November 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

Supreme Court Decisions

‘Silly mistake’ or ‘Human error’ not justifiable grounds to levy penalty

The taxpayer was engaged in the business of providing multi-disciplinary management consultancy services. For the Assessment Year (AY) 2000-2001 the taxpayer filed its return of income under Section 139(6) read with Section 139(6A) of the Act. As statutorily required by Section 139(6A) of the Act, the taxpayer also filed a tax audit report under Section 44AB of the Act alongwith statement of particulars in Form No. 3CD for the year under consideration. In clause 17(i) of the said tax audit report, the amount of INR 2.37 million was mentioned as ‘provision for payment of gratuity not allowable under Section 40A(7) of the Act. However, in the return of income no disallowance of the said amount was made and the assessment under Section 143(3) of the Act was completed without making any adjustment in this behalf. Subsequently the assessment was reopened and notice under Section 148 of the Act was issued to make an adjustment for said provision for gratuity. Soon after the receipt of reasons the taxpayer filed a letter stating that the amount was not offered to tax due to genuine mistake and omission which has also been overlooked by the AO while completing assessment. The taxpayer accordingly filed a revised return of income and paid the tax due thereon alongwith interest. The AO then initiated penalty proceedings under Section 271(1)(c) of the Act for the addition and levied a penalty at 300 percent on the amount of tax thereon which was also upheld by the CIT(A). The Tribunal upheld the levy of penalty; however, quantum was reduced to 100 percent. The said levy of penalty was also upheld by the High Court.

The Supreme Court observed that although the taxpayer is a reputed firm and has great expertise available, the possibility of ‘silly’ mistake could not be ruled out which has been acknowledged both by the Tribunal as well as by the High Court. It was further observed that the tax audit report filed along with the return unequivocally stated that the provision for payment was not allowable under Section 40A(7) of the Act which itself indicated that the taxpayer had made a computation error in its return of income which was also overlooked by the AO while framing the assessment. Further the content of the tax audit report suggests that there was no question of concealing any income or furnishing any inaccurate particulars. Thus it was a case of a bonafide and inadvertent error, committed while

submitting a return of income. The caliber and expertise of the taxpayer has little or nothing to do with the inadvertent error.

Price Water House Cooper P. Ltd. v. CIT (TS-731-SC-2012)

High Court Decisions

Retrospective amendment is not applicable to the matter which has already attained finality before introducing the amendment

An appeal was filed by the taxpayer under Section 260A of the Act against the decision of the Tribunal dated 31 August 2005. Since an appeal was filed after 180 days, the appeal was barred by limitation and hence application for condonation of delay was filed. The Allahabad High Court, relying on the decision of the full bench of its own jurisdiction in the case of CIT v. Mohd. Farooq (2009) 317 ITR 305 (All), rejected the application for condonation of delay and accordingly dismissed the appeal. The taxpayer then challenged the said order before the Supreme Court by special leave wherein the Supreme Court ordered to expeditiously hear and dispose of the review petition. In the review petition the taxpayer contended that the High Court has the power to condone the delay in view of insertion of Sub-section (2A) of Section 260A of the Act inserted by the Finance Act, 2010, with effect from 1 October 1998.

The Allahabad High Court dismissed the review petition, relying on the decision of Supreme Court in the case of Babu Ram v. C. C. Jacob and others AIR [1999] SC 1845, and held that cases already settled before the amendment cannot be re-opened. The High Court observed that on 11 December 2009, when the instant appeal was dismissed on the ground of limitation, there was no discretion with the court to condone the delay since the power to condone the delay has come to the court by virtue of the amendment made by Finance Act 2010, which inserted sub-section (2A) in Section 260A of the Act. The High Court inter alia relied on the decision of Ace Investment Limited v. Settlement Commission (2004) 264 ITR 571 (Mad). Further, it also held that the remedy of appeal is a statutory right and hence it has to be presented in accordance with the procedure, the manner and within the time prescribed by the statute, and the principles of natural justice cannot be attracted so far as the question of limitation is concerned.

J.B. Roy v. DCIT (Income Tax Appeal No. 127 of 2006 dated 7 September 2012)

Tribunal Decisions

Fees paid to a foreign company for registering on its website are not FTS

The taxpayer, a tax resident of Switzerland, operated India-specific websites for providing an online platform to users based in India for the purchase and sale of goods and services. The taxpayer derived income in the form of a 'User fee' from sellers registered on the taxpayer's website.

For availing certain support services in connection with its India-specific websites, the taxpayer also entered into a Marketing

Support Agreement (MSA) with its Indian group companies.

