August 2012

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

Foreword

I am pleased to enclose the August issue of FICCI's Tax Updates. This contains recent case laws, circulars, and notifications pertaining to direct and indirect taxes. Of particular note are the two cases cited below.

In the case of Dynamic India Fund, the Authority for Advance Ruling (AAR) held that capital gains arising from the proposed sale of investment in shares in India held by a Mauritius entity, which holds a valid Tax Residency Certificate (TRC), will not be taxable under Article 13(4) of the India-Mauritius tax treaty. The AAR also held that the tax department may consider the provisions of the General Anti-avoidance Rules (GAAR) after they come into force (i.e. from 1 April 2013).

Regarding indirect taxes, in the case of Raja Mechanical Co Pvt Ltd, the Supreme Court held that where appeal of the taxpayer is dismissed on the ground of limitation, without considering the case on merits the order in original cannot be said to be merged with the order of Commissioner (Appeal). The Supreme Court further held that the doctrine of merger would apply only in cases where the order is dismissed by the Appellate Authority on the merits of the case.

I am pleased to inform you that FICCI has begun to prepare its Pre-Budget Memorandum for the year 2013-2014. We have requested constituents to furnish their suggestions and comments for inclusion in the memorandum; in addition to asking for suggestions for changes in rates of duties and taxes, we have also invited suggestions for procedural reforms and changes in the administrative structure. We look forward to your valuable inputs.

Rajiv Kumar
Secretary General

Recent Case laws

I. DIRECT TAX

High Court Decisions

Claim of deduction made by the taxpayer in the assessment and appellate proceedings but not in the income-tax return, can be entertained and allowed by the appellate authorities

During the Financial Year (FY) 2003-04 the taxpayer paid certain fees to the Securities and Exchange Board of India (SEBI) worth INR 4 million for a provision which was made in FY 2001-2002. However, inadvertently in the return of income the taxpayer claimed deduction of only INR 2 million. During the assessment proceedings, the taxpayer made a claim of INR 4 million under Section 43B of the Income-tax Act, 1961 (the Act). The Assessing Officer (AO) rejected the claim on the ground that he had no authority to allow any relief or deduction which had not been claimed in the return of income. However, the Commissioner of Income-tax (Appeal) [CIT(A)] allowed a deduction of INR 4 million as per the provisions of Section 43B of the Act, which clearly indicate that only actual payments made are to be allowed as a deduction. The Tribunal upheld the order of the CIT(A).

The Bombay High Court relying on various judicial precedents held that the taxpayer is entitled to raise additional grounds not merely in terms of legal submissions, but also additional claims not made in the return filed by it. The appellate authorities have the discretion whether or not to permit such additional claims to be raised. They may choose not to exercise their jurisdiction in a given case. The appellate authorities have jurisdiction to deal not merely with additional grounds, which became available on account of change of circumstances or law, but with additional grounds which were available when the return was filed. The tax department has not suggested or established that the omission was deliberate, mala-fide, etc. The conclusion that the error in not claiming the deduction in the return of income was inadvertent cannot be faulted. Further, in relation to the tax department's reliance on the Supreme Court's decision in the case of Goetze (India) Limited v. CIT [2006] 157 Taxman 1 (SC), it was held that the Supreme Court did not hold anything contrary to what was held in the previous judgments and hence, even if a claim is not made before the AO, it can be made before the appellate authorities. The jurisdiction of the appellate authorities to entertain such a claim has not been negated by the Supreme Court in this judgment.

CIT v. Pruthvi Brokers & Shareholders (ITA No. 3908 of 2010)(Bom)(HC)

Tribunal not entitled to extend period of stay of demand beyond 365 days, even if the delay is not caused by the taxpayer

The taxpayer filed applications before the Tribunal for stay of recovery of the outstanding demand. The Tribunal granted the stay for a certain period, after the expiry of which the taxpayer requested further extension of the stay, which was also granted by the Tribunal. The aggregate duration of the stay contained in multiple stay orders exceeded 365 days. The tax department appealed against the orders of the Tribunal arguing that as per the provisions of Section 254 of the Act, stay cannot be extended beyond 365 days.

The Karnataka High Court held that the stay cannot remain in effect beyond a period of 365 days, which is the outer limit stipulated in the third proviso to Section 254(2A) of the Act. The specific insertion of the said proviso by the Finance Act 2008 made the same abundantly clear. The Tribunal being created by statute cannot assume powers and jurisdiction which are not conferred on it by the statutory provisions. Statutory provisions must be interpreted in consonance with intent of legislation and not to defeat the same. Interpretation of provisions of a particular enactment cannot be applied to the provisions of another enactment by just assuming it to be more or less similar. The High Court distinguished the judgment of the Supreme Court in the case of CCE v. Kumar Cotton Mills Pvt. Ltd. [2005 (180) ELT 434], relied upon by the taxpayer.

