December 2012

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

Foreword

I am pleased to enclose the November and December issues of FICCI's Tax Updates. These contain recent case laws, circulars and notifications pertaining to direct and indirect taxes.

I would like to inform all of you that FICCI has forwarded its Pre-Budget Memorandum 2013-14 to the Government of India. We also had a pre-budget meeting with the Revenue Secretary on 10th December, 2012. The FICCI delegation was led by its President Shri R V Kanoria and included Ms Naina Lal Kidwai, the President-Elect, Shri Sidharth Birla, Vice President and Shri Harsh Pati Singhania, Past President, FICCI, as also the Chairman and Co-Chairman of the Taxation Committee. The delegation highlighted the core issues and the major area of concern to the trade and industry. Some of the important issues raised in the meeting were:-

- Implement the recommendations of the Shome Committee on GAAR and the Rangachary Committee on IT and related issues.
- Avoid imposition of Inheritance Tax.
- Introduce measures to avoid litigation and improve the dispute resolution process.
- Grant pending refund claims of all taxes and duties.
- Do away with tax on dividends from investments made overseas.
- Expedite implementation of GST ensuring that all Central and State taxes are subsumed in the proposed framework of GST.
- Restrictions on availment of cenvat credit under the new service tax regime should be removed; provide clarity on the scope of service tax based on the concept of a negative list.

I would like to convey my thanks to all the constituents who provided useful suggestions which formed the basis of our Pre-Budget Memorandum. We have decided to place the document in public domain by incorporating it on our website effective 17th December.

On the taxation regime, the Hyderabad Tribunal in the case of My Home Power Ltd. held that the 'Carbon Credit' was in the nature of an 'entitlement' received to

improve the world environment and represented accretion of capital hence income earned on sale of these credits was a capital receipt. Further the Tribunal held that the sale consideration had no element of profit and it cannot be subjected to tax in any manner under any head of income.

The Delhi High Court in the case of Sharp Business System held that the non-compete fees paid by the taxpayer would not be allowed as revenue expenditure since the benefit accrued was in the capital field for a substantial period of time. Further, the non-compete fees are not eligible for depreciation under Section 32(1)(ii) of the Income-tax Act, 1961 (the Act) because only intangible rights enforceable against the 'world at large' would qualify for depreciation.

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

Royalty and Fees for Technical Services income received by a foreign company is taxable on a receipt basis as per Article 12 of the India-Germany tax treaty

The Bombay High Court has upheld the decision of the Mumbai Tribunal, wherein the Tribunal relying on the provisions of Article 12 of the India-Germany tax treaty, had held that the assessment of royalty or FTS should be made on receipt basis i.e. in the year in which the amounts are received by the non-resident.

DIT v. Siemens Aktiengesellschaft (ITA No.124 of 2010) (Bom)

Common Head Office expenditure incurred for general administration cannot be apportioned to individual units for computing deductions under Section 10B

The taxpayer claimed deduction under Sections 10B, 80HH and 80-I of the Act. The taxpayer claimed deduction on the grounds that the accounts for these units were separately maintained, and therefore, common expenditure of the Head Office (HO) cannot be apportioned for computing the deduction under Chapter VI-A of the Act. The Assessing Officer (AO), however, apportioned the common administrative expenditure incurred by the HO among all units on a proportionate basis.

The Madras High Court observed that the taxpayer's units had separate accounts indicating their income and expenditure. Furthermore, the units did not claim any deduction on the expenditure incurred by the HO. It was also observed that the tax department had no grievance as regards the order passed by the Tribunal for earlier years and that the expenditure incurred was pure and simple administrative expenditure, monitoring the requirements of finance and other actions which were necessary in the running of the business. Based on the above observations, it was held that the common HO expenditure could not be apportioned to various units for the purpose of calculation of deduction under Section 10B, 80HH and 80-I of the Act. The High Court distinguished the decision of the Supreme Court in the case of Consolidated Coffee Limited v. State of Karnataka [2001] 248 ITR 432 (SC) and the decision of Madhya Pradesh High Court in the case of Prestige Foods Limited v. CIT [2012] 23 taxmann.com 126 (MP) relied up-on by revenue.

CIT v. Hindustan Lever Limited [Tax Case (Appeal) No.219 of 2006, 267, 269, 270, 273 and 274 of 2008 dated 24 September 2012]

Deep Sea Matdrill, registered under the Merchant Shipping Act, is a 'qualifying ship' for tonnage tax purposes

The taxpayer is an owner of ships/vessels engaged in drilling operations referred to as 'Deep Sea Matdrills'. The taxpayer sought to opt for the tonnage tax scheme under Chapter XII-G in respect of such ships. Its claim was rejected on the ground that in terms of Section 115VD of the Act, Deep Sea Matdrills were not qualifying ships but 'offshore installations'. Section 115VD defines a qualifying ship which excludes any 'offshore installations'. The Tribunal allowed the taxpayer's appeal and held that Deep Sea Matdrill was not in the nature of 'offshore installations'.

The Delhi High Court observed that the vessels were consistently registered under Section 407 of the Merchant Shipping Act, 1958 and had a valid certificate which was produced for consideration. It also observed that unlike in the case of offshore installations which are stationed at one place, the very nature of the activity in which the taxpayer is engaged is to carry out operations in different places; necessarily, at least for a short duration, the vessel has to be stationed at one place. Thus it was held that a Deep Sea Matdrill, registered under the Merchant Shipping Act, 1958, is a 'qualifying ship' for tonnage tax purposes.

CIT v. Jaggon International Ltd. (ITA No 1395/2010 and 1289/2011, dated 8 November 2012)

A 'non-compete right' is not an 'intangible asset' and therefore not eligible for depreciation

The taxpayer, a joint venture of Sharp Corp, Japan, and L&T Ltd, paid L&T, a consideration for not competing with it for seven years. The taxpayer claimed that the non-compete fee was revenue in nature. It also claimed, alternatively, that the rights under the non-compete agreement were an 'intangible asset' under Section 32(1)(ii) of the Act, eligible for depreciation. The AO rejected the taxpayer's claim.

The High Court held that the advantage derived by the taxpayer from the non-compete agreement entered into with L&T is for a substantial period of seven years and ensures a certain position in the market by keeping out L&T. The advantage cannot be regarded as being merely for facilitation of business and ensuring greater efficiency and profitability. The advantage falls in the capital field. With regard to depreciation on an 'intangible asset', the High Court held that the non-compete rights cannot be treated as an 'intangible asset' under Section 32(1)(ii) of the Act because the nature of the rights mentioned in the definition of an 'intangible asset' spell out an element of exclusivity which inures to the taxpayer as a sequel to the ownership. The 'intangible asset' should be such that, but for the ownership of the 'intangible asset', the taxpayer would be unable to either access the advantage or assert the right 'in rem' i.e. as against the world. In the case of a non-competition agreement, it is a right 'in personam' where the advantage is restricted and does not confer an exclusive right to carry-on the primary business

activity. The rights under a non-competition agreement cannot be transferred; the same is purely personal. As a result of the above the said right cannot be termed as an 'intangible asset'.