In connection with the above, based on the facts of the case, the Income-tax Appellate Tribunal (the Tribunal), *inter-alia*, observed and held as follows:

- By making its website available in India to the sellers for displaying their product, the taxpayer is not rendering any managerial, technical or consultancy services to the sellers and therefore the services do not qualify as FTS within the meaning of section 9(1)(vii) of the Act;
- As the Indian group companies provide services exclusively to the taxpayer and have no other source of income, they constitute dependent agents of the taxpayer in India. However, the activities performed by the India group companies do not satisfy the conditions set out in Article 5(5) of the India-Switzerland tax treaty to constitute a Dependent Agent Permanent Establishment (DAPE) of the taxpayer in India;
- The Indian group companies, performing only marketing support services, cannot be said to be taking any managerial decisions on behalf of the taxpayer to qualify as a place of management under Article 5(2) of the tax treaty; and
- Therefore, the taxpayer does not have a Permanent Establishment (PE) within the meaning of Article 5 of the tax treaty.

eBay International AG v. ADIT [2012] 25 taxmann.com 500 (Mumbai ITAT)

Gift of shares in an Indian company by a foreign company could be regarded as genuine

British India Steam Navigation Co. (UK Co) gifted the shares of Hill Park Ltd (HPL), a company incorporated in India, to the taxpayer during the year 2007. Both the taxpayer and UK Co. were a 100 percent-owned subsidiary of the same parent company based in the UK.

The issue for consideration before the Mumbai Tribunal, inter alia, was whether such transaction can be termed as a ‘gift’ within the meaning of Section 47(iii) of the Act.

In connection with the above, based on the facts and arguments of the case, the Tribunal, *inter-alia*, observed and held as follows, *inter-alia*:

- As the term ‘gift’ is not defined under the Act, reference could be made to the definition of ‘gift’ under the Transfer of Property Act, 1882 (TPA);
- Under the provisions of the TPA, there is no requirement that a ‘gift’ can be made only between natural persons out of natural love and affection. Therefore, a company can also gift shares, provided its Articles of Association permit the making of such a gift; and
- In the instant case, the UK Co was authorized to make such gift as per the

laws of the UK and the gift would be a capital receipt in the hands of the taxpayer.

DP World Pvt Ltd v. DCIT [2012] ITA No. 3627/Mum/2012 (Mum)

Judicial conflict as to whether Tribunal has power to extend stay beyond 365 days was resolved in the favour of taxpayer

The taxpayer was granted a stay of demand on the first occasion by an Order dated 4 March 2011 for six months which was further extended to another six months vide Order dated 16 September 2011 and then another six months vide Order dated 12 March 2012. The taxpayer approached the tribunal for grant of a further stay. The tax department, relying on the decision of the Karnataka High Court in the case of CIT v. Ecom Gill Coffee Trading Pvt. Ltd. (ITA No. 160 of 2012), contended that the Tribunal had no power to extend a stay beyond 365 days, even if the delay was not attributable to the taxpayer. The taxpayer placed reliance on the decision of Bombay High Court. in the case of CIT v. Ronuk Industries [2011] 333 ITR 99 (Bom), and on the decision of Special Bench, in the case of Tata Communications Ltd v. ACIT [2011] 138 TTJ 257 (Mum), wherein it was held that the Tribunal had jurisdiction to extend a stay beyond 365 days. The Delhi Tribunal had to consider whether it was the view of the Bombay High Court and the Special Bench had to be followed or that of the Karnataka High Court.

The Delhi Tribunal observed that in the case of Narang Overseas (P) Ltd v. ACIT [2008] 114 TTJ 433 (Mum) (SB), it was held by the Special Bench that if there is a cleavage of opinion amongst different High Courts and there is no decision of the jurisdictional High Court on the issue, then the view favourable to the taxpayer has to be followed. As the view of the Bombay High Court in Ronuk Industries and that of the Special Bench in Tata Communications Ltd is favourable to the taxpayer, that has to be followed and it has to be held that the taxpayer is entitled to a stay of the demand even after the expiry of the period of 365 days if the delay in disposal of the appeal is not exclusively attributable to it.

Qualcomm Incorporated v. ACIT (Stay Petition no. 177 to 183/Del/2012)

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

During the year under consideration the taxpayer had received dividend income which was exempt from tax. However, the taxpayer did not make any disallowance of expenditure relating to the said exempt income. In the books of account the taxpayer had shown the shares as stock-in-trade and was of the view that such stock-in-trade could not be taken into account while computing the disallowance under Rule 8D of the Income-tax Rules, 1962 (the Rules). The Assessing Officer (AO) computed the disallowance under Section14A of the Act as per Rule 8D of the Rules and disallowed the expenditure holding that the provisions of Section 14A of the Act were applicable even in relation to the dividend received from the trading shares. The Commissioner of Income-tax (Appeal) [CIT(A)] excluded the stock-in-trade from the purview of computation of disallowance

of expenditure under Rule 8D of the Rules and computed the disallowance.

The Mumbai Tribunal relying on the decision of Karnataka High Court in the case of CCI Ltd. v. JCIT (2012) 250 CTR 291 (Kar) has held that since the taxpayer had not retained the shares with the intention of earning dividend income, the disallowance of interest in relation to the dividend received from trading shares cannot be made. It was further held that, there being a direct decision of the Karnataka High Court on this issue, the same has to be followed, in preference to the decision of the Mumbai Special Bench Tribunal in the case of ITO v. Daga Capital Management P. Ltd. [2009] 117 ITD 169 (Mum) (SB).

