanied by Form VAT 515. The Commercial Tax Officer intercepted the said goods and having noticed that the goods were not accompanied by Form VAT 505, levied penalty under section 53 of the KVAT. The First Appellate Authority reversed the order, however, the Revisional Authority disagreed to the order passed by the First Appellate Authority and restored the penalty levy.

The matter reached before the Karnataka HC, wherein the taxpayer contended that since the goods were not meant for sale but were for recycling purposes, they were covered within notification dated January 5, 2006, which prescribed Form VAT 515 to be carried along with the goods. However, the Revenue Authorities contended that as per another notification dated August 8, 2008, in respect of transfer of non-ferrous metal but for the purpose other than sale, the appropriate form was Form VAT 505. Accordingly, since such form was not available with the goods at the time of interception, the penalty levied was justified. The Karnataka HC decided the case against the taxpayer. The Court reasoned that although the notification dated August 8, 2008 was issued only in respect of sale, however the body of the notification categorically indicated that delivery note in form VAT-505 is made applicable in respect of the scrap of nonferrous metal, whether it is for sale or not. The HC held that the delivery note in Form VAT 505 was applicable in the present case and therefore levy of penalty on taxpayer was held to be justified.

CMC Commutator (P) Ltd vs Additional Commissioner of Commercial Taxes, Zone-1 Bangalore [(2014) 45 GST 363]

Credit notes issued represent the sale price of spare parts supplied free of cost and accordingly liable to sales tax

The taxpayer was a registered dealer under the provisions of the Karnataka Sales Tax Act, 1957. The taxpayer purchased cars from manufacturer and sold them to local customers wherein the sale price included cost of warranty. The warranty was meant to provide free replacement of parts to customers if found to involve any manufacturing defect. The taxpayer supplied the parts to the customers free of cost and after such replacement returned the defective parts to the manufacturer. The taxpayer raised debit notes on the manufacturer, on receipt of which the manufacturer issued credit notes to the taxpayer reimbursing it for the cost of parts supplied. In the returns filed for Assessment Year 2001-02 to 2003-04, the taxpayer claimed deduction of the amounts for which credit notes were received from the manufacturer. The Revenue Authorities contended that such deductions were not allowable. The matter reached before the CESTAT which held that there was no sale involved within the definition under section 2(1)(t) of the Karnataka Value Added Tax Act, 2003 (“KVAT”) in the transactions of free supply of parts and the corresponding credit notes issued by the manufacturer towards reimbursement of cost of the parts so supplied to the customers and therefore set aside the order of the Revisional Authority.

The matter reached by the Karnataka HC which held against the taxpayer. The HC reasoned that unlike the transaction in credit notes, had such spare parts been purchased in the open market, both (manufacturer and taxpayer) of them would have to pay sales tax. The HC relied upon the decision of the SC in Mohd

Ekram Khan & Sons vs CTT [(2004) 136 STC 515], wherein it was held that the consideration paid by the manufacturer to the taxpayer by way of credit notes represented the sale price of the spare parts replaced and was therefore liable to tax. Accordingly, the claim of the Revenue Authorities was allowed

State of Karnataka vs Cauvery Motors (P) Ltd [(2014) 45 GST 380]

Bank is a dealer liable to pay VAT on the transaction of sale of pledged goods

The taxpayer is a bank constituted under the State Bank of India Act, 1955 and is engaged in the banking business of lending and borrowing money from its customers. To recover outstanding loan amounts from the borrowers whose accounts have been classified as Non- Performing Assets, the taxpayer puts their movable assets to auction and the sale proceeds are appropriated to the loan account of the borrowers. The Revenue Authorities sought to levy VAT on such auction sales under the Odisha Value Added Tax Act, 2004 ("OVAT"). In response, the taxpayer contended that it did not qualify as a dealer under the OVAT and hence was not liable to be assessed under it. It further submitted that a seller won't qualify as a dealer unless the sale is in the course of business. As auctioning of pledged movables was not the main 'business' of the taxpayer, it could not be classified as a dealer under the OVAT.