Sharp Business System v. CIT [ITA 492/2012 & CM APPL. 14836/2012, dated 05 November 2012]

In a scheme of merger of a wholly owned transferor subsidiary company with its holding company, holding transferee company is not required to initiate separate proceedings under Sections 391 to 394 of the Companies Act

The petitioner transferor company is a wholly owned subsidiary of the transferee company. The transferor company had filed a petition under Sections 391 and 394 of the Companies Act, 1956 (the Companies Act) for sanction of the scheme of amalgamation of the company with the transferee company, whereby the entire businesses and the undertaking of the transferor company were to be transferred to, and vested in the transferee company. The petitioner transferor company had its registered office in Gujarat, whereas the registered office of the transferee company was in the State of Maharashtra. Notices were served upon the Official Liquidator as well as the Regional Director. Official Liquidator raised no objections to the scheme. Regional Director stated that transferee company ought to have filed an application/petition in the High Court of Bombay which had jurisdiction over it. It had further been observed that the order of the High Court of Gujarat dispensing with filing of an application by the transferee company was without jurisdiction.
The Gujarat High Court held that where the scheme of amalgamation provides for the transfer of all the assets and liabilities of the subsidiary transferor company to the holding transferee company, and such transfer does not affect the rights of its members or creditors and does not involve a reorganization of the share capital of the transferee company, a separate application by the transferee company, under section 391 or section 394, would not be necessary. Further, the net worth of the petitioner transferor company as well as of the transferee company, is positive. As the scheme does not envisage issuance of any shares of the transferee company, the capital structure of the transferee company would remain unaltered. Thus, in the instant case, there is no requirement for the holding transferee company to initiate separate proceedings under Section 391 to 394 of the Companies Act.

Further, the objection of the Regional Director after having accepted the order of the High Court of Gujarat is untenable. If, on the basis of the stand taken by the Regional Director, a view is taken that the High Court of Gujarat has no jurisdiction to decide the above requirement of taking out proceedings by transferee company or otherwise, then the Regional Director cannot request the High Court of Gujarat to withhold proceedings of the scheme of the transferor company on the ground of absence of separate proceedings by the transferee company in the High Court having jurisdiction, as even such a direction would be without jurisdiction.

Reliance Jamnagar Infrastructure Ltd [2012] 27 taxmann.com 228 (Guj)

Tests for determining whether income from sale of shares constitutes capital gains or business income Interpreted

Recently, the Delhi High Court examined various tests that were discussed in prior judicial rulings and Circular to analyse whether the income derived by the taxpayer from the sale of shares was taxable as capital gains or business income.

Inter alia, the factors that were considered relevant by the High Court were the occupation of the taxpayer, if separate trading and investment portfolios were maintained, the acceptance of these portfolios by the tax authorities in the taxpayer's prior assessments and the number of transactions as opposed to the quantity of shares sold.

CIT v. Vinal Mittal [ITA 1172/2011, dated 27 April 2012]

Tax paid by the employer on behalf of the employee, being a non-monetary perquisite, qualifies for exemption from multiple gross-up

The Uttarakhand High Court recently held that the income-tax paid by the employer on behalf of the employees would be considered as a non-monetary perquisite in the hands of the employee. It would therefore qualify for the exemption that is available in respect of taxes borne by the employer on non-monetary perquisites provided to the employee, other conditions being satisfied. In the absence of the exemption, the tax borne by the employer would have been subject to gross-up (tax on tax).

DIT v. Sedco Forex International Drilling Inc. & Others [2012] 252 CTR 447 (Utt)

Tribunal Decisions

Exemption from MAT provisions under section 115JB of the Act to be available even to an SEZ unit claiming deduction under section 10A of the Act

The taxpayer, being a public company engaged in the business of providing information technology solutions and geographical information services. The taxpayer has two undertakings, one located in a Special Economic Zone (SEZ) in Mumbai, and another located in Software Technology Park in Bangalore. Both units were eligible for tax benefit under section 10A of the Act. During the Assessment Years (AYs) 2008-2009 and 2009-2010 the taxpayer, while computing tax liability under Section 115JB of the Act, deducted income of INR 108.610 million in respect of the unit located in Mumbai as per the provisions of section 115JB(6) of the Act.

The AO however rejected the position adopted by the taxpayer on the following grounds –

- He referred to the amendment made by the Finance Act, 2007 with effect from AY 2008-09 in clause (f) of section 115JB of the Act which provides that the amount of income to which the provisions of section

10A or 10B applies will come within the purview of MAT.

- section 115JB(6) of the Act providing exemption from levy of MAT to SEZ units was inserted by the SEZ Act, 2005 along with section 10AA and therefore, it was applicable only to the units claiming deduction under section 10AA of the Act and not under section 10A of the Act

The Mumbai Tribunal, after referring to the definition of SEZ under Section 2 of the SEZ Act, held that Section 115JB(6) of the Act does not refer to either Section 10A or Section 10AA of the Act but simply provides that MAT provisions shall not apply to income arising from any business carried on in a unit located in SEZ. Consequently, despite the fact that an amendment was made in clause (f) in Explanation 1 to Section 115JB to provide that MAT shall apply to units eligible for deduction under Section 10A or 10B of the Act, a unit which is situated in a SEZ will continue to be exempt from MAT by virtue of the provisions of section 115JB(6) of the Act.

Genesys International Corporation Ltd. v. ACIT (ITA No. 6903/M/2011 for AY 2008-2009 and 609/M/2012 for AY 2009-2010 dated 31 October 2012]

Once a taxpayer suo-moto disallows an amount under Section 40(a)(i)/(ia) of the Act based on a tax audit report, it cannot be subject to TDS provisions under Section 201(1)/(1A) of the Act

During survey proceedings for AY 2007-08, the AO noted that the taxpayer had defaulted in not deducting tax on certain expenditure/payments made by it. These payments included 'provision made but tax not deducted under Section 40(a)(i) and 40(a)(ia)'of the Act, purchase of traded goods, purchase of packing material and clinical trial expenses (other expenses). The taxpayer explained that it was in the practice of making provision for expenses at the end of the year as it had multifarious locations and innumerable transactions. Since all the bills were not received, instead of making specific entries into the accounts of the parties, it made provision for expenses. Next year the entire provision of expenses was written back and the actual amounts paid to the respective parties were credited to their respective accounts and tax was deducted at source (TDS) as per the provisions of the Act. The taxpayer also contended that in its return for AY 2007-08 it had disallowed the entire provision made but not deducted tax on the same. The above contention of the taxpayer was not accepted by the AO. The AO had raised a demand in respect of the tax and interest due under Section 201(1)/ 201(1A) of the Act. The Commissioner of Income-tax (Appeal) [CIT(A)] affirmed the AO's action of levying tax and interest under section 201(1) and 201(1A) with respect to 'provision made but tax not deducted'. However, CIT(A) deleted the levy of tax and interest with respect to other expenses as mentioned above.