CIT v. Ecom Gill Coffee Trading Pvt. Ltd. (ITA No. 160 and 161 of 2012)(Kar)(HC)

Reopening under Section 147 of the Act in the absence of 'fresh tangible material' is invalid

The taxpayer filed his return of income for Assessment Year (AY) 2002-03 declaring income of INR 149.9 million. The taxpayer filed a revised return claiming 30 percent ad hoc expenditure and offered to tax net income of INR 81.1 million. During the course of assessment proceedings when the AO asked the taxpayer to substantiate the expenditure, the taxpayer withdrew the claim for the said expenditure. The assessment under Section 143(3) of the Act was completed. The AO then, within four years from the end of the AY, issued a notice under Section 148 of the Act to reopen the assessment on the ground that the claim for 30 percent ad hoc expenditure, which was withdrawn, had to be assessed as 'unexplained expenditure' under Section 69 of the Act. The CIT(A) and Tribunal struck down the reassessment order on the ground that the material on the basis of which the assessment was sought to be reopened was always available at the time of the original proceeding and there was no new material which was brought on record.

The Bombay High Court observed that the taxpayer had made a claim for 30 percent ad hoc expenditure which was withdrawn by the taxpayer when asked by the AO to substantiate. The reopening on the basis that the said ad hoc expenditure constituted 'unexplained expenditure' under Section 69 of the Act was based on the same material. Hence, the Bombay High

Court held that since there was no fresh tangible material before the AO to reach a reasonable belief that the income liable to tax has escaped assessment, the reassessment in this case was invalid. It is a settled position of law that reviews under the garb of reassessment are not permissible.

CIT v. Shri Amitabh Bachchan (ITA No. 4646 of 2010)(Bom)(HC)

Leave encashment liability not a statutory liability; Section 43B(f) disallowance on leave encashment unconstitutional

The taxpayer had claimed a deduction for premium on LIC's 'Group Leave Encashment Scheme' in the FY 2004-2005 i.e. AY 2005-2006. During course of assessment proceedings, the AO had allowed deduction for the said premium under Section 37 of the Act as expenditure exclusively incurred for the purpose of business. Subsequently, the Commissioner of Income-tax (CIT) invoked provisions of Section 263 of the Act and revised the assessment order on the ground that it was prejudicial to the interest of the revenue. The CIT applied provisions of Section 43B(f) of the Act and disallowed the premium on group leave encashment scheme since it was not actually paid during the year. Section 43B(f) states that a deduction for employee leave encashment is allowed only upon actual payment. The Tribunal allowed the deduction to the taxpayer against which the revenue was in appeal before the Kerala High Court.

The Kerala High Court followed the Calcutta High Court ruling in Exide Industries Ltd [2007] 292 ITR 470 (Cal) wherein it was held that clause (f) of Section 43B of the Act is unconstitutional. The Kerala High Court also concurred with the Calcutta High Court's conclusion that leave encashment liability is not a statutory liability. The Kerala High Court held that as the tax department had not challenged the correctness of the Calcutta High Court's decision before the Supreme Court the tax department could not challenge the correctness of Exide Industries Ltd in the case of another taxpayer. Further it was also held that as the liability for leave encashment was insured, the liability was solely that of the insurer. Thus even if provisions of Section 43B(f) of the Act stand, they would not be applicable to the taxpayer as the intention of clause (f) of Section 43B was to deny the deduction of liabilities not actually incurred or in other words to exclude the provisions being made as against future liabilities, from being granted a deduction which was not the case here. The premium paid towards the renewal and continued validity of the insurance policy necessarily became business expenditure, wholly and exclusively incurred for business and hence, was allowable as a deduction under Section 37 of the Act. Accordingly, the Kerala High Court ruled that the AO's order allowing deduction for premium was not erroneous and that the CIT did not have jurisdiction to revise the assessment order by applying Section 263 of the Act.

CIT v. Hindustan Latex Ltd. [TS-468-HC-2012(KER)]

The difference between market price and issue price of shares offered under the stock option plan is a deductible expenditure

The taxpayer is engaged in the business of computer training and software development. The taxpayer had claimed the difference between the market price and exercise price of the shares as allowable expenditure, in respect of Employees Stock Option Plan (ESOPs). As per the Guidelines issued by SEBI, such expenditure should be accounted for by the Company in its financial statements. The AO accepted taxpayer's claim and allowed the deduction of the said expenditure. The CIT initiated proceedings under Section 263 of the Act to revise the AO's Order, and held that the accounting treatment prescribed by SEBI nowhere suggests that it is revenue expenditure to be debited to the Profit and Loss Account. As per the CIT, it was only a notional and contingent expenditure and accordingly, held that the difference in the price at which shares were allotted and the market price of the shares did not warrant any allowance as expenditure. On appeal to the Tribunal, the Tribunal held that the shares were issued to the employees only for the interest of the business of the taxpayer. The allotment of shares was done by the taxpayer in compliance with the SEBI Guidelines. The Tribunal also stated that so far as the taxpayer is concerned, once the option was given and exercised by the employee, the liability in this behalf got ascertained. The Tribunal held that it was not a case of contingent liability depending on the various factors on which the taxpayer had no control. The expenditure in this behalf was an ascertained liability and in line with the SEBI Guidelines and thus allowed the taxpayer's claim.