DCIT v. India Advantage Securities Ltd (ITA No 6711/Mum/2011 dated 14 September 2012)

Declaration of dividend by wholly owned subsidiary, just prior to sale of its shares, not a 'colourable device' to avoid capital gains tax

The taxpayer sold the shares of its wholly owned subsidiary, Nedloyd India P Ltd (NIPL) to Maersk India P Ltd. The sale was part of an overall reorganization of the business. The taxpayer offered long term capital gains on sale of shares at INR 25.9 million. Just before the sale of shares, NIPL had declared a dividend of around Rs. 150 million. The AO held that the distribution of the dividend was a colourable device to deny the revenue its legitimate share by way of tax. Hence, the AO ignored the distribution of dividends while computing capital gains tax. The AO held that it was a case of tax evasion and accordingly recomputed the sales consideration based on a Net Asset Value (NAV) of INR 184.25 per share as against the INR 48.56 per share declared by the taxpayer.

The Kolkata Tribunal observed that the taxpayer had sufficient reserves and surplus as well as sufficient cash balance for declaration of dividends. The dividend was declared in accordance with the law. The Tribunal, relying on the ruling of the Supreme Court in the case of UOI & Anr. v. Azadi Bachao Andolan (2003) 263 ITR 706 (SC), held that the decision to distribute dividends cannot be termed as a 'dubious' method to evade taxes. The Tribunal also observed that NIPL had paid the dividend distribution tax and it was duly accepted in its assessment. Further relying on Gujarat High Court ruling in the case of Banyan & Berry v. CIT (1996) 222 ITR 831 (Guj) (HC), it was held that every tax advantageous action or inaction cannot be treated as a colourable device unless such an action or inaction is not bonafide, it conceals the true nature of the transaction or is an exercise without any commercial justification. Thus it was held that the distribution of dividends could not be characterised as a colourable device or as a sham transaction. Therefore, the dividend could not be re-characterised as a sales consideration in the hands of the taxpayer.

ADIT v. Maersk Line UK Ltd. (TS-723-ITAT-Kol)

Depreciation on machinery is allowed even where loan for

purchase of machinery waived by parent company subsequently

The taxpayer, a manufacturer and trader of polymer-based industrial paints and sealant products, imported certain machineries. It sought assistance from a group entity, CEL UK, which funded the first installment of advance payments in 1996. Since the taxpayer could not obtain RBI approval the balance payment was also made to the suppliers by CEL UK. Accordingly, the funds for supply of machinery now became payable to CEL UK. In the meantime, Akzo Nobel group acquired Courtaulds group worldwide including the taxpayer. Consequently, the amount due by the taxpayer to CEL UK was transferred to an-other company i.e. Akzo International BV, Netherlands. As a part of the business restructuring, because of the absence of RBI approval for making remittances of monies and taking note of the business exigency, Akzo International BV waived the amount due from the taxpayer. The assessment proceedings for AY 2001-02 were reopened and the waiver of the loan came to the knowledge of the AO in the course of assessment proceedings for AY 2004-05. From AY 1997-98, the taxpayer had worked out depreciation on the imported machinery by considering the actual cost at that point of time, including the monies payable to the supplier of machineries. According to the AO, on the waiver of loan by the parent company, the Written Down Value (WDV) of the plant& machinery had to be reworked by reducing the waiver amount from the opening WDV. The CIT(A) granted part relief to the taxpayer and the taxpayer was in appeal.

The Bangalore Tribunal held that the depreciation as claimed by the taxpayer was allowable on whole amount including on the waived off amount. The Tribunal observed that the merger of various assets into the block asset can be altered only when the eventuality contained in Section 43(6)(c) of the Act takes place, viz., when a particular asset is sold, discarded or destroyed in the previous year (other than the previous year in which first it is brought into use) which is not the case here. It was further held that Explanation 10 to Section 43(1) of the Act was also not applicable to the present case as it lays down that where a portion of the cost has been met in the form of a subsidy or grant or reimbursement (by whatever name called), such a portion shall not be included in the actual cost, however, in the instant case there was no such subsidy or grant or reimbursement. Further it was held that Section 43(1) of the Act is applicable only in the year of purchase of machinery and in the present case the purchase of the machinery in question was not in AY 2001-02. The Tribunal further acknowledges the lacuna in the law in this regard.

Akzo Nobel Coatings India P. Ltd v. DCIT (TS-783-ITAT-2012(Bang)

Real Income

The taxpayer owned two plots of land. During Financial Year (FY) 2006-07, the taxpayer sold one plot to a developer for a cash consideration plus construction, free of cost, on the second plot. During FY 2007-08, before the developer can commence construction, the taxpayer sold both the plots to a third party with the consent of the developer. The taxpayer offered capital

gain, based on cash consideration, for the first plot in FY 2006-07 and additional consideration for the second plot in FY 2007-08. The AO added the estimated cost of construction as consideration for the first plot to the income in FY 2006-07. The Tribunal deleted the addition on the grounds that, as per the doctrine of real income, there cannot be accrual of income that has never been received in a real sense.