The Mumbai Tribunal observed that the entire provision had been written back in the next year and the actual amounts paid/credited were subjected to TDS provisions. Therefore, the taxpayer complied with the provisions of TDS as and when the amounts were paid/credited to

the respective parties. The Tribunal also noted that the taxpayer had suo-moto disallowed the expenses under Section 40(a)(i)/(ia) of the Act and held that once an amount was disallowed under section 40(a)(i)/(ia) on the basis of the audit report of the Chartered Accountant, the same amount cannot be subject to the provisions of TDS under Section 201(1) of the Act. Further the Tribunal held that the taxpayer was not liable for levy of tax and interest under Section 201(1) & 201(1A) of the Act on the provision made in respect of expenses for which the payees were not identifiable.

Pfizer Ltd. v. ITO (ITA No. 1667/Mum/2010 dated 31October 2012)

Disallowances made under Section 40(a)(ia) of the Act, being in the nature of business profits, are eligible for deduction under Section 80IB(10) of the Act

The taxpayer is a partnership firm, engaged in the business of construction and development. The taxpayer filed a Nil return for AY 2006-07 as it had claimed deduction under Section 80IB(10) in respect of its business income. During the course of assessment proceedings, the AO had made an addition of INR 3.55 million under Section 40(a)(ia) with respect to payments made without deduction of tax at source. The AO contended that due to the disallowance under Section 40 (a)(ia), business income increased but profit derived under section 80IB(10) from developing and building the project remained the same. The AO thus held that no deduction under Section 80IB would be available in respect of the amount disallowed under Section 40(a)(ia) of the Act and taxed the same separately. The CIT(A) allowed the appeal filed by the taxpayer.

The Pune Tribunal held that once the amount was disallowed under Section 40(a)(ia) of the Act, the same constituted a part and parcel of the taxpayer's profits and gains from the business, which in turn would form part of its gross total income and would be eligible for deduction in accordance with and to the extent specified by Section 80IB of the Act. The Tribunal, inter alia also observed that in this case there was no other source of income other than the profits from 80IB unit.

ITO v. Kalbhor Gawade Builders (ITA No. 386/PN/2011 dated 30 October 2011)

Sale consideration on transfer of carbon credits is a capital receipt. There is no element of profit and therefore it cannot be taxed under the Act

The taxpayer was engaged in the business of power generation through a biomass power generation unit and was eligible for deduction under section 80-IA of the Act. During AY 2007-08, it had received Carbon Emission Reduction Certificates (CERs), popularly known as 'Carbon Credits', for the project activity of switching off of fossil fuel from naphtha and diesel to biomass. The taxpayer sold these CERs to a foreign company and accounted the sale consideration as capital in nature and therefore had not offered the same for taxation. The AO held the sale proceeds to be a revenue receipt since the CERs were a tradable commodity

and even quoted on the stock exchange. Accordingly, the AO added the net receipt from the sale to the returned income. The CIT(A) confirmed the order of the AO. The Hyderabad Tribunal held that Carbon credit is in the nature of 'an entitlement' received to improve the world's atmosphere and environment by reducing carbon, heat and gas emissions. It is not generated or created due to carrying on business but it is accrued due to 'world concern'. Due to that a taxpayer gets a privilege in the nature of the transfer of carbon credits. A person who has surplus carbon credits can sell them to others to have the emission commitment capped under the Kyoto Protocol.

Transferable carbon credit is not a result or incidence of one's business and it is a credit for reducing emissions. The persons having carbon credits get benefit by selling the same to a person who needs carbon credits to overcome one's negative point carbon credit. The amount received is not received for producing and/or selling any product or by-product, or for rendering any service for carrying on the business. Carbon credit is entitlement or accretion of capital and hence income earned on the sale of these credits is a capital receipt. Reliance was placed on the judgement in the case of Maheshwari Devi Jute Mills Ltd. [1965] 57 ITR 36 (SC) wherein the Supreme Court held that the transfer of surplus loom hours to other mills out of those allotted to a taxpayer under an agreement for control of production was capital receipt and not income. Similarly, in the present case, the taxpayer transferred the carbon credits like loom hours to some other concerns for a certain consideration. Therefore, the receipt of such consideration cannot be considered as business income, and was a capital receipt. Carbon credit does not increase profit in any manner and does not need any expense.. Carbon credit is not in the nature of profit or in the nature of income and it cannot be subjected to tax in any manner under any head of income. It was not liable for tax for the year under consideration.

My Home Power Ltd. v. DCIT [2012] 27 taxmann.com 27 (Hyd)

Change in more than 51 percent shareholding

The taxpayer was a company in which public was not substantially interested as defined under Section 2(18) of the Act. During the AY 2007-08 more than 51 percent of the paid up share capital of the taxpayer was transferred to 'P' family and the control and management of company was also transferred to 'P' family. The taxpayer has incurred business losses in the FY 2004-05. The AO held that the provisions of Section 79 of the Act would apply to the taxpayer's case and accordingly the business loss incurred by the taxpayer in FY 2004-05 could not be allowed to carry forward.

The Agra Tribunal upheld the decision of CIT(A), who held that the taxpayer's contention that 72.8 percent of total paid share capital was introduced by P family during FY 2004-05 and not during the year under consideration has no merit in it because that was simply share application money and no shares were allotted during that year. It is only after the shares have been allotted

that an applicant who had remitted the money becomes a share holder and can participate in the affairs of the company as provided in the articles of association. The CIT(A) held that the shares have been admittedly allotted during the year under consideration and more than 51 percent of share holding has changed. The provisions of section 79 of the Act are clearly attracted.

Peoples Heritage Hospital Ltd. v. DCIT [2012] 26 taxmann.com 170 (Agra)

Notifications/Circulars/ Press releases

Protocol amending the India- UK and Northern Ireland tax treaty

India and UK signed a Protocol on 30 October 2012 amending the Convention for Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains. The key amendments to the tax treaty are as follows:

- Article 4 of the tax treaty, i.e. the 'Resident' Article, now provides that the benefits of the tax treaty will apply to income derived by a partnership firm to the extent such income is taxed in the UK either in the hands of the partnership or in the hands of its partners.

- According to Article 11 of the tax treaty, i.e. the 'Dividends' Article, the gross amount of dividend will be taxed at the following rates:

  - 15 percent if such dividend is paid out of income derived directly or indirectly from immovable property by an investment vehicle which distributes most of its income annually and whose income from such immovable property is exempt from tax; and

  - 10 percent in all other **cases**.

- Further, anti-abuse provisions are included in the 'Dividends' Article which provides that if the main purpose of any person concerned with the creation or assignment of the shares or other rights in respect of which the dividend is paid is to take advantage of the dividend article, then no relief shall be available to the taxpayers.