The Madras High Court held that the Tribunal was right in stating that the taxpayer had to follow the SEBI Guidelines, vide which the taxpayer claimed the ascertained amount as liability for deduction. The High Court agreed with the submissions of the taxpayer and allowed the claim of deduction.

CIT v. PVP Ventures Limited (TC(A) No.1023 of 2005 (Mad))

Sale of shares by Promoters through offer for sale at the time of IPO which is not subjected to securities transaction tax is not exempt under Section 10(38) of the Act

The Delhi High Court held that the sale of shares by a Promoter, through offer for sale simultaneously with the Initial Public Offer (IPO), which is not subjected to securities transaction tax, is not exempt under Section 10(38) of the Act. Further it was held that the sale takes place prior to listing of shares and therefore, long term capital gain on such sale is not eligible for lower rate of tax of 10 percent applicable to long term capital gains on sale of listed shares, but will be liable to tax at the rate of 20 percent applicable to other long term capital gains.

Note: Securities transaction tax is made applicable to sale of unlisted shares through Offer for sale after 1 July 2012. In view of this, long term capital gains on such sale of shares made after 1 July 2012 will be exempt under Section 10(38) of the Act.

Shri Uday Punj v. CIT (ITA No. 183/2012)(Del)(HC)

Transfer of shares through a legitimate scheme of arrangement is not a 'Tax avoidance device'

The Bombay High Court while approving the scheme of arrangement in the case of Unichem Laboratories Limited (along with other petitioners) has held that a tax efficient transfer of shares under a scheme of arrangement under Sections 391 to 394 of the Companies Act, 1956, could not be held to be a tax avoidance device just because such transfer would have been liable to capital gains tax if transferred otherwise. It also reaffirmed that the Income-Tax Authority is not required to be heard while sanctioning the Scheme.

AVM Capital Services Pvt. Ltd. (Company Petition No. 670 of 2011, dated 12 July 2012) (Bom)

Tribunal Decisions

Loss making onshore activity does not indicate that the composite contact was artificially split to avoid payment of taxes

The taxpayer, a tax resident of China, entered into contracts with two Indian customers for offshore supply of equipment and onshore supplies and services, including installation and commissioning of thermal power units. A separate consideration was specified for each activity in the agreements.

The taxpayer, relying on Ishikawajma-Harima Heavy Industries Ltd v. DIT [2007] 288 ITR 408 (SC), claimed that the profit from offshore supply was not taxable in India. As regards the onshore activities, the taxpayer claimed a loss vis-à-vis its project office, which constituted its Permanent Establishment (PE) in India.

The AO contended that the original contract was for erection of power plants and was split into two parts in such a way that the activities in India would always result in loss. Further, on the basis that the PE in India was not compensated at arm's length for its services, the AO made a transfer pricing adjustment for services rendered by the PE in connection with offshore supplies.

Based on the facts of the case, Kolkata Tribunal observed and held as follows:

- The transactions have to be looked at as a whole, and not on a standalone basis, when the overall transaction is split in an unfair and unreasonable manner with a view to evade taxes;

- In each set of the contracts, there was a 'cross fall breach clause' which provided that a breach in one contract would automatically be classified as breach of the other contract. This clause gave an indication that the 'offshore supplies' contract and 'onshore supplies' contract had to be viewed as an integrated contract;

  However, this fact by itself did not indicate that the onshore services and supplies contract was understated so as to avoid tax in India. That would be the situation in which while offshore supplies showed unreasonable profits, the onshore supplies and services resulted in unreasonable losses;

- In the instant case, if both these contracts were put together, there was no profit earned by the taxpayer. Therefore, there could not be an occasion, even otherwise, to tax income from these contracts in India.

- Since the working of overall losses given by the taxpayer was not examined by the AO, the matter was remanded to him to examine the taxpayer's claim regarding overall loss on the project.

Dongfang Electric Corporation v. DDIT (ITA No. 833/Kol/2011) (Kol)

Taxability of income under residuary Articles in tax treaties

The taxpayer, an Indian company engaged in the business of trading and export of sea foods, made payments to a Singapore based company towards consultancy charges without deduction of tax at source on the basis that the services were rendered outside India and therefore not taxable as Fees for Technical Services (FTS) under Section 9(1)(vii) of the Act.

The AO held that, as the services were used in India, the amounts paid to the non-resident were taxable in India as FTS. On appeal, the CIT(A) held that, as the consultancy charges were not covered by the scope of FTS under Article 12 of the India-Singapore tax treaty and also as the non-resident did not have a PE in India, there was no obligation on the taxpayer to withhold tax on the payments made to the non-resident.

Before the Kolkata Tribunal, the tax department contended that, even though the consultancy charges were not taxable in India as business profits under Article 7 or as FTS under Article 12 of the India-Singapore tax treaty, these amounts were taxable in India as residuary income under Article 23 of the India-Singapore tax treaty.