The taxpayer was owned by two groups of shareholders. In view of disputes between two groups the operations of the taxpayer were getting impacted. Therefore, for smooth functioning of the taxpayer, the taxpayer purchased its own shares and cancelled the same and debited the premium paid to the profit and loss account and claimed the same as revenue expenditure. The Tribunal held that the expenditure in question incurred by the taxpayer on payment of premium for purchase of its own shares from warring group of shareholders is revenue in nature and the same being wholly and exclusively incurred for the purpose of its business, is allowable as a deduction when computing its income under the head 'Profits and gains of business or profession'.

Chemosyn Ltd. v. ACIT [2012] 25 taxmann.com 325 (Mum)

Conversion of Partnership under part IX of the Companies Act

The taxpayer, a partnership firm, revalued its assets during FY 2007 and was converted to a company under part IX of the Companies Act, 1956. The Tribunal held that conversion of a partnership firm into a company under Part IX of the Companies Act does not involve Transfer and that the provisions of Section 45 or 50 of the Act are not applicable to such a conversion.

ITO v. Alta Inter-Chem Industries (ITA No.223/Ahd/2012)

Cost plus remuneration model is more appropriate in a case where the taxpayer is merely a low risk bearing sourcing-support service provider. No additional allocation for location savings is required. Profit level Indicator (PLI) adopted should not yield absurd results

The taxpayer was engaged in the business of the sourcing of apparel merchandise from India for GAP Group. The taxpayer used the Transactional Net Margin Method (TNMM) to substantiate that its cost plus 15 percent remuneration was the Arms Length Price (ALP). The Transfer Pricing Officer (TPO), based on a Functions, Assets and Risk (FAR) analysis, rejected the taxpayer's approach and held that commission at the rate of 5 percent on the Free on Board (FOB) value of goods sourced by the Associated Enterprise (AE) through Indian vendors was the most appropriate ALP. The Dispute Resolution Panel (DRP) upheld the TPO's order.

The Tribunal ruled that the tax department had not been able to substantiate that the taxpayer had borne any business risks or developed any valuable supply chain or human asset intangibles. Location savings arise to the industry as a whole and there was nothing to prove that the taxpayer was the sole beneficiary. Thus, no separate/

additional allocation was called for on account of location savings.

The Tribunal further held that the PLI of the percentage of FOB value of goods procured by AE resulted in distorted results. If a particular PLI results in abnormal results then another method and PLI should be chosen, so as to provide rational results. The Tribunal concluded that for non risk bearing procurement facilitating functions, the appropriate PLI will be net profit/total cost (TC). The Tribunal further held that the taxpayer's case was different from the Li & Fung case (Li & Fung India (P) Ltd. v. DCIT [2012] 12 ITR 748 (Del)) and that the taxpayer cannot be held to be entitled to remuneration based on Li & Fung (i.e. on FOB value of goods procured). The Tribunal accepted the taxpayer's suggestion that even if the Li & Fung ruling was applied, the OP/TC worked out to 32 percent and, thus, the Tribunal held that the taxpayer's TP adjustments be made by adopting a 32 percent cost plus mark up for the taxpayer for AY 2006-07 and 2007-08.

GAP International Sourcing (India) Private Limited [ITA Nos. 5147/Del2011 & 228/Del/2012 AYs 2006-07 & 2007-08]

Artworks (paintings, etc) may not always be personal effects and hence subject to tax on sale, if not held for personal consumption

Recently, the Mumbai Tribunal held that paintings purchased in large numbers by a taxpayer and stored in a packed condition could not be treated as personal effects and hence subject to tax on sale. Please note that paintings and works of art are specifically excluded from the definition of personal effects with effect from the tax year 2007-08.

This decision reiterates the factors that would be relevant in identifying an asset as a 'personal effect'.

Sanjay Kumar vs. DCIT [2012] 16 ITR 262 (Mum)

Notifications/Circulars/ Press releases

CBDT prescribes details to be included in the Tax Residency Certificate to be obtained by the non-resident

The Central Board of Direct Taxes (CBDT) has issued a Notification prescribing the details which should be included in the Tax Residency Certificate (TRC) to be obtained by the non-resident to claim tax treaty benefit under the provisions of the Act. The particulars which the TRC should contain, inter alia, include taxpayer's tax identification number in the foreign country and residential status for tax purposes.

Notification No. S.O. 2188(E), dated 17 September 2012

CBDT prescribes conditions to avail lower withholding tax at the rate five percent under section 194LC of the Act on interest paid on borrowings made in foreign currency

The CBDT has issued a Circular granting a blanket approval to all borrowings by way of loan agreement and long term infrastructure bonds that satisfy certain prescribed conditions. The prescribed conditions, inter alia, include compliance with External Commercial Borrowing (ECB) regulations/Reserve Bank of India (RBI) guidelines.