- Provisions for effective exchange of information between the tax authorities of the two countries contained in Article 28 have been modified to be in line with the latest international standards including exchange of banking information and supplying of information irrespective of domestic interest.

- A new Article 28C, i.e. the 'Limitation of Benefits' Article has been incorporated in the tax treaty which has provisions to ensure that the benefits of the tax treaty are not misused.

- New Articles on ‘Tax Examination Abroad’ and ‘Assistance in the Collection of Taxes’ have also been incorporated in the tax treaty.

Source: pib.nic.in

Protocol amending the India-Spain tax treaty

India and Spain signed a Protocol on 26 October 2012 amending the Convention for Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains. The amended tax treaty is expected to stimulate effective exchange of information and enable assistance in collection of taxes between India and Spain. It also contains provisions to reduce obstacles in mutual cooperation between the two countries and provisions to prevent the abuse of the benefits of the tax treaty.

Source: pib.nic.in

Time limit for completing return e-filing process for specified years extended

The Director General of Income-tax (System) has announced an extension of the time limit for sending ITR-V forms relating to Income Tax Returns filed electronically (without attesting a digital signature certificate) for AY 2010-11 (filed during the period 1 April 2011 to 31 March 2012) and AY 2011-12 (filed on or after 1 April 2011).

Taxpayers who electronically file their tax returns without attesting a digital signature are required to send the physically signed ITR-V to the Centralised Processing Centre (CPC) in Bengaluru within the time specified. The ITR-V form, which is automatically generated upon e-filing, is required to be signed and sent via post (either expedited or ordinary) within 120 days of e-filing the return or the date specified in this regard, whichever is later.

The ITR-V forms for the specified assessment years can now be sent to the CPC anytime up to 31 December 2012 or within a period of 120 days from the date of uploading of the electronic return data, whichever is later.

Notification No. 1/2012 under CPR scheme 2011 [F.No.DIT(S)-III/ITR-V Extension/2012-13] dated 23 October 2012

EPFO issues circular on identification of Indian International Workers

In October 2008, the 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. The definition of an IW includes an Indian employee having worked or going to work in a foreign country with which India has entered into a Social Security Agreement (SSA) and being eligible to benefits under the social security programme of that country by virtue of the SSA.

There was a gap in the identification of IW's, particularly in situations where employees change jobs. To address this, the Employees' Provident Fund Organisation (EPFO) has recently revised the declaration form (Form 11) required to be collected by employers from new employees. In the revised declaration, the employee will need to declare details of their contributions to a foreign social security programme or indicate if they have not made such contributions. It is interesting to note that the declaration form requires a disclosure of such contributions, whether or not India has entered into a SSA with the foreign country.

The aim of these changes appears to be the identification of those Indian employees who are eligible to become IWs. Consequently, upon their identification, such Indian employees and their employers will be required to comply with the IW provisions under the EPF Act.

Source: www.epfindia.com

II. SERVICE TAX

High Court Decisions

Where a government authority provides any services which are in the nature of its statutory obligations, the charges so recovered shall not be liable to service tax.

The tax payer, a Department of the Government of Kerala, was established for providing life insurance coverage to the State Government employees and also for providing general insurance coverage for the assets of the government/ government institutions, and the service tax was being discharged in respect of general insurance activities. Various notices and orders covering different periods were issued to the tax payer demanding service tax in respect of life insurance segment also. Some orders were being set aside, some new orders were being passed despite the fact that certain previous orders were being set aside by appellate authorities at different levels. Aggrieved of the same, the tax payer had filed two writ petitions before the Court dealing with the same issue.

The tax payer contended that it was an organ of the State Government itself and that the operations were in respect of insurance coverage to the employees of the State Government to discharge the statutory obligations under Rule 22A of Part 1 of Kerala Service Rules. The Revenue contended that the liability to pay service tax originated from Finance Act, 1994 and it could not be made subject to any prescriptions in some other statues. The tax payer could have been granted exemption under Section 93 had he sought for it and since he had not sought for it, no benefit should be allowed to him.

The High Court held that services of life insurance were provided as part of the statutory obligations and thus not liable to service tax.

Kerala State Insurance Department v. Union of India and Others [2012-54-VST-231 (Kerala High Court)]

Tribunal Decisions

When under the contract there was no condition that the user should have been manufacturing the goods only under the brand name of the trade mark owner, the trademark owner is not liable to pay service tax on the remuneration received from other company under the category of 'Franchise services'

The respondent had entered into an agreement with M/s K.P. Pan Flavour Ltd. to allow the use of their trade marks for the purpose of manufacture and sale of Pan Masala. The show cause notices were issued to respondents alleging that the consideration received by the respondent un-

der the aforementioned agreement should be chargeable to service tax under the taxable category of 'Franchise service'. To this, the respondents argued that the consideration paid by them would not be classified as 'Franchise Service' since M/s K.P. Pan Flavour Ltd. were under no obligation not to manufacture any Pan Masala under the brand name of any other person and hence the conditions laid down under the taxable category of 'Franchise Services' were not satisfied.

The matter finally reached before the CESTAT. The Tribunal held that the consideration received by the respondents was not chargeable to service tax under the taxable category of 'Franchise Service' on the basis that there was no exclusivity of contract between the respondent and M/s K.P. Pan Flavour Ltd for the manufacture of Pan Masala.

Commissioner of Customs, Kanpur vs. Kamla Kant & Co. [2012 (28) STR 186 (Tri – Del)]

Service tax (on reverse charge basis for 'import of services') is payable on gross amount paid to the service provider inclusive of income tax deducted at source by the Indian service recipient

The taxpayer had received technical and project consultancy services from an offshore service provider. Accordingly the taxpayer paid service tax on reverse charge basis on import of the aforesaid services. However, in order to determine the taxable value for the purpose of payment of service tax, the taxpayer excluded the amount of TDS paid and deposited service tax on the invoice value less the Income Tax deducted. To this, the revenue contended that the TDS deducted by the taxpayer was also liable to be included in the 'gross value' of services provided and accordingly, service tax had to be discharged on the entire invoice value inclusive of the TDS amount.

The Tribunal observed that under the contract entered between the taxpayer and the service provider, it was stated that the taxpayer was liable to pay an amount net of taxes to the service provider and taxes if any payable in addition to the contract price. The Court held that as per the provisions of service tax laws in cases of liability under reverse charge, the service recipient is deemed as the person providing services. Further the 'gross amount' / consideration payable for any service is the total amount charged for providing such services. Basis the above, the Tribunal held that the gross value for the purpose of payment of service tax will be the invoice value inclusive of TDS amount.

T.V.S. Motors Co. Ltd. vs. CCE, Chennai- III [2012 (28) STR 150 (Tri - Chennai)]

Benefit under Notification No.12/2003-ST dated June 20, 2003 cannot be denied on the ground that the invoice does not separately state the value of goods sold.