The Kolkata Tribunal, on the issue of taxability of consultancy charges as residuary income under Article 23 of the India-Singapore tax treaty, held as follows:

- A tax treaty assigns taxing rights of various types of income to the source state upon fulfillment of conditions laid down in respective clauses of the tax treaty. Only when these conditions are satisfied, does the source state get the right to tax such income.

- When a tax treaty does not provide for the taxability of a particular kind of income under the tax treaty provision dealing with that particular kind of income, the taxability cannot be invoked under the residuary provisions of Article 23 of the tax treaty.

- Article 23 of the tax treaty begins with the words 'items of income not expressly covered' by the provisions of the other Articles, and therefore, does not apply to items of income which can be classified under other Articles of the tax treaty whether or not taxable under those Articles.

- Accordingly, the income from consultancy services which cannot be taxed under Article 12 or Article 7 of the tax treaty because the conditions for taxability specified therein are not satisfied, cannot be taxed under Article 23 of the tax treaty either.

- Therefore, in the instant case, the taxpayer is not liable to withhold tax on the payments made to the non-resident.

DCIT v. Andaman Sea Food Pvt Ltd (ITA No. 1412/Kol/2011) (Kol)

No disallowance under Section 14A of the Act with reference to investments having the potential of generating taxable income, following the decision of the Bombay High Court in the case of Delite Enterprise

The taxpayer is an investment and trading company which issued unsecured optionally convertible premium notes. During the year under consideration, the holders of premium notes got the said notes redeemed and accordingly, proportionate premium was paid by the taxpayer to the premium note holders. The premium so paid was claimed as a deduction being allowable business expenditure. Amount received by the taxpayer on the issue of premium notes was utilised for making investment in the purchase of shares of Reliance Utilities and Power Ltd. (RUPL). The income (dividend and long term capital gains) arising from the said investment was exempt under Section 10(23G) of the Act. Thus, the AO disallowed the deduction for premium paid under Section14A of the Act, which was upheld by the CIT(A).

The Mumbai Tribunal, on perusal of the copy of relevant Notification issued under Section 10(23G) of the Act, held that exemption under Section 10(23G) of the Act is subject to satisfaction of certain conditions. Keeping in view all these uncertainties and contingencies, the Tribunal held that the premium paid cannot be regarded as expenditure incurred exclusively in relation to earning of exempt income so as to invoke the provisions of Section 14A of the Act. The Tribunal observed that the said investment had the potential of generating taxable income in the form of short term capital gains etc., and it is immaterial whether such taxable income was earned in the year under consideration or not. The Tribunal has also accepted the taxpayer's contention that if no exempt income is earned during the year under consideration, the provisions of Section 14A of the Act could not be invoked. For this proposition, the Tribunal relied upon the decision of the Bombay High Court in the case of Delite Enterprise (ITA No. 110 of 2009). Further in response to the tax department's argument that the Bombay High Court had summarily dismissed the tax department's appeal in Delite's case by merely observing that no question arises, the Tribunal held that if the High Court considers the facts pertaining to the issue and gives approval to the decision of the lower forum, the decision of the lower forum gets merged with the order of the High Court and it becomes a binding precedent even though approval of the decision of the lower forum/court is summarily recorded.

Avshesh Mercantile P. Ltd and Ors v. DCIT (ITA No.5779/Mum/2006)(Mum)

No TDS is deductible when a subsidiary company reimburses part of the rent for the portion of premises used by it, to its holding company in the absence of the lessor-lessee relationship

The taxpayer had reimbursed an amount to its holding company towards its portion of rent, for the premises which was used by the holding company as well as by the taxpayer. Further such reimbursement was made without any deduction of tax. The AO

disallowed the said amount invoking the provisions of Section 40(a)(ia) of the Act stating that the tax should have been deducted by the taxpayer under Section 194-I of the Act. On appeal by the taxpayer, the CIT(A) deleted the addition made by the AO.

The Delhi Tribunal observed that the taxpayer is paying rent to the holding company as reimbursement since last many years. This position has been accepted by the tax department all through and it has been never disputed even when provisions for Tax Deducted at Source (TDS) were on statute since 1994. More so this position was also not disputed even after the amendment in Section 40(a)(ia) of the Act by the Taxation Law (Amendment) Act, 2006 with effect from 1 April 2006 on this issue. There is no material change in the facts and law during the year under consideration. Necessary tax was deducted on the actual payments made by the lessee (holding company) to the lessor. The holding company has also not debited the whole of rent to its books of account. It has only debited the rent which pertains to the part of the premises occupied by it. Therefore, the Tribunal held that since there was no lessor and lessee relationship between the holding company and the taxpayer, the provisions of Section 194-I of the Act are not attracted and hence no disallowance can be made under Section 40(a) (ia) of the Act.