The taxpayer preferred a writ before the Odisha HC which held against the taxpayer. The HC relied on the SC decision in the case of Federal Bank Ltd vs State of Kerala and others [(2007) 4 SCC 188] wherein it was held that banking business includes sale of pledged goods to recover the loan and in respect of such sales in the course of banking business, the bank is 'dealer'. The Odisha HC observed that that the definition of business under section 2(27) of the OVAT was wide and included transactions incidental to trade, commerce or manufacture irrespective of profit motive. Following the above decision and aforesaid definition, it held that the taxpayer was a dealer. Accordingly, the writ of the taxpayer was dismissed.

State Bank of India vs State of Odisha [2014 VIL 117 Ori]

Credit notes to be allowed as deductions for computing the final sale price and taxable turnover

The taxpayer was a public sector undertaking owned and controlled by the Government of India and was engaged in the business of procuring and selling natural gas through pipelines and also processing natural gas to manufacture liquefied petroleum gas and other liquid hydrocarbons. The price of petroleum and natural gas is controlled by the Ministry of Petroleum and Natural Gas prior to April 1, 2002 and after that by Petroleum Planning and Analysis Cell ("PPAC") which is attached to the ministry. Under the price fixing scheme, the taxpayer was not at a liberty to fix the sale price of the products and PPAC fixes the price at the end of every quarter after taking into consideration the foreign crude price. The taxpayer at the time of supply of petroleum products used to issue provisional bills / invoices and after receiving information about the final price, it used to issue a final bill and adjust the price by issuing a debit or a credit note. The Revenue Authorities sought to compute the taxable turnover on the basis of the provisional bills issued by the taxpayer and not consider the credit / debit notes issued. It was the contention of the taxpayer that it was allowed to make deductions in the provisional bill amounts on the basis of the credit note issued in its favour which was received by it subsequent to the fixing of sale price by the PPAC.

The taxpayer preferred a writ before the Madhya Pradesh HC which was allowed. The HC reasoned that in the present case, both the provisional as well as the final sale price were controlled by the PPAC. The change in this sale price was as per the directions of the PPAC and this was final and binding. It was therefore held that the final sale price of the petroleum products would be the price fixed by the taxpayer in accordance with the directions of the PPAC subsequently. Therefore, it was not correct to disallow deductions in the provisional invoice on the basis of credit notes which resulted in the reduction of taxable turnover. Accordingly, the writ of the taxpayer was allowed

GAIL India Limited vs State of Madhya Pradesh [2014 VIL 99 MP]

Contract for imparting computer education which involves leasing of computer hardware on a Build, Own, Operate and Transfer basis to be a 'works contract'

The taxpayer was engaged in the business of imparting computer training and information technology solutions. The taxpayer also traded in software and for this reason was registered with the Andhra Pradesh General Sales Tax Act, 1956 ("APGST"). The taxpayer entered into a contract with the Government of Andhra Pradesh for imparting computer education in high schools, including leasing of computer hardware, software and connected accessories on a Build Own Operate Transfer ("BOOT") basis and at the end of the contract, the computer hardware would get transferred to the respective schools for no consideration. The Revenue Authorities contended that the arrangement was a works contract and therefore, the turnover of the property involved was liable to tax at 8 percent under section 5F of the APGST.

The taxpayer on the other hand contended that it had provided the computers for teaching purpose and the supply of computers was purely incidental and involved no sale of goods. Therefore, the contract qualified as a service contract and not a works contract.