The taxpayers were engaged in fabrication and installation of retail visual identity elements (RVIs) and sign boards for petrol pumps. A service tax demand was confirmed on them under "erection, commissioning or installation service" and the exemption under Notification No.12/2003-ST was denied since the taxpayer had neither intimated the value of the goods sold nor

provided any sale bills indicating the value of such materials sold. Also, the revenue contended that no sale had taken place as per the Central Excise Act and the "deemed sale" concept given under Constitution cannot be adopted for the purposes of Notification No.12/2003-ST. Separately, an order demanding excise duty on the fabricated items was set aside by the Tribunal for de novo consideration of issues involving excisability of goods and the valuation thereof.

The Tribunal did not accept the submission that "deemed sale" could not be adopted for the purposes of the impugned Notification because CBEC itself acknowledged the concept in Draft Guidance Paper issued in respect of 2012-13 budget. The Tribunal observed that the taxpayer was eligible for exemption as no proof other than the value of excisable goods arrived at by the authorities would be required as the excise authorities were themselves making out a case that the taxpayer manufactured and sold excisable goods to petrol pumps for executing the contract.

Mehta Plast Corporation vs Commissioner of Central Excise, Jaipur-I [2012-54-VST-353 (CESTAT – New Delhi)]

Notification & Circulars

Revised form ST-3 for filing of service tax return for the period April-June 2012 issued

The Central Board of Excise & Customs has extended the date of submission of the return for the period 1st April 2012 to 30th June 2012, from 25th October, 2012 to 25th November,2012 and the revised form ST-3 for filing of service tax return for the period April-June 2012 was also issued.

Order No. 3 /2012, dated October 10, 2012 and Instruction F. No. 137/22/2012, dated September 28, 2012

III. VAT/ CST

High Court Decisions

If an entry in the schedule is an inclusive entry and is wide enough to cover all kinds of an article, no particular kind of that article can be excluded in the absence of a specific exclusion

The taxpayer imported jumbo rolls of paper of different colour, which contained strips of adhesive on one side, then cut the paper into pieces and prepared 'post-it-paper'. For seeking a clarification with regard to the rate of tax, the taxpayer made an application to the Authority for Clarification and Advance Ruling ("ACAR"). ACAR held that 'post-it-paper' would fall under the category of unscheduled goods and liable to be taxed at 12.5 percent. An application for review was filed with ACAR which was rejected. Aggrieved of the same, the taxpayer approached the High Court of Karnataka which remanded the matter to the Commissioner of Commercial Taxes ("Commissioner"). The Commissioner held that 'post-it-paper' would be subject to tax at 12.5 percent as it falls in the residuary clause. Aggrieved by the order of the Commission-

FICCI

er, the taxpayer filed an appeal before the High Court of Karnataka.

The taxpayer contended that 'post-it-paper' would be covered under Entry 69(i) of Schedule III of Karnataka Value Added Tax Act as the entry includes all kinds of paper without stipulating the use or utility to which they are put to use and therefore, be liable to concessional rate of tax of 4 percent. The Revenue argued that during the course of manufacture of 'post-it-paper', the original paper loses its identity and becomes a commercial commodity distinct from the paper of any kind.

The High Court held that the relevant entry is an inclusive entry and is wide enough to cover all kinds of paper other than those specifically excluded.

3M India Limited vs. State of Karnataka, [2012-VIL-73-BANG (Kar HC)]

In order to determine classification of a product in the schedule, common parlance test has to be applied in the absence of a specific definition / entry

The taxpayer was engaged in the manufacture of fruit pulp based drink "Slice". The taxpayer sought to deposit tax on the sale of "Slice" at the residuary rate of 8 percent whereas the department demanded 12 percent tax as applicable on the sale of "food article" which was upheld by the assessing authority. The dealer filed an appeal before the Joint Commissioner which was rejected. Aggrieved of the order, an appeal was filed before the Tribunal which placed reliance on the definition of "food article" prescribed under the Prevention of Food Adulteration Act, 1954 as no definition was given under the Delhi Sales Tax Act. It observed that "Slice' fell within the scope of the term 'food article" and therefore, upheld the decision of the Joint Commissioner. Aggrieved of the same, the dealer filed an appeal before the High Court of Delhi.

The taxpayer argued before the Court that it was not appropriate to import the definition given under one enactment for the purposes of another, where both the enactments seek to achieve an entirely different purpose. The taxpayer supported its arguments by relying on judgments Union of India vs Kalyani Breweries Ltd – 1999 (113) ELT 39 (wherein it was held that beer was not a food article) and S.Samuel, M.D., Harrisons Malayalm and Another vs Union of India and Others – 2003 (134) STC 61 (wherein it was held that tea was not a food article). The revenue contended that the term "food article" had to be given a wide meaning and reliance was placed on the dictionary meaning of "food".

The High Court relied on the case of State of Bombay vs Virkumar Gulabchand Shah (1952 AIR 335 SC) and Collector of Central Excise vs Parle Exports Pvt. Ltd. (1988 (38) ELT 741) wherein it was held that common parlance test has to be adopted to determine whether an entry in a taxing statute comprehends one or other article or not. The High Court followed the common parlance theory and held that "Slice" cannot be called a "food article" especially when the major content is water (70% approx).

Varun Beverages Limited vs. Commissioner of Value Added Tax, [2012-VIL-86-DEL (High Court- Delhi)]

In the absence of specific entry providing rate of tax on works contract, tax should be levied as per the rate applicable on the value of each class of goods involved in the execution of works contract

The taxpayer was engaged in the business of civil works contracts. The taxpayer made an application to the Authority for Clarification and Advance Ruling ("ACAR") for seeking a clarification with regard to the rate of tax prior to March 31, 2006 on the execution of civil works contract. ACAR held that there is no specific entry in respect of works contract upto March 31, 2006, therefore, tax should be levied as per the rate applicable on the value of each class of goods involved in the execution of works contract. The Commissioner of Commercial Taxes ("Commissioner") found ACAR's clarification erroneous and held that the goods used in the works contract cannot be treated on par with the normal sale of goods for determining the rate for the period prior to March 31, 2006. Aggrieved by the order of the Commissioner, the taxpayer filed an appeal before the High Court of Karnataka.

The taxpayer contended that Section 3(1) of the Act provides for levy of tax on every sale of goods and Section 4 prescribes the rate of tax. The definition of sale includes deemed sale and, therefore, levy of tax is same for both sales and deemed sales.

The Court agreed with the taxpayer's contention and held that for the period prior to the April 1, 2006, tax has to be levied as per Section 3(1) of the Act on the value of each class of goods involved in the execution of works contract.

Durga Projects Inc vs State of Karnataka & Anr, [MANU/KA/1463/2012]

Any transfer of goods between amalgamating and amalgamated companies after effective date of amalgamation specified in Scheme should be regarded as 'Branch Transfers' unless specifically provided to the contrary.