ACIT v. Result Services (P.) Ltd. [2012] 23 taxmann.com 93 (Del)

Transfer of shares at cost by Indian company to an overseas parent company as part of a group restructuring exercise cannot be treated as a sham transaction or colourable device

The Mumbai Tribunal, in the case of Euro RSCG Advertising Pvt. Ltd. held that the transfer of shares at cost by an Indian company to an overseas parent company as a part of a group restructuring exercise cannot be treated as a sham transaction or colourable device. Further, it was held that the cost of acquisition has to be taken as per the book value and not the fair market value as adopted by the AO, more so because the same has been accepted by the tax department in scrutiny proceedings in the earlier years. The share purchase agreement cannot be brushed aside, unless there is something on record to prove that it was a non-genuine arrangement.

Euro RSCG Advertising Pvt. Ltd. v. ACIT (ITA No. 4306 (Mum) of 2011) (Mum)

Loss on sale of shares in a private limited company

The Tribunal held that loss accruing on purchase / sell of shares in a private limited company, which was held as stock-in trade, should be treated as trading loss.

Mask Inv. Ltd. v. ACIT (ITA No.2380 /Ahd / 2009) (Ahd)

Taking over of the business of two partnership concerns does not amount to reconstruction of business

The Tribunal held that the taking over of the business of two partnership concerns by the taxpayer does not amount to reconstruction of business as business of the undertaking had continued. It was

further held that deduction under Section 80-IB/80-IC of the Act was available to the undertaking and not the taxpayer as envisaged in Central Board of Direct Taxes (CBDT) Circular No. F15/5/63/ IT(A-1) dated 13 December 1963. Therefore, the deduction under Section 80-IB/80-IC of the Act for the remaining period, which should have been available to the two firms, was available to the taxpayer. It was also held that income from Annual Maintenance Contract (AMC) relating to products manufactured and supplied is eligible for claiming deduction under Section 80-IB/80-IC of the Act.

Separately, the Tribunal held that the value of shares allotted to the employees under the sweat equity scheme, being ascertained liability, is to be allowed as a deduction.

ACIT v. Spray Engineering Devices Ltd [ITA No.701 /Chd/2009][Chd]

In the case of merger there is no formation of new business and therefore deduction is allowed under Section 10B of the Act

The Tribunal held that in case of merger there is no formation of new business so as to deny the claim for deduction under Section 10B of the Act.

Further, considering that, in the CBDT Circular dated 13 December 1963, the Board pointed out that the benefit under Section 84 of the Act is attached to the undertaking and not to the owner and therefore, the successor should be entitled to benefit for the balance unexpired period. Given that the undertaking was taken over as a running concern and continued its business, as an Export Oriented Unit (EOU), it was held that the taxpayer was entitled to deduction under Section 10B of the Act.

CIT v. Shri Renuga Textiles Mills Limited [TC(A). No. 1282 of 2005(Mad)]

The term 'Top Level Managerial Position' under the India-Poland tax treaty interpreted

The Ahmedabad Tribunal in a recent case has denied the exemption claimed by the taxpayer under the India-Poland tax treaty, in respect of the salary earned by him from his Polish employer. Article 17 of the India-Poland tax treaty deals with the taxation of Director's fees and remuneration paid to officials in 'top level managerial positions' in the Company. The India-Poland tax treaty provides that a tax resident of India who is an official in a 'top level managerial position' in a company that qualifies as a Polish tax resident may be taxed in Poland. In such a case, the income taxed in Poland shall be exempt from tax in India.

The Tribunal analysed the meaning of 'top level managerial positions' in detail and held that only a few personnel can be said to fall within this definition and not all management functions can be equated with as 'top level' management functions.

DCIT v. Mohan Balakrishnan Pookulangara [2012] 21 taxmann.com 115 (Ahd)

Decisions of Authority for Advance Rulings

Capital gains arising to a Mauritius entity, which holds a valid TRC, from a proposed sale of investment in India shall not be taxable in India

The AAR, in the case of Dynamic India Fund - I, held that the capital gains arising to a Mauritius entity, which holds a valid TRC, from a proposed sale of investment in India shall not be taxable in India under Article 13(4) of the India-Mauritius tax treaty. Further, it was held that the provisions of GAAR which are effective from 1 April 2013 are not relevant at this stage. However, as and when they come into force, it will be open to the tax department to consider those aspects; notwithstanding this ruling.

Dynamic India Fund I (AAR No 1016 of 2010, dated 18 July 2012) (AAR)

Notifications/Circulars/ Press Releases

India and Jersey sign an agreement for exchange of information with respect to taxes

India and Jersey had signed an agreement for exchange of information and assistance in collection with respect to taxes on 3 November 2011. The Agreement is effective from 8 May 2012. The Agreement, inter alia, provides for effective exchange of information relevant to the determination, assessment and collection of covered taxes, recovery and enforcement of such tax claims. The Agreement also provides that the competent authorities of both the States shall also lend assistance to each other in the collection of tax claims.

Notification No.26/2012, dated 10 July 2012

Extension of time limit to rectify assessments in specific circumstances of past arrears of demand

Under the Income-tax provisions, an income-tax authority can amend any order passed by it with a view to rectify any mistake apparent from the record. However, barring certain prescribed exceptions, such a rectification was permitted only if it was made within four years from the end of the FY in which the order sought to be amended was passed.