The matter reached before the Andhra Pradesh HC which held it against the taxpayer. The HC reasoned that in light of the decision in Larsen and Toubro vs State of Karnataka [2013 TIOL 46 SC LB], the traditional decisions which hold that the substance of the contract must be seen have lost their significance and now all composite contracts have to be seen in the philosophy of Article 366 (29A) of the Indian Constitution. The HC further held that the said article permits one to separate the transfer of property in goods from the contract of service. The HC opined that the contract in a way was for the installation of equipment, as imparting education was not possible in the absence of such installation. Additionally, all other services provided by the taxpayer were incidental to the supply of computer hardware. The HC also held that the mere fact that the equipment is transferred at the end of the contract makes no difference, the transfer of property in goods involved in execution of the works contract takes place when the goods are incorporated in the works. Accordingly, the taxpayer was assessed under the APGST for execution of works contract

NIIT Limited vs The Commercial Tax Officer, Hyderabad and Ors [2014 VIL 109 AP]

IV. CUSTOMS

Tribunal Decisions

If the intention is to restrict benefit of concessional rate of duty to goods with specific use, the notification would prescribe the end use or specification

The taxpayers were engaged in import of 'Commercial Propane' in liquefied form classifiable under Custom Tariff Heading 27111200. However, they cleared it as Liquefied Petroleum Gas ("LPG") classifiable under Custom Tariff Heading 27111900 at concessional duty rate, in terms of notification no 4/2006-CE dated March 1, 2006 ("notification 4/2006"). The Revenue Authorities contended that the concessional rate was available only to LPG and not to 'commercial propane'.

The matter reached before the CESTAT wherein the Revenue Authorities reiterated that LPG is a gas used as 'fuel' in households, as commonly understood by public in general. They further submitted that law is settled that the words and phrases used in taxing statute, which are not specifically defined, must be understood in popular and commercial parlance. Therefore, as LPG is a mixture of propane and butane, it cannot be interpreted to include 'commercial propane'.

On the other hand, the taxpayers contended that liquefied forms of all petroleum gases were covered under (5) Tariff items covering LPG and that Custom Tariff Heading 2711 1200 specifically covered propane. Further, the taxpayer submitted that since propane in liquefied form is a petroleum gas, it has to be considered as LPG and the Revenue Authorities could not limit the benefit under notification 4/2006 to one tariff item when the same covers (3) different Tariff items. It was also submitted that the notification does not use the words 'liquefied petroleum gas' but 'liquefied petroleum gases'; which shows that different types of gases are covered and not LPG alone.

The CESTAT reasoned that it may be true that a layman in general understands LPG as the gas which is used as fuel in household; however this is not the case under Central Excise Tariff / notification. It further observed that LPG is nothing but gases at the ambient temperature and pressure which are of petroleum origin and such goods are termed as LPG.

The CESTAT held that the term 'petroleum gases' is a generic term and covers wide range of gases or mixture of such gases and each individual component can be separated from the mixture and used for a specific purpose. In this regard, it was stated that even 'commercial propane' could be used as fuel.

It observed that Entry No 27 in notification 4 / 2006 reads as 'LPGs' falling under Custom Tariff Headings 2711 1200, 2711 1300, 2711 1900 and therefore, this would imply that concessional rate of duty would apply to 'propane' and 'butane' as well and if the intention was to restrict the benefit of concessional duty to LPG used as fuel, the notification would have prescribed the end use or specification for such lower rate of duty. Thus, allowing the claim of the taxpayer, it held that the benefit of concessional rate of duty cannot be restricted to LPG used as fuel, but would be applicable to all types of liquefied petroleum gases.

Commissioner of Customs (Import), Mumbai vs Aegis Logistics Limited [Appeal No C/86082 to 86084, 86110/13- Mum CESTAT]

Refund of Special Additional Duty available to the importer in the absence of endorsement if the buyer not able to claim credit

The taxpayer imported stainless steel, industrial raw material etc. and paid appropriate customs duty along with 4 percent Special Additional Duty ("SAD"). After importing, the taxpayer sold the imports in the local market on payment of CST or VAT. Typically, the taxpayer makes an endorsement on the invoices issued to the buyer stating that credit of SAD will not be available to the buyer. But in the instant case, the taxpayer did not make the said endorsement on the invoice issued to Vishal Steel, as it was not registered with the Central Excise Department. In the absence of the endorsement, the Revenue Authorities rejected the refund claim of the taxpayer in view of notification no 102 / 07- Customs. The Revenue Authorities contended that as per the said notification, there should be an endorsement on the invoice that the credit of SAD paid will not be available as credit to the buyer; and if this condition is not fulfilled, the SAD paid is not available as refund.