The taxpayer was engaged in the production of pharmaceuticals. An amalgamation scheme was filed whereunder the taxpayer and five other group companies merged in different proportions into two resultant companies. The scheme provided that June 1, 1995 would be the date from which the scheme for amalgamation will be effective – the scheme was approved by the Gujarat High Court on May 2, 1997.

The sales tax authorities sought to levy sales tax on transactions between the amalgamating entities during the period June 1, 1995 to May 2, 1997 – this was countered by the amalgamating entities by highlighting that the sanction of the High Court of the scheme of amalgamation led to the consequence that the transactions between the amalgamating entities during the period June 1, 1995 to May 2, 1997 would no longer qualify as 'sales' and hence not leviable to sales tax.

The High Court ruled in favor of the taxpayer and held that in case of amalgamation of companies, such amalgamation is deemed to take effect from the effective date specified in the scheme approved by the High

Court. In absence of any provisions to contrary, any transfer of goods between amalgamating and amalgamated companies after effective date of amalgamation specified in the scheme should be regarded as 'Branch Transfers' and would not be liable to sales tax. Consequently, any sales-tax paid by taxpayer thereon is refundable as per law.

The High Court further clarified that principle of unjust enrichment (as provided in Central Excise laws) is applicable in case of all indirect taxes even in absence of specific statutory provisions. If amalgamated companies undertake transfer of goods post the effective date and have paid sales tax on such a transaction, they would be eligible for refund only in case the burden of such tax has not been passed on to the customer or any other third party. In case the burden has been passed on, the principle of unjust enrichment would come into the picture and therefore, the refund would not be available.

Cadila Healthcare Ltd vs Dy CST, [(2012) 37 STT 259 (Gujarat)]

Development of customized software wherein all rights in respect of the software including the intellectual property rights vest with the customer and the software is absolute property of customer is not sale of goods liable to VAT

The taxpayer was engaged in software development and provided software services. An audit of the taxpayer was conducted wherein the Commercial Tax Officer ("CTO') concluded that the taxpayer dealt in high-end software development work and in fact executed works contracts. The CTO was of the view that software development activity attracts tax under works contract as per Section 4(1)(c) of the Karnataka Value Added Act at four percent. The taxpayer filed objections contending that it was rendering 'services' which are subject to the levy of service tax. This contention was rejected by the CTO and the matter was finally argued before the High Court of Karnataka.

Revenue contended that as per the settled legal position, software is 'goods' where it is capable of being bought and sold and consequently, sale of software would be subject to the levy of sales tax. The taxpayer contended that it renders 'software development service' on which service tax is duly discharged.

The High Court held that the entire agreement was a 'service agreement' wherein the taxpayer had given up the rights in the software even before developing it. The consideration paid to the taxpayer was based on the time or man hours spent in the project. Further, there were no goods in existence when they entered in to the agreement and the software was the absolute property of the customer at all times.

Sasken Communication Technologies Ltd vs Joint Commissioner of Commercial Taxes, [(2012) 55 VST 89 (Karn)]

Movement of goods must be integrally connected with the contract of their supply for determining if a sale is an inter-state sale / sale in the course of import

Taxpayer was engaged in the manufacture and sale of engineering goods including

power distribution system. The taxpayer entered into a contract with Delhi Metro Railways Corporation ("DMRC") for supply of power distribution system and certain other equipments. The taxpayer had imported such goods and subsequently, supplied them to DMRC. On such supplies, no VAT/CST was discharged by the taxpayer considering it to be a 'sale in the course of import' / 'sale occasioning import'. Certain other goods were manufactured by the taxpayer in their factory outside Delhi and were supplied to DMRC treating them as inter-state sales. The assessing officer imposed a demand of VAT on the goods imported as well as those supplied from the factory outside Delhi and penalty as well. Aggrieved of the order, the taxpayer filed an appeal which finally reached before the Delhi High Court.

The taxpayer submitted that the goods were imported only for the requirements of DMRC and the import of goods was occasioned by the order from DMRC. Further, the supply of goods from the factory constituted inter-state sales in terms of the established legal principles. The Revenue contended that only the specifications of the goods were specified by DMRC but there was a possibility of diversion of goods. Also, orders from DMRC did not stipulate an inter-state movement of goods and there were no such instructions as well.

As regards the inter-state sales, the High Court observed that if a reasonable presumption can be drawn that to fulfill the contract, goods would move inter-state, it would qualify as an inter-state sale under Section 3(a) of the CST Act. In this case, it was evident that DMRC was aware that the goods would be procured from the factories of the taxpayer which were located outside Delhi and even in the absence of specific instructions, an inter-state movement was implied. With respect to the sale in the course of import, the High Court observed that if the movement of goods is integrally connected with the contract, it would qualify as a 'sale in the course of import'. In the instant case, the goods were custom made, pre-inspected and in line with DMRCs specifications and therefore, it was evident that the sale of goods to DMRC occasioned the import.

ABB Limited vs. Commissioner, DVAT, [2012 (10) TMI 185]

The sole criteria for considering a transaction as an inter-state sale is the movement of goods intimately connected with the sale irrespective of the fact that the purchaser moves the goods at his own cost or he bears the insurance charges, etc.

The taxpayer effected sales to his buyer located at Warora, Maharashtra and claimed the sale as an inter-state sale as the goods moved from Tamil Nadu to Maharashtra. The Assessing Officer passed an order holding the sale to be an intra-state sale and thus assessable under Tamil Nadu General Sales Tax Act for the reasons that the purchaser bore the insurance charges, moved the goods inter-state at his own cost, the seller was relieved of the liability after the delivery and that the price was ex-godown. An appeal was made to the Sales Tax Appellate Tribunal where the Tribunal upheld the order of the Assessing Officer. Aggrieved of the order, the taxpayer had filed an appeal before the Madras High Court.

The taxpayer did not deny the observations of the Tribunal but in his defense, he argued that though there was no written agreement as to the terms of sale, yet the invoice and conduct of parties reveal that the sale was an inter-state sale as the movement of goods and sale were intimately linked to each other. He further argued that the reasons given by Tribunal cannot be a decisive factor for determining the character of the sale and the transaction was liable to Central Sales Tax as the parties had contemplated movement of goods pursuant to the contract of sale. The Revenue contended that the transaction can be inferred as that of an intra-state sale as the purchaser had taken over the goods in Tamil Nadu, arranged for transport as well as insured the goods.

The Court stated that from the facts, it was clear that the sale and the movement were intimately connected and the movement of goods was a consequence of sale. The Court allowed the appeal and held that the sale was an inter-state sale.

Aspick Engineering Pvt. Ltd. vs. The State of Tamil Nadu, [2012-VIL-89-MAD]

A transaction of sale cannot be regarded as an inter-state sale where the dispatch instructions for movement of goods to the other state are issued after the purchase of goods as there is no link between the purchase and dispatch.