This impacted those taxpayers, who disputed the figures of arrear of demands, since such demand was already paid or reduced/eliminated in the appeals, etc. In such cases, the un-rectified arrears of demand were shown as outstanding in the records of the AOs. In some cases, the AOs uploaded such disputed demands on the Financial Accounting System portal of Centralised Processing Center, Bengaluru which resulted in adjustment of refund arising out of processing of income-tax returns for other tax years against such arrear demands. However, the AOs were unable to correct or reconcile such disputed demand on the ground that the rectification order was time-barred.

The CBDT, considering the genuine hardship faced by taxpayers, has issued instructions to its subordinate income-tax authorities to process the rectification of tax assessments that were otherwise time-barred, in specific circumstances of such past arrears of demand.

Circular No. 4 of 2012, dated 20 June 2012

Indian Government grants exemption from Provident Fund contribution for certain expatriate employees

In October 2008, the Government of India had made fundamental changes in the Employees' Provident Funds Scheme, 1952 (EPFS) and Employees' Pension Scheme, 1995 (EPS) by bringing foreign nationals under the purview of the Indian social security regime. Consequently, foreign nationals who were working in an organisation covered under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 were required to pay the Provident Fund (PF) contributions. However, foreign nationals qualifying for detachment under a Social Security Agreement were exempted from PF contributions in India subject to specified conditions. Such employees have been defined as 'excluded employees' under the EPFS.

Recently, the Ministry of Labour and employment has issued a Notification to enlarge the scope of 'excluded employee'.

The latest amendment in the EPFS would facilitate the exemption from PF contributions in India for employees coming from countries such as Singapore, which have entered into a Comprehensive Economic Cooperation Agreement (CECA)/Comprehensive Economic Partnership Agreement (CEPA) with India before 1 October 2008. The new regulation is effective from 24 May 2012.

Notification dated 24 May 2012

II. SERVICE TAX

High Court Decisions

Services provided by Member's Club to its members not liable to service tax

The issue was whether services provided by the taxpayer, a member's club incorporated under the Companies Act, 1956, to its members were liable to service tax.

The taxpayer contended that based on the principle of mutuality, transactions *inter se* the club and its member were not transactions between 'two persons'. Reliance was placed on the Full Bench decision of the Patna High Court in *CIT v Ranchi Club Limited [1992 (1) PLJR 252 (High Court)] – a sales tax decision,* and the Supreme Court's decision in *CTO v Young Men's Indian Association [1970 (1) SCC 462] – an income tax decision.*

The Revenue, on the other hand, relied on sections 65(25a), 65(105)(zzze) and the Explanation to section 65 of the Finance Act, 1994 to contend that services provided by a club to its members are clearly liable to service tax. It was also contended that reliance could not be placed on interpretation of member's club activities under other enactments since each taxing statute has its own definitions, which have to be given effect to irrespective of the definitions in other statutes.

The High Court accepted the contention of the taxpayer and held as follows:

- It is true that sale and service are two different and distinct transactions. Sale entails transfer of property whereas in service, there is no transfer of property. However, the basic feature common to both transactions is the existence of two parties.

- This issue of whether there are two persons involved in activities of member's clubs has been decided by the Supreme Court and the Patna High Court in the decisions referred to by the taxpayer and therefore the same may be applied to interpreting levy of service tax as well.

- Based on the principle of mutuality and in view of the club's activities, if the taxpayer provides any service to its members then it is not a service by one to another in the light of the decisions referred above as foundational facts of existence of two legal entities in such transaction is missing.

Ranchi Club Limited v CCE & ST (2012) (26 STR 401) (Jharkhand High Court)

Eligibility of CENVAT credit on inputs used in construction of warehouse

The taxpayer was engaged in providing storage and warehousing services, and used various inputs for constructing warehouses, from where the aforementioned services were provided.

The Revenue disputed CENVAT credit on the ground that the 'inputs' were not used for providing any taxable 'output service', ie, storage and warehousing services.

The Tribunal held that without utilizing inputs, the warehouse could not have been constructed; hence, the taxpayer would not have been in a position to provide the output service of storage and warehousing.

Therefore, the taxpayer rightly availed CENVAT credit on input used for constructing the warehouse.

It should be noted that the above mentioned decision of the High Court was subsequently relied on to determine eligibility of CENVAT credit on construction related input services used by a provider of renting of immovable property services in *Navaratna SG Highway Prop Pvt Ltd v CST (2012) 35 STT 519 (Ahmedabad Tribunal)*, wherein CENVAT credit on input services used for construction of malls subsequently let out was permitted by the Tribunal.

CCE v Sai Sahmita Storages Private Limited (2012) (34 STT 306) (Andhra Pradesh High Court)

Tribunal Decisions

Rule 5 refunds can be claimed on CENVAT credit availed in prior periods

The issue was whether the claimant could claim refund under Rule 5 of the CENVAT Credit Rules, 2004 (the "CENVAT Rules") given that CENVAT credit on inputs was not taken in the month in which the refund claim was made.