The matter reached before the Mumbai Bench of CESTAT which held in favor of the taxpayer. The CESTAT reasoned that admittedly, although there was no endorsement on the invoice, still the buyer was not able to claim credit of the SAD paid because he was not registered with the Central Excise Department. Since the buyer was not able to claim credit of the same, the condition mentioned in the notification stood fulfilled. Consequently, refund claim of the taxpayer was allowed.

Vijay Steel Industries vs Commissioner of Customs [Appeal no C/ 562/ 11- Mum-CESTAT]

V. CENTRAL EXCISE

High Court Decisions

Duty on removal of inputs to be paid by the 5th day of the following month, not necessary to pay duty at the time of removal

The taxpayer was a manufacturer of headlamp assembly and motor vehicle parts classifiable under Central Excise Tariff Heading numbers 8512 and 8705 and has availed CENVAT Credit on the inputs. The taxpayer removed the inputs on which CENVAT Credit was availed, without reversing the credit on the date of removal, but paid the duty at the end of the month. The Revenue Authorities objected to this and demanded interest under section 11AB of the Central Excise Act, 1944 ("CEA"). The Revenue Authorities contended that as per rule 3(4) of CENVAT Credit Rules, 2004 ("CCR"), when inputs or capital goods on which CENVAT Credit was taken are removed as such from the factory, the manufacturer of the final products is liable to pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 7.

The matter came up for consideration before the Madras HC which ruled the decision in favour of the taxpayer. The HC observed that rule 3(4) of the CCR was substituted by notification 13 / 2003-CE dated March 1, 2003, wherein the expression 'on the date of such removal' is referable to the rate applicable to such goods and it cannot be understood to mean that the duty should be paid at the time of removal in terms of the substituted provisions. Further rule 8(1) read with rule 3(4) of CCR, clearly stipulates that the duty is to be paid by the 5th day of the following month and in case, the goods are removed during the month of March, the duty is to be paid by the 31st day of March.

The HC observed that the taxpayer had duly paid the duty in accordance with the provisions and therefore, in such circumstances, it cannot be said that there has been a delay in payment of duty so as to invoke section 11AB of the CEA. Therefore, it was held that the taxpayer's case essentially fell within the scope of rule 3(4) read with rule 8 of the CCR and hence, no interest accrued.

CCE, Chennai-IV vs CESTAT, Chennai [2014-TIOL-163-HC-MAD-CX]

Payment of excise duty prior to export, an essential condition to be complied with, to claim rebate under rule 18 of the Central Excise Rules, 2002

The taxpayer was a manufacturer of automotive parts and claimed CENVAT Credit for the duty paid on inputs as per the CCR. During the months of April to August 2009, the taxpayer cleared certain goods for export. However, at the material time of exporting the goods the excise duty on the goods had not been paid, but was paid subsequently in December 2009 along with applicable interest. In February 2010, the taxpayer filed a rebate claim for refund of excise duty paid under rule 18 of the Central Excise Rules, 2002 ("Excise Rules"). The Revenue Authorities rejected the claim of the taxpayer on the ground that the conditions for rebate were not complied with since the taxpayer paid the duty after export and not prior, as prescribed.

The taxpayer preferred a writ before the Delhi HC, which held against the taxpayer. The HC reasoned that the Excise Rules only provided for payment of interest on delayed payment of duty. However, payment of interest on delayed payment of duty (after the goods have been cleared) cannot be construed to mean that excise duty was paid in time for the purpose of rebate. Accordingly, the writ of the taxpayer was dismissed.