The taxpayer, a company manufacturing tyres and tubes, had purchased natural rubber from State Trading Corporation Ltd. ("STC"), Madras. STC charged Central Sales Tax at the concessional rate of 4 percent against Form C provided by the taxpayer. During the course of inspection by the Enforcement Wing Officers, it was found that the taxpayer did not pay tax on such purchases under Tamil Nadu General Sales Tax Act ("TN GST Act") as the 'last purchaser' as the transaction qualified as an intra-state sale. It was observed by the Assessing Officer ("AO") that pursuant to receipt of allocation order, the taxpayer requested STC to allow it to take delivery of goods from Madras and thereafter goods were moved to Kottayam and Goa. The AO rejected the taxpayer's contention that title was transferred only on delivery outside the State and confirmed the assessment as in his view, though the purchases were made locally, but by manipulating certain records, the taxpayer treated the transaction as that of an inter-state sale. The first appellate authority confirmed the assessment order passed by AO because in his opinion, purchase and allocation had not contemplated inter-state movement and the remittance slips indicating the name of the remitter would not make the movement, an inter-State movement. An appeal was made to the Tribunal wherein it was observed that there was no clause in the allocation order or any subsequent agreement specifying that the delivery instruction to dispatch the goods to Kottayam or Goa was an incidence of sale. After taking delivery of the goods, the taxpayer had distributed goods to its branches. The subsequent movement of rubber was an independent transaction and not connected with this transaction and transaction could not be held to be an inter-state transaction. The Tribunal further held that purchases were made by the taxpayer as one unit and the branches and factories were only its limbs. Further mere furnishing of 'C' Forms would not alter the character of

the transaction from an intra-state sale to an inter-state sale. The Tribunal upheld the demand and dismissed the contention of the taxpayer that assessment of STC as inter-state sales remain unchallenged.

Aggrieved of the Tribunal's order, an appeal was made to the High Court where the taxpayer contended that since STC reserved the right to cancel/ modify the application/allocation, the contract would be concluded only when the deliveries were affected. The taxpayer also argued that by not challenging the assessment of STC, the State had already decided the character of the transaction and it cannot change its position.

The High Court observed that the fact that STC reserved the right to alter or cancel the allotment did not touch on what the parties contemplated as regards the movement of goods. The Court held that no records are available to demonstrate that the allotment was intended to result in movement of goods to branches of the taxpayer and that after having purchased the goods, the taxpayer had issued dispatch instructions for movement of the goods to the other states. Since there was no link between the purchase and dispatch, the Court found it difficult to accept the case of the taxpayer that the movement is nothing but an inter-state sale. The Court also quashed the taxpayer's contention that assessment of STC under Central Sales Tax Act would prevent the Revenue from making assessment under TN GST Act in respect of the taxpayer. The Court ordered that payment of 4 percent tax under Central Sales Tax Act should be adjusted towards the 5 percent tax demanded under TN GST Act.

MRF Limited vs The State of Tamil Nadu, [2012-VII-76-MAD (Madras High Court)]

Sale of camera by one service provider to another where both the parties are not carrying any business of buying, selling, supplying or distributing goods shall not be liable to VAT/CST.

The taxpayer, a company running a diagnostic center in Bangalore had purchased a second hand Gamma Camera from M/s Spect Lab Medicine Services ("Spect") (who had purchased it originally from M/s Wipro GE Medical Systems Limited, the transaction being liable to sales tax). Both the taxpayer and Spect were rendering medical services and thus not registered under Karnataka VAT as a result of which no tax invoice was raised. When the camera was being transported from Pune to Bangalore by road, the check-post authorities in Karnataka detained the camera and demanded a penalty on the ground that no tax invoice or sale bill for movement of goods was produced and neither consignor nor consignee were registered under respective State VAT Acts. Aggrieved of the order of the check-post authorities, an appeal was filed which finally reached before the Karnataka High Court.

The taxpayer argued before the High Court that they and the seller are not doing any business nor they are 'dealers' in terms of Karnataka VAT. Since both of them are not registered under Karnataka VAT, no tax invoice can be issued and instead a debit note has been issued. The Revenue contended that the taxpayer did not obtain any prior permission of the Competent Authorities for inter-state transportation of materials not attracting sales tax under Karnataka

VAT as required by a Circular issued by the Commissioner of Commercial taxes only to his subordinates.

The Court held that the question of producing the sale bill and tax invoice did not arise since it involved purchases by a service provider from a service provider. Moreover, the circular was held to be non-applicable in the present case as it was an internal communication only and was not known to the general public. The documents submitted were considered to be sufficient and the matter was decided in favour of the taxpayer.

Elbit Medical Diagnostics Limited, Bangalore vs The Additional Commissioner of Commercial Taxes (Appeals), Zone-1, Bangalore, [2012 (73) Kar L J 423 (HC) (DB) (Karnataka High Court)]

IV. CUSTOMS

Notification & Circulars

Specified items required for the LR-SAM Programme of Ministry of Defence exempted from Customs Duty

The Government has amended the notification no. 39/96-Customs, dated the 23rd July, 1996, thus exempting import of machinery, equipment, instruments, components, spares, jigs, fixtures, dies, tools, accessories, computer software, raw materials and consumables required for the Long Range Surface to Air Missile (LR-SAM) Programme of Ministry of Defence from customs duty.

Notification No. 57/2012, dated October 18, 2012

New Duty Drawback Rates

The Government announced the new Duty Drawback Rates vide Notification No 92/2012-Customs (NT) on October 5, 2012. The New Duty Drawback Rates for 2012-13 have come into effect from October 10, 2012

Notification No.92/2012, dated October 5, 2012

Validity of duty credit scrips issued upto and after July 26, 2012

The DGFT clarified that duty credit scrips issued upto July 26, 2012 will continue to have validity of 24 months and duty credit scrips issued after that date will have validity of 18 months

Policy Circular No. 7 (RE-2012)/2009-14, dated October 25, 2012

V. CENTRAL EXCISE

High Court Decisions

MODVAT credit cannot be denied on account of storage tanks being immoveable property

The taxpayer availed MODVAT credit on structural steel items used in construction of storage tanks for storage of water as well as syrup and molasses (arising as a by-

product in course of manufacturing activity). In the relevant period the MODVAT credit provisions didn't specifically include 'storage tanks' in the definition of 'capital goods' – basis this, the revenue contended that credit couldn't be availed on inputs like structural steel items for manufacture of storage tanks by treating storage tanks as 'capital goods'.

The insertion of 'storage tanks' in the definition of 'capital goods' in the subsequent period was held by the High Court to be clarificatory and the benefit was extended for the earlier periods too by holding the storage tanks to be a component of the main machinery and thereby qualifying as 'capital goods' despite the fact that storage tanks were embedded to the land.