Circular No. 07/2012, dated 21 September 2012 [(F.No. 142/17/2012-SO(TPL)]

Expert Committee issues draft report on retrospective amendments relating to indirect transfer

The Shome Committee (Expert Committee) constituted by the Prime Minister of India has issued its draft report on 9 October 2012. The key recommendations, inter alia, made by the committee are as follows:

- Amendments relating to taxation of indirect transfer of assets made by the Finance Act, 2012, should be applied prospectively;
- The word 'substantially', used in Explanation 5 to Section 9(1)(i) of the Act, should be defined as a threshold of 50 per cent of the total value derived from the assets of the company or entity;
- The phrase 'directly or indirectly', used in Explanation 5 to Section 9(1)(i) of the Act, may be clarified as representing a 'look through' approach. This implies that, for determination of value of a share of a foreign company, all intermediaries between the foreign company and the assets in India may be ignored; and
- Interest and penalty should not be charged/ levied under the provisions of the Act in cases where a tax demand is raised on account of a retrospective amendment relating to indirect transfer of assets.

Source: www.itatonline.org

Government of India allows refund of Provident Fund accumulations for expatriates from Social Security Agreement countries

In October 2008, GOI made fundamental changes in the Employees' Provident Funds Scheme, 1952 (EPFS), and Employees' Pension Scheme, 1995 (EPS), by bringing International Workers (IWs) under the purview of the Indian social security regime.

In September 2010, the GOI issued a notification further amending the EPFS vis-à-vis IWs. The amendments broadly specified that IWs can apply for withdrawals only on retirement from service in the establishment at any time after the attainment of 58 years of age (except under specified conditions).

Recently, the GOI has issued a notification changing the EPFS and EPS vis-à-vis IWs.

The new change in the refund condition will ease the hardship for expatriates who are covered under SSAs that India has signed with other countries and that are in force. Such expatriates can withdraw their PF accumulations immediately on cessation of employment in establishments covered

under the EPF Act in India and will not have to wait till they are 58 years of age to get access to their PF accumulations.

Furthermore, the PF dues can be paid to the bank account of IWs directly or through the employer. This should help address the problems faced by expats who have closed their bank accounts in India.

The GOI has also amended the EPS to clarify that the services rendered by an IW covered under an SSA in a social security programme of another country will be added to his service in India in an establishment covered under the EPF Act, for determining eligibility for pension under EPS. However, in determining the amount of the pension, only the services rendered in an establishment covered under the EPF Act will be considered.

II. SERVICE TAX

High Court Decisions

Service tax liability shall not be passed on to the service recipient, if the contract so provides

The Petitioner-trust leased out the premises owned by it to Respondent by a lease deed dated September 25th, 2007. The lease was terminated on September 30th 2011 and the premises were handed over to the Petitioner. By virtue of the Finance Act, 2007, a retrospective amendment was introduced levying service tax on the renting of immovable property. Consequent to the said amendment, the Petitioner started charging service tax in its rent bills. The Respondent refused to pay the service tax component on the ground that under the lease deed, the service tax liability was that of the Petitioner. The matter was referred to arbitrator and the Petitioner's claim against the Respondent for reimbursement of the service tax was dismissed.

High Court dismissed the petition filed by the petitioner. The Court relied on the clause of the lease deed providing that Petitioner shall be liable to pay property taxes and other outgoings in respect of the Premises, whatsoever payable and as levied from time to time promptly and timely, including any revisions thereto, directly to the authorities concerned and no claim for contribution towards such taxes, cesses, levies or increases shall be made by the Lessor-petitioner or be entertained by the Lessee. The Court held that this clause is wide enough to include the service tax "in respect of" the premises. Merely because levy was not statutorily operative at the time of entering into the lease deed did not mean that the said liability did not attach to the Petitioner.

In a given case, a service provider may decide to undertake the burden of service tax itself without passing it on to the service recipient. The intention of the parties in that regard can be determined only by examining the relevant clause in the agreement they execute. Even Section 64A of the Sale of Goods Act, 1969 is useful in understanding the importance of the contract governing the parties. It opens with the words "unless a different intention appears to the terms of the contract". Therefore it is the contract and not the nature of the levy, which will determine which party, the service provider or recipient, is liable to bear the burden of service tax.

Basis the above, the Court held that clause of the lease reflects the intention of the parties that it is the Petitioner who would bear the incidence of all taxes.

Raghubir Saran Charitable Trust v Puma Sports India Pvt. Ltd., 2012 (193) ECR 0030 (Delhi)

Tribunal Decisions

Service tax notification pertaining to SEZ related exemption should be interpreted in a broader manner in light of the policy objectives as enshrined in the SEZ legislation

The taxpayer (Special Economic Zone Developer and Special Economic Zone Units) filed various refund claims towards the Service Tax paid on services consumed within the SEZ and services which were used in the authorized operations of the SEZ units. Some of the refund claims were rejected on the ground that the services in question do not bear a direct nexus with the authorized operations undertaken by the taxpayer. Some other claims were rejected on the ground that they pertained to services which were wholly consumed in SEZ and for such services, as per Notification 15/2009-ST, only exemption is available and not the refund route.