Sandhar Automotives vs Joint Secretary, Ministry of Finance [WP (C) 2469/ 2014 Delhi HC]

Tribunal Decisions

Building body of motor vehicles on chassis supplied free of cost amounts to 'job work' and not on principal to principal basis

The taxpayers were manufactures of body-built motor vehicles, viz Dumpers and Tippers falling under Central Excise Tariff Sub-heading 8704 1010 and used the chassis sent free of cost by Tata Motors Limited ("TML"), against purchase orders. The purchase orders stipulated that the manufacturing process would require approval of TML and that TML's representative would have the right to verify whether the product conformed to special requirements, while also mandating that delivery of finished vehicle would be made at TML depot. The taxpayer availed the credit of duty paid on chassis including credit of additional duty of excise per vehicle and cess paid by TML. As per Chapter Note V in Chapter 87 of the Central Excise Tariff Act, 1985 ("CETA") building or fitting of a structure or an equipment on the chassis falling under Chapter Sub-Heading 8706 amounts to manufacture of motor vehicles. On building the body, motor vehicles were dispatched to Regional Sales Depots of TML after paying duty on the value i.e. cost of chassis plus fabrication charges. The final product, viz motor vehicle, was sold from TML's depot at much higher price.

The Revenue Authorities contended that the taxpayers were nothing but the job-workers of TML, and rejected the valuation offered by the taxpayers for computing excise duty. Accordingly, they sought to determine the assessable value under rule 10A of Central Excise Valuation Rules, 2000 ("Valuation Rules").

Conversely, the taxpayers contended that there was sale of body for a price, in terms of section 4 of Sale of Goods Act, 1930, when the body built on chassis was cleared to TML. It was further contended that the transaction was strictly on principal-to-principal basis and since it involved transfer of possession of body from the taxpayers to TML, the same amounted to sale of body. The taxpayer also submitted that the duty was being paid on full value as a completely / fully body-built motor vehicle, since the body was sold to TML for the price agreed upon between them. Consequently, the taxpayers challenged the applicability of rule 10A of Valuation Rules by stating that rule 6 read with section 4(1)(a) of CEA would operate instead; and an amount equivalent to the free supplies by TML should be added to the value of the cleared goods for the computation of excise duty.

The matter reached before the Kolkata Bench of CESTAT which held against the taxpayers. It was reasoned that rule 10A and not rule 6 of the Valuation Rules would be applicable to the case at hand because it was found that there was no "sale" of motor vehicles by taxpayer to TML or any other customer. Further, it was also found that the vehicles were sold for the first time by TML from its depots and the taxpayer merely transferred the motor vehicles from its factory to TML's depots. Therefore it was held that the contention of the taxpayers that the transactions were on a principal to principal basis and not "on behalf of" TML was rejected. Accordingly, in terms of the decision in Audi Automobiles vs CCE, Indore [2010 (249) ELT 124 (Tri-Del)], it was held that motors vehicles were liable to be valued as per rule 10A and the taxpayers were held to be job workers for TML.

Hyva India Private Limited vs CCE, Jamshedpur [Order No FO / A / 75263 - 75318 / 2014 (Mum CESTAT]

CENVAT Credit available for commission agents who also undertake sales promotion activity

The taxpayers received services from commission agents and also availed CENVAT Credit of the service tax paid as "input services". The Revenue Authorities denied the credit of service tax so paid on the ground that the services of commission agents are post removal activities and hence did not qualify as input services as per the definition in rule 2(I) of CCR. The Revenue Authorities relied on the decision of the Gujarat HC in the case of *Commissioner of Central Excise vs Cadilla Healthcare Limited [2013 TIOL 12 HC Guj]* wherein it was held that the services of a commission agent are not included in the inclusive part of the definition of service which includes "sales promotion"; as the services of commission agents are related directly to "sales" and not "sales promotion".

The matter came up for consideration before the Bangalore Bench of CESTAT which held in favour of the taxpayer. In reaching this conclusion, the CESTAT considered the scope of activities undertaken by the commission agent and found that the commission agent was not acting merely as a commission agent but was undertaking several activities of sales promotion as well. The CESTAT observed that canvassing and procuring orders are activities preceding removal of the goods by the manufacturers. Without the firm order, the respondents were not expected to remove the goods to a foreign destination. Therefore it cannot be accepted that sale promotion activities are post removal activities. The CESTAT distinguished the decision of *Cadilla Health Care (supra)* on the grounds that in that case there was no evidence produce to demonstrate that the commission agent was also involved in some form of sales promotion activity. Accordingly, it was held that the services were falling within the definition of input services and based on the factual submissions, the CESTAT allowed credit of service tax on the services of the commission agent.