Commissioner of Central Excise vs. Doodhganga Krishna Sahakari Sakkare Karkhane Niyamit, [(2012) 37 STT 41 (Karnataka)]

Expenses incurred towards pre delivery inspection and free sales services provided by dealer to a vehicle owner during the warranty period, is not includible in the transaction value of the vehicle

The taxpayer was manufacturing Indica/Indigo cars at its Pimpari factory in Pune which were sold to end customers through a nation-wide dealer network (vide a group company as an intermediary). As per the dealership agreement, the dealer was required to carry out pre delivery inspection before a car was actually delivered to the end customer. Further, after a car was delivered to the customer, the customer was entitled to bring the car to the dealer for getting the said car serviced after running the car for certain number of kilometers or certain number of days. A dealer was required to conduct such servicing free of cost. The expenses incurred by a dealer to conduct pre delivery inspection and free after sales services were borne by the dealers from the dealer margin. The contention of the revenue was that excise duty should not only be paid by the taxpayer on the price paid by a dealer to the taxpayer for the sale of a car to such dealer, but should also include the aforementioned expenses incurred by the dealer in providing the pre delivery inspection and after sales services free of cost. This contention was essentially based on the reasoning that such expenses incurred by a dealer are essentially additional consideration to Taxpayer for sale of cars by the taxpayer to such dealer (over and above the sale price of a car charged by the taxpayer from such dealer).

The revenue were supported in their contention by Circular No. 643/34/2002 dated 1st July, 2002 and the decision in Maruti Suzuki's case [2010 (257) ELT 226 (Tri LB)]. The taxpayer challenged the validity of the aforementioned circular and contended that once the car is sold by the taxpayer to a dealer, no further transaction takes place between the taxpayer and that dealer and hence no further consideration flows from the dealer to the taxpayer.

The Bombay High Court upheld the contention of the taxpayer and held that it is the contractual obligation of the dealer to provide free pre delivery inspection and after sales services to end customers; the dealer is not providing the said free services on behalf of the taxpayer to the end customers. The Bombay High Court also held that

no amount was flowing from dealers to the taxpayer on account of such free services and hence it cannot be said that there was flow of additional consideration from the dealers to the taxpayer.

The Bombay High Court concluded that the Circular relied upon by the tax authorities was erroneous but refused to comment on the Maruti decision since the same is pending before the Supreme Court of India.

Tata Motors Ltd vs UOI, 2012 (193) ECR 0312 (Bombay)

Tribunal Decisions

'Works contract service' in respect of erection and commissioning of transmission towers had a connection with output service of Telecommunication and hence eligible as 'input service'

The taxpayer availed CENVAT Credit of service tax paid on the input side works contract services in respect of erection and commissioning of transmission towers used for provision of telecom services. The same was challenged by the Revenue on the grounds that the input works contract services were in respect of erection and commissioning of transmission towers and, as these towers are immovable property, they would not qualify as 'capital goods' under the CENVAT Credit Rules 2004 and consequently there was no connection between the 'works contract service' and the 'output service' of telecommunications.

The taxpayer submitted that status of the transmission towers is not relevant to the relation between the 'input service' and the 'output service'. To support their argument, the taxpayer relied upon the stay order passed by CESTAT Delhi in the case of Suzuki Motorcycle (I) Pvt. Ltd. vs. CCE, Delhi-III [2012 (25) STR 405 (Tri-Del)]. In the said case also, the question was whether 'commercial or industrial construction service' which was used for construction of certain buildings which, in turn, was used for manufacture of excisable goods could be considered to be 'input service' vis-a-vis the manufacture of the goods. The Tribunal took a prima facie view in favour of the taxpayer (manufacturer) and granted waiver and stay.

The Hon'ble Tribunal held that there is a clear analogy between the instant case and the case of Suzuki Motorcycle *(supra)* and therefore waiver and stay was granted.

Vodafone Essar Cellular Ltd vs. Commissioner of Central Excise and Customs, Cochin, [2012-TIOL-1510-CESTAT-BANG]

Trading activity was not an 'exempted service' prior to 1-4-2011 and thus no question of reversal of service tax credit/ maintaining separate accounts on that activity arises

The taxpayer was registered as input service distributor and was distributing input service credit to its various manufacturing units ("Units") during the material period. The Units took the CENVAT Credit of those input service and utilized the same for payment of duty of excise on the pharmaceutical formulation (excisable goods) manufactured and cleared during the material period. Simultaneously the units were also buying similar formulation from the third

parties and marketing the same i.e. they were engaged in trading activity. During the material period the trading activity was not specified as an 'exempt service' under the CENVAT Credit Rules.

The department treated the activity of trading as an 'exempted service' and also noted that the Units were not maintaining separate accounts in respect of input services which were utilized in relation to manufacturing of dutiable products and those utilized in relation to the trading activity. On this basis, the department issued show-case notices to the Units for recovery of CENVAT Credit taken on input services used in relation to trading activity along with applicable interest and penalty.

The Tribunal held prima facie that the Units were lawfully utilizing the entire credit for payment of duty on the dutiable final products and Units could not have been expected to maintain separate accounts since during the material period the trading activity was not specified as an 'exempt service' under the CENVAT Credit Rules. As a result, waiver of pre-deposit and stay of recovery was granted.

Micro Labs Ltd. v CCE, [2012 (284) ELT 407 (Tri-Bang)]

Bill of export not mandatory for rebate claims for supply of goods from Domestic Tariff Area to SEZ units under ARE-I

The taxpayers filed claims of rebate under Rule 18 of the Central Excise Rules, 2002 on the grounds that they had supplied goods to SEZ units. During the scrutiny of documents submitted with the rebate claims, original authority noted that bill of exports has not been filed with the claims. Therefore, show cause notices were issued to the taxpayer proposing to reject the claims. Subsequently, the adjudicating authority vide impugned orders-in-original ("OIO") rejected the said rebate claims. Being aggrieved by the OIO, taxpayer appealed before Commissioner (Appeals), which decided in favour of the taxpayer which was the subject matter of this revision application.

Basis various circulars issued in this regard, the revision application filed by the revenue was rejected and it was held that in case export entitlements are not availed, the movement of goods from the place of manufacture in DTA to SEZ shall be on the basis of ARE-1. In the present case taxpayers are not availing any export entitlement, hence they were not required to file any shipping bill. Further, although bill of export is required to be filed for making clearances to SEZ, yet the substantial benefit of the rebate claim cannot be denied on this lapse only.

In Re: Rohit Poly Product Pvt Ltd, [2012 (284) ELT 137 (GOI)]

Notification & Circulars

Specified items required for the LR-SAM Programme of 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 machinery, equipment, instruments, components, spares, jigs, fixtures, dies, tools, accessories, computer software, raw materials and con-

FICCI

sumables required for the Long Range Surface to Air Missile (LR-SAM) Programme of Ministry of Defence from excise duty.

Notification No.38/2012-CE, dated October 18, 2012

"This newsletter has been prepared with inputs from KPMG and BMR & Associates and does not express views or expert opinions. The newsletter is meant for general guidance. It is recommended that professional advice be sought based on the specific facts and circumstances. This newsletter does not substitute the need to refer to the original pronouncement"