On the first objection the Tribunal held that when the SEZ Approval Committee has given the nexus and justification for use of services in relation to authorized operations, it was totally unwarranted on the part of the adjudicating authority and the appellate authority to go into this question and come to their own findings in the matter. Thus refund claim in relation to input services cannot be disallowed on the ground that the various services does not bear a direct nexus with the authorized operations undertaken by the taxpayer.

On the second objection the Tribunal held that where the service tax liability was discharged in relation to services which were wholly consumed within SEZ, there was no necessity to discharge the service tax liability ab-initio. However, that does not mean that in a case where service tax liability has been discharged, the appellant is not eligible or not entitled for refund of the service tax paid under the provisions of Section 11B of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994. If the taxpayer was entitled to refund under Section 11B, then the same cannot be denied on the ground that the claim was made under Notification No. 09/2009-ST. In this regard, the overriding effect of Section 51 of the SEZ Act was emphasized upon to underline the necessity of interpreting exemption notifications pertaining to SEZs in a broader manner in line with the policy objective of SEZs.

TATA Consultancy Services Ltd. v CCE & ST, 2012-TIOL-1034-CESTAT-MUM

Installation of meters as also their technical testing and analysis are services relating to the transmission and distribution of electricity and eligible for the exemption under Notification No.45/2010-ST dated July 20, 2010

The taxpayer was engaged in the purchase of electricity from Uttar Pradesh Power Corporation Ltd. and transmitting it to various consumers within its jurisdiction and in the course of its business the taxpayer also carried out activities of installation as also technical testing and analysis vis-a-vis meters at premises of electricity consumers. Taxpayer claimed exemption from service tax under Notification No. 45/2010-ST dated July 20, 2010. The exemption was denied

by department to taxpayer on the ground that exemption was available only in respect of transmission and distribution of electricity, not in respect of installation, testing etc. of meters and sought to levy service tax under 'Erection, Commissioning and Installation Services' and 'Technical Testing and Analysis Services'.

The Tribunal held that the notification exempts the services relating to transmission and distribution of electricity provided by the service provider to the service receiver from the incidence of levy of service tax. The taxpayer is engaged in transmission and distribution of electricity after purchasing the same from U.P. Power Corporation Limited. Since the assessee is selling electricity to the consumer, for billing the consumer for electricity consumed it is essential to install the electricity meter having capacity to withstand the load provided to the consumer.

Thus, the activity or service of installation of meters as also technical testing and analysis can easily be termed as service relating to the transmission and distribution of electricity provided by the service provider to the service receiver. Taxpayer is thus entitled to exemption under benefit provided by Notification No. 45/2010-ST.

Purvanchal Vidyut Vitran Nigam Ltd v CCE, 2012-TIOL-1169-CESTAT-DEL

Notification & Circulars

Revision in due date of filing of service tax return

Service Tax Rules, 1994 have been amended to provide that half-yearly return in Form ST-3 to be submitted by 25th October 2012 will cover period April 2012 to June 2012 only. The return for the period July 2012 to September 2012 will have to be filed in a separate form which will be notified separately.

Notification No 47/2012, dated September 28, 2012 & Instruction dated September 28, 2012

III. VAT/ CST

High Court Decisions

Uttar Pradesh ("UP") State Government cannot levy VAT on inter-state sale of natural gas from the State of Andhra Pradesh

Taxpayer [Reliance Industries Limited ("RIL")] has entered into a production sharing agreement (PSA) with the Government of India for exploration and sharing of natural gas from site located in Andhra Pradesh. In pursuance of PSA, RIL has entered into Gas Sales and Purchase Agreement (GSPA) with its customers. Customers take delivery of natural gas in Gadimoga, Andhra Pradesh ("AP") on furnishing of Form C to RIL issued by assessing authority of the State of UP. The customers have entered into separate agreements with Reliance Gas Transportation Infrastructure Ltd. ("RGTIL") and Gas Authority of India Ltd. ("GAIL") for transportation of gas from Gadimoga, Andhra Pradesh to Hajira in Gujarat and from Hajira (Gujarat) to Auraiya, UP, from where gas is

taken to their respective plants or factories for manufacture of fertilizer, chemicals etc. RIL has paid Central Sales Tax on natural gas extracted in Andhra Pradesh. Show cause notice was issued to RIL by State of UP demanding Value Added Tax (VAT) on sale of natural gas as intra-state sales and demand was confirmed. The taxpayer has filed writ petition challenging levy of VAT.

The Revenue contended that gas pipelines carries gas for different customers in a comingled form and hence the gas in transit remains unascertained goods which becomes ascertained goods only at Auraiya, UP - thus sale shall be deemed to have taken place at Auraiya, UP and not in AP, and it cannot be an instance of inter-state sale. The taxpayer contended that the title of natural gas gets transferred to the buyers at the delivery point i.e. Gadimoga, AP and thereafter natural gas is transported to Gujarat and then to Uttar Pradesh thereby rendering it to be a case of inter-state sale under Section 3 of CST Act.