The Tribunal answered the question in the affirmative, and held as follows:

- Relying on the clarification issued by the CBEC through Circular 120/01/2010-ST dated January 19, 2010, it was clear that refund of past credits should be allowed in subsequent quarters.

- The Tribunal also agreed with the view of the Commissioner (Appeals) in the same case, that the situation was revenue neutral since if refund was inadmissible in a particular month, it would become admissible in the preceding or the succeeding month.

- On a related note, regarding eligibility of certain input services, it was held that the claimant was eligible to avail CENVAT credit on vendor invoices addressed to its pure agent.

- Further, the Tribunal, while relying on the Tribunal decisions in *NBM Industries v CCE [(2009 (94) RLT 367(Ahmedabad Tribunal)]* and *CCE v Rangdhara Polymers [(2010-TIOL-518) (Ahmedabad Tribunal)],* held

that refund of CENVAT credit pertaining to supply of goods to SEZs would be eligible even though there was no direct export outside the country.

CCE v Chamundi Textiles Silk Mills Limited (2012) (26 STR 498) (Bangalore Tribunal)

Services consumed outside the SEZ are not eligible for service tax exemption

The claimant availed exemption from service tax on Cargo Handling Agency ("CHA") and air/ sea freight agency services provided to an SEZ unit under Notification No 4/2004 dated March 31, 2004 (the "SEZ Notification").

The Revenue contended that exemption under the SEZ Notification was available only on "services provided for consumption within the SEZ". In the claimant's case, the services were not consumed entirely within the SEZ; therefore, exemption could not be claimed.

In a stay application, while ordering pre-deposit, the Tribunal held as follows:

- The SEZ Notification explicitly used the phrase "services provided for consumption within such SEZ". This would mean that services consumed outside an SEZ were not entitled for exemption based on the cannon of interpretation that the express mention of one thing excludes all others.

- Further, the SEZ Notification, being a conditional exemption notification issued under Section 93 of the Finance Act, 1994, could not be interpreted on the basis of section 26 of the Special Economic Zone Act, 2005 (the "SEZ Act") and rule 31 of the SEZ Rules, 2006 (the "SEZ Rules"), which state that SEZ developers/ units shall be entitled to exemption from service tax.

- It was also noted that the SEZ Notification existed prior to enactment of the SEZ Act and Rules. Further, the SEZ Notification was not amended even after introduction of the SEZ Act and Rules. Hence, it could be inferred that there was no intention to align the SEZ Notification with the SEZ Act and Rules.

DHL Lemuir Logistics Private Limited v CCE (2012-TIOL-705) (Mumbai Tribunal)

Refund of service tax under Notification 9/2009 dated March 3, 2009 (the "SEZ Notification 9")

The key questions addressed in this decision are as follows:

- Whether refund could be claimed on payments made prior to obtaining approved list of services from the Development Commissioner's office?

- Whether refund would be available even on services received prior to March 3, 2009 (effective date of SEZ Notification 9), for which payment was made subsequently?

- Whether service tax refund could be claimed on services provided outside the SEZ?

- Could the adjudicating authority rely on a Chartered Accountant ("CA") certificate to decide if specified services were used for authorized operations of the SEZ unit/ developer?

The Tribunal answered the above questions as follows:

- *Claim of refund for service tax paid prior to date of list of services approval*

The Tribunal held that the taxpayer was entitled to claim refund of service tax paid on all services approved by the Unit Approval Committee.

- *Refund for services received prior to effective date of SEZ Notification 9 but paid subsequently*

As per paragraph 3 of SEZ Notification 9, the only requirement for claiming refund is that service tax should have been paid on or after March 3, 2009. Hence, refund may be claimed even if services were rendered prior to March 3, 2009, provided that the SEZ unit/ developer paid service tax to the service provider after March 3, 2009.

- *Refund with respect to services performed outside the SEZ*

The preamble of SEZ Notification 9 makes it abundantly clear that exemption is on services provided for authorized operations, and received by a developer or units of the SEZ, irrespective of where the services are provided (whether inside or outside the SEZ). Hence, refund could be claimed on services rendered outside the SEZ as well.

- *Use of CA certificate to establish use in authorized operations*

In respect of Rule 5 refunds, CBEC's Circular 120/01/2010-ST dated January 19, 2010 allows submission of a CA certificate as proof of co-relation between input/input services and exports. This procedure may be reasonably applied to SEZ refund claims as well.

Further, given that the adjudicating authority itself directed the appellant to produce the CA certificate to establish use in "authorized operations", benefit of refund could not be denied.

Wardha Power Company Limited v CCE (2012-TIOL-700) (Mumbai Tribunal)

Taxability of Leased Circuit Services

The taxpayer, a stock broker, also provided V-SAT connectivity at its customers' site and charged consideration for the same.

The Revenue demanded service tax on the above mentioned activity under the service category of 'Leased Circuit Services' (subsequently merged with the category of Telecommunication services).