Bhuruka Gases vs Commissioner of Central Excise [Final order nos 20176 – 20183 / 2014, Bangalore CESTAT]

Insurance of plant and machinery and group insurance of employees are services related to business of manufacture; hence eligible for CENVAT Credit

The taxpayer was the manufacturer of zinc, lead ingots, sulphuric acid etc. An audit was conducted at its premises and the Revenue Authorities found that the taxpayer had availed CENVAT Credit on the insurance of plant and machinery as well as group insurance of the workers and denied the same on the ground that such insurance services did not qualify as input services.

The matter came up for consideration before the Delhi Bench of CESTAT which held in favour of the taxpayers. The CESTAT reasoned that insurance of plant and machinery, goods in transit, cash in transit and insurance of vehicles and laptop is an integral part of manufacturing business as no manufacturer would carry on manufacturing operations without insuring them against any loss due to accident, natural calamities etc. Therefore, insurance of vehicles, laptops, goods in transit, cash in transit etc. were all integral to the business of manufacture and therefore were eligible for the CENVAT Credit.

As regards the group insurance of all employees against sickness or accident, the CESTAT reasoned that the same was cenvatable in terms of the decision of the Karnataka HC in *Millipore India Ltd vs CCE [2009 TIOL 490]*. This was held in light of the fact that such group insurance was a requirement of section 38 of the Employees State Insurance Act, 1948 and a manufacturer was required to comply with it. Accordingly, the appeal of the taxpayer was allowed.

Hindustan Zinc Limited vs Commissioner of Central Excise [2014 TIOL 855 CESTAT Delhi]

Scrap generated having economic value to be included in the assessable value; penalty not imposable in cases where interpretation of law is involved

The taxpayer was getting certain goods manufactured from its job workers and cleared the goods on payment of duty. However, it excluded the value of scrap generated from the assessable value of the goods. The Revenue Authorities contended that the value of scrap arising out of manufacture would form part of the assessable value of job-worked goods.

The matter reached before the Delhi Bench of CESTAT which held that if the scrap arising out of manufacture has an economic value, the same cannot be excluded from the assessable value of the job-worked goods for valuation of goods under section 4 of the CEA. Additionally, the CESTAT also held that since the matter involved interpretation of law, penalty under section 11AC of CEA was waived

Mech & Fab Industries vs CCE, Bhopal [2014 (303) ELT 282 (Tri – Del)]

Inputs include all materials necessary for making the final product except consumables

The taxpayer was engaged in the manufacture of two wheelers classifiable under Chapter 87 of the CETA and availed CENVAT Credit in respect of tool kits and first aid kits sold along with the vehicles. The Revenue Authorities contended that such tool kits and first aid kits do not qualify as input goods and hence, CENVAT

Credit is inadmissible under rule 3(i) of the CCR. They further contended that as per the definition of 'input', only those goods that are used in or in relation to manufacture of final product are entitled to the benefit of CENVAT Credit and the benefit cannot be availed merely basis the fact that such goods are entailed to be supplied along with the vehicles.

The matter reached before the CESTAT for consideration wherein it was observed that the definition of 'input' is an inclusive definition and is wide enough to cover all goods with certain exclusions such as light diesel oil, high speed oil, etc. that are in the nature of consumables. Further, it was observed that tool kits and first aid kits qualify as input goods under section 2(k)(i) of the CCR, since the Central Motor Vehicles Rules, 1989 mandates for provision of the same to the buyers, as accessories to be used in relation to manufacture of vehicle. In result, the CESTAT therefore held that all the goods that are part of the original equipment are entitled to benefit of CENVAT Credit as per the definition of 'input' and basis this principle, tool kits and first aid kits shall be held to be part of the motor vehicles, before the same can be put to use