The High Court concluded in favor of the taxpayer and inter alia held that where situs of sale has not been fixed or covered by any legal fiction created by the appropriate legislature, the location of sale would be the place where the property in goods passes. It is the passing of property within the State, which has to be latched upon for the purpose of determining whether a sale is inside or outside the State. The High Court went on to hold that the natural gas is handed over to a bailee or transporter in terms of the agreement at Gadimoga, AP and after travelling a long distance it reaches the State of UP - movement of gas from Gadimoga itself is indicative of the fact that the sale in question is an inter-state sale.

Reliance Industries Limited v. State of UP [Allahabad High Court (Lucknow Bench) Order dated September 7, 2012]

Non-prescription sunglasses would qualify for concessional VAT rate under Maharashtra VAT laws available for “Medical Devices & Implants”

Maharashtra VAT allows for a concessional VAT rate for goods classifiable under the description “Medical Devices & Implants”. “Spectacles, Correctives, Protective or other” was specifically notified as falling under the aforesaid description in the relevant period. In a ‘Determination of Disputed Question’ (an advance ruling process provided under Maharashtra VAT) it was held by the Commissioner that it would be absurd to say that the sunglasses are medical devices and accordingly held that the non prescription sunglasses would not be eligible for the concessional VAT rate.

Before the High Court the Revenue contended that under the Central Excise Tariff, Chapter Heading 9004 (referred to in the relevant notification under Maharashtra VAT) deals with spectacles as also goggles and while incorporating the provisions of the Central Excise Tariff in the notification, the State government has deliberately not included goggles within the notification. Therefore, sunglasses / goggles would not be eligible for the concessional rate of VAT.

The Bombay High Court rejected this contention and held that corrective spectacles as also protective spectacles are liable to be considered as ‘Medical Device’ as per the VAT notification. It is not the requirement of the notification that the protective spec-

tacles such as protective sunglasses can be considered as medical device only if it is sold under a prescription. The High Court went on to hold that in common parlance protective sunglasses may not be considered as a medical device, but if the legislature for a particular purpose has notified protective sunglasses to be Medical Device, it would not be open to the Commissioner to hold to the contrary. Similarly, the fact that under the Central Excise Tariff, spectacles and goggles are separately classified under different sub-headings would not be of much relevance once it is accepted that the protective sunglasses are covered under the notification.

The Addl. CST v Chheda Marketing, (2012) 54 VST 45 (Bom)

Contract with ONGC for letting out manned cranes and placing them at ONGC's disposal for carrying out operations conforming to specifications of ONGC (along with the necessary accessories with valid permits/licences, insurance, etc., for performing the duties as advised by ONGC), qualifies as transfer of right to use goods and is subject to VAT

The taxpayer entered into contract with ONGC for letting out manned cranes, for carrying out the operations conforming to specifications of ONGC along with the necessary accessories with valid permits/licences, insurance, etc., for performing the duties as advised by ONGC, at the appointed time and place at sites in Assam. Cranes placed at the disposal of ONGC should be available throughout the contract duration with the required efficiency/fitness to handle loads up to the designed capacity. Per day hire charges for the cranes were inclusive of all expenses necessary for continuance of service of the cranes. Repair and maintenance of the cranes and establishment expenses were of the taxpayer. Issue which arose for consideration was whether the transaction involves the transfer of right to use the goods for consideration and taxable under the Assam Value Added Tax Act, 2003.

The High Court held that for determining whether the transaction involves transfer of right to use the goods, there must be goods available for delivery; there should be consensus as to the identity of goods; the transferee should have legal right to use the goods, to the exclusion of the transferor.

The contract was for hiring of the cranes for carrying out the operations as per the specifications of ONGC. The work was not to be executed by the contractor but by the ONGC itself and the contractor-taxpayer was to provide cranes on hire in connection with the said work. The cranes were at the disposal of the ONGC and per day hire charges were paid for all days, except maintenance days. Services of staff and maintenance were incidental to the hiring of the cranes. Liability to the third party was on account of the fact that in spite of hiring of the cranes by the ONGC, the employees operating the cranes were provided by the taxpayer. It was ONGC alone which was entitled to exclusively use the cranes.

On the basis of the above it was held that the transaction involved transfer of right to use goods for consideration and thus taxable under the Assam Value Added Tax Act, 2003.

Brahmaputra Valley Construction and Suppliers v ONGC, (2012) 53 VST 401 (Gauwahati)

For classification of multifunctional printer/copiers/scanners, dominant or main purpose to be seen

The issue was whether multi functional printers/machines and their spares and consumables, during the period 1st April, 2005 to 31st March, 2007, were taxable under Entry No. 41A of the third schedule of the Delhi Value Added Tax Act, 2004 or are taxable under the residuary head @ 12.5%.

The High Court held that the doctrine of dominant purpose of the multi-functional machine will determine whether it is an input or output unit of an automatic data processing machine. In case the principal or dominant purpose is to act as input or output unit, then it would be covered by Entry 41A at Sr. No. 3. However, in case multi-functional machine is a duplicator or a photocopying machine, which incidentally can be used as a printer or a scanner, etc., it would not qualify and cannot be treated and regarded as input or output unit of automatic data processing machine. It would not qualify under Entry No. 41A and will be covered by the residuary tax rate. Accordingly, for the purposes of classification, the principal or dominant purpose has to be determined in each case with reference to machines in question.