The Tribunal held that based on a reading of the definition of 'Leased Circuit Services', it was evident that these services were taxable only when provided by a person registered as a 'telegraph authority' under the Indian Telegraph Act, 1885. Since the tax-

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payer was not a 'telegraph authority' but only a stock broker, V-SAT connectivity did not qualify as 'Leased Circuit Services' and accordingly, no service tax would be applicable.

JSEL Securities Limited v CCE (2012) (26 STR 464) (Delhi Tribunal)

Notification & Circulars

Levy of education cess and secondary and higher education cess to continue

The CBEC has issued a Circular to remove doubts regarding applicability of education cess and secondary and higher education cess (collectively referred to as "Cess") on services provided in the taxable territory with effect from July 1, 2012. Doubts had arisen since the provisions governing levy of Cess refer to section 66 of the Finance Act, 1994, which ceased to be in operation from July 1, 2012.

The Circular clarifies that any reference to section 66 of the Finance Act, 1994 shall be construed as reference to the newly re-enacted charging provision, ie, section 66B. In other words, cess would be applicable on services provided in the taxable territory even after July 1, 2012.

Circular No DOF No.334/1/2012-TRU dated June 29, 2012

Exemption to rail transportation services

The Central Government has exempted from the levy of service tax on the following services provided by Indian Railways upto September 30, 2012:

- Service of transportation of passengers by railways in first class or an air conditioned coach
- Services by way of transportation of goods by railways

By way of this Notification, the above services provided by the Indian Railways would not attract service tax upto September 30, 2012.

Notification No 43/2012 - ST dated July 02, 2012

III. VAT/ CST

High Court Decisions

Eligibility of input tax credit is not a matter to be considered when suppression is detected and such benefit of input tax credit should only be made available to taxpayers conforming to statutory provisions such as maintenance of accounts, filing of returns and remittance of tax

In the present case, the taxpayer claimed that his turnover for FY 2005-06 would be less than Rs 50 lakhs and based on the same, paid presumptive tax at 0.5 percent of the turnover for the said period. The total turnover declared in the returns filed by the taxpayer, for the said period was 44 lakhs. However, an inspection by the Reve-

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nue authorities disclosed suppression of purchases and sales by the taxpayer. Pursuant to the same, the taxpayer filed revised returns, declared a turnover in excess of Rs 50 lakhs and made payment of taxes under the regular scheme, in accordance with section 6(1) of the Kerala Value Added Tax, Act, 2003. As the taxpayer made payment of taxes under the regular scheme, he claimed input tax credit.

In light of the above, the Revenue authorities disallowed the taxpayer's claim of input tax credit ("ITC") on the ground that the taxpayer did not furnish From 25A along with the stock of inventory on the date of change in the scheme for payment of taxes, within 15 days of the change over, as prescribed by the Kerala Value Added Tax Rules, 2005 ("KVAT Rules").

The taxpayer contended that he was eligible to input tax credit as the total turnover for the said period had crossed Rs.50 lakhs and as the goods sold by the taxpayer had been assessed at the schedule rate.

The Kerala High Court observed that the taxpayer had not followed the procedure prescribed by the KVAT Rules and therefore, the contention of the taxpayer for availing input tax credit could not be upheld. Further, the High Court also stated that benefits like input tax credit should only be allowed to taxpayers who follow the statutory provisions and the Revenue should be slow in granting such benefits to taxpayers who are involved in tax evasion. *Venus Marketing v State of Kerala (2012) (51-VST-377) (Kerala High Court)*

Liquidated damages are expenditures to be incurred by a taxpayer for any default on his part and do not have any connection with the sale price

In the present case, the taxpayers who were engaged in executing contracts, received payments from their customers after the deduction of amounts towards liquidated damages, that were reduced for defaults by the taxpayers.

The Revenue authorities sought to include the liquidated damages in the total turnover of the taxpayers and levied tax on the same. The Revenue authorities contended that the liquidated damages were merely in the nature of temporary deductions that would be made good to the taxpayers on completion of the contract and handing over of the project.

In response to the above, the taxpayers contended that since liquidated damages had to be contractually borne by them (and therefore reduced from the payment received by the taxpayers), it could not form part of the turnover liable to tax.

In this regard, the first appellate authority and the Tribunal held that the liquidated damages should not form part of the taxable turnover. In response to the same, the Revenue authorities filed a revision petition before the Madras High Court.

Based on the above facts and the contention of the Revenue, the High Court relying on the decision of the Punjab and Haryana High Court in the case of Punjab Communications Limited *v* State of Punjab held that

the liquidated damages being contractual obligations of the taxpayers had been rightly excluded from the taxable turnover and basis the same, orders passed by the first appellate authority and the Tribunal were upheld.

State of Tamil Nadu v Thermon Heat Tracers Limited (2012-51-VST-69) (Madras High Court)

Detention of goods belonging to a purchasing dealer on account of non-payment of taxes by the seller of the goods in not only without jurisdiction but is also void

In the present case, Siemens Limited sold