CCE, Delhi-III vs Honda Motorcycle & Scooter India Private Limited [2014 (303) ELT 193 (P & H)]

Remote, Smart card supplied free-of-cost by buyer includible in the assessable value of Set Top Box for computation of excise duty

The taxpayer was a manufacturer of Set-top boxes ("STB"). It sold its set-top boxes to a dealer who in turn had an agreement with the third party to sell STB to the ultimate consumer. Remote controls and viewing cards were supplied by the third party free-of-cost to the taxpayer (through the dealer). Likewise, the third party paid royalty to an overseas entity to allow the taxpayer download software from their server. The taxpayer downloaded such software into a flash memory and soldered it to the printed circuit board of the STB. Revenue Authorities sought to include the value of remote controls, viewing card and royalty paid for the software in the assessable value of the STB on the ground that they formed an integral part of the same.

The taxpayer contended that the STB was fully complete and functional without the remote control and the viewing cards. The remote control was supplied with the STB merely for the purpose of convenience and did not form an integral part of the STB. Thus, it should not form part of the assessable value. Further, viewing cards were not used in the production of STB as they were merely inserted into the slot provided in STB. As regards the inclusion of royalty paid on software, the taxpayer contended that value of the software even if sold along with the STB or even if preloaded, could not form part of the assessable value.

On the other hand, the Revenue Authorities argued that as per the agreement between the dealer and the taxpayer, the STBs were manufactured as per the specification of the dealer. The STB design and manufacture specifications were provided by the dealer for the integration of the software and smart cards. The STB consisted of Integrated Circuits on which the software was copied and mounted on the circuit board which formed an integral part of STB and thus value of such smart cards, software and remote control was includible in the assessable value.

The matter came up for consideration before the Mumbai Bench of CESTAT which held that the remote control although supplied free, provided value addition as an additional feature and thus its value was includible in the assessable value. On the issue of software and the viewing cards, after analyzing the nature and their use in the manufacture of the STB and relying on various precedents in this regard, the CESTAT held that they formed an integral part of the STB and hence its value should be included in the assessable value.

Jabil Circuit India Private Limited vs Commissioner of Central Excise [2011 TIOL 745 CESTAT MUM]

Notification & Circulars

Import tariff of gold and silver amended

Import tariff value of Gold has been amended and notified to be 411 / 10 grams and Import tariff value of Silver has been amended and notified to be USD 632 / kilogram. New tariff values for 10 other import items also notified

Notification no. 46 / 2014 - Customs (NT) dated June 13, 2014

Antidumping Duty imposed on Pre-sensitized Positive Offset Aluminium Plates

Central Government imposes Anti-Dumping Duty at USD 0.22 / kg on import of 'Pre-sensitized Positive Offset Aluminium Plates' from 'The People's Republic of China' for 5 years

Notification no 25 / 2014 - Cus dated June 9, 2014

Customs Duty exemption on import of goods for display / use at an event approved by Government of India / India Trade Promotion Organisation

Central Government exempts goods from whole of customs as well as additional customs duty for import under India-Taipei Agreement on FICCI / TAITRA Carnet for Temporary Admission of Goods; Goods imported must be intended for use / display at an event sponsored or approved by Government of India / India Trade Promotion Organisation

Notification no. 10 / 2014 - Customs dated May 12, 2014

Clarification on the amount of Security / Bank Guarantee and documentation required at the time of renewal of 'Customs Brokers License'

Central Board of Excise & Customs ("CBEC") issued a clarification on the amount of Security / Bank Guarantee required and prescribed the list of documents to be submitted, for renewal of Customs Broker Licence under Customs Broker Licensing Regulations 2013

F No 502 / 07 / 2013- Customs dated May 12, 2014

Establishment of Online Complaint Resolution System by Directorate General of Foreign Trade

Directorate General of Foreign Trade establishes online complaint resolution system for electronic data interchange issues to enable users file online complaints. All stakeholders have been requested to use such facility w.e.f. June 4, 2014

F Trade Notice no. 25 / 2014 dated June 4, 2014