In this regard, the High Court examined the relevant portion of Entry No. 41A and compared that with the entries under the Central Excise Tariff Act, 1985 as required under the interpretative rules provided under the Delhi VAT laws – the High Court also recorded its interpretation of such interpretative rules under Delhi VAT laws. The High Court also relied upon the Supreme Court decision in Xerox India Ltd. vs. Commissioner of Customs, Mumbai 2010 (260) ELT 161(SC) where the principal purpose or dominant purpose test was endorsed in the context of multi-functional machines.

Ricoh India Limited v Commissioner, 2012 (193) ECR 0049 (Delhi)

IV. CUSTOMS

Tribunal Decisions

Refund of SAD/ACD permissible on goods exempted from payment of VAT/Sales Tax

Commissioner (Appeals) had allowed the benefit of Notification 102/2007-Cus (provides for refund of ACD/SAD component of customs duty) to the taxpayer in a scenario where the goods in question were exempted from VAT under Delhi VAT laws. The Revenue filed an appeal and sought to stay the said order of the Commissioner (Appeals) on the ground that the above notification provides for refund on the condition of payment of VAT/CST and given the exemption from VAT, this condition would not be met.

The Tribunal, in its stay order, noted that SAD/ACD component of customs duty (of 4%) is levied for counter-balancing for Sales Tax/VAT, once the importer fulfils the obligation of paying both the SAD/ACD and the Sales Tax/VAT, the taxpayer is entitled to

refund of the SAD/ACD. In case the subject goods are exempted from VAT/CST, the same should have also been exempted from SAD/ACD and the taxpayer would be entitled to claim refund of SAD. Basis the above, the Tribunal prima facie held that SAD/ACD refund can be claimed on goods that are exempt from payment of VAT/Sales Tax.

Commissioner of Customs v Katyal Metal Agencies, 2012-TIOL-1053-CESTAT-KOL

Notification & Circulars

Mandate regarding e-payment of customs duty

With effect from 17.9.2012, electronic payment of customs duty has been made mandatory for all assesses registered under Accredited Clients Programme or the assesses paying customs duty more than Rs.1 Lakh or more per Bill of Entry.

Notification No.83/2012, dated September 17, 2012 & Circular No. 24/2012, dated September 5, 2012

V. CENTRAL EXCISE

Supreme Court Decisions

Assembled TV sets disassembled and cleared to satellite units by taxpayer-manufacturer, classifiable as television receivers under Tariff Entry 8528 only and not as the parts of TV

The taxpayer was a manufacturer of various components of television sets. The components were manufactured at its factory at Delhi. Thereafter, the said components were assembled in the same factory for the purpose of testing of each component and for checking the working of each television set. Thereafter the television sets so assembled were disassembled and then transported as parts to various satellite units of the taxpayer company at different places. In these satellite units, the separate components were re-assembled and some further processes were carried out in order to make those sets marketable. The issue before the Supreme Court was whether such components, which are manufactured at and transported from the factory of the taxpayer at Delhi are liable to be assessed as 'Television Receivers' or as 'Parts of Television Receivers'.

The Revenue contended that the taxpayer had chosen to disassemble the television sets as parts before transporting them in order to avail the lower tax rate payable on such parts. In this regard they relied upon Rule 2(a) of the Rules for the Interpretation of Excise Tariff.

The Supreme Court concluded against the taxpayer and held that once the complete television sets were assembled, the manufacturing process was over. It is not relevant as to what happened subsequently or it was not relevant that the television sets (in assembled or disassembled form) were sent to satellite units. On this basis, the Court upheld the classification of the manufactured goods as complete television sets adopted by the Revenue. The Court laid a lot of emphasis on the factual matrix in the case where at the time of transportation of

parts, they were identified as distinct units and that the goods assembled at the satellite units were identified as the parts dispatched from the factory.

The Supreme Court clarified the above conclusion by stating that if the taxpayer had been in the practice of simply manufacturing and transporting parts of Television Receivers in bulk, while leaving the assembling, matching and numbering functions to be done at the satellite units, then the conclusion would have been different.

Salora International Ltd. v CCE, 2012 (284) ELT 3 (SC)

High Court Decisions

Wrongly taken credit reversed without utilization, taxpayer not liable to pay interest

The taxpayer reversed the entire amount of CENVAT credit attributable to exempted products without utilizing the said credit.

The issue was whether taxpayer was liable to pay interest under Section 11AB of the Central Excise Act.

The High Court of Karnataka in CCE & ST v. Bill Forge Pvt. Ltd, had earlier held that interest is compensatory in character and is imposed on taxpayer who has withheld payment of tax as and when it was due and payable. Levy of interest is on the actual amount withheld and the extent of delay in paying the tax from the due date.

Basis the above, the Karnataka High Court in this case held that the interest cannot be claimed from the date of wrong availment of Cenvat credit and interest would only be payable from the date Cenvat credit is utilized wrongly.

CCE v Pearl Insulation Ltd, 2012 (27) STR 337 (Kar.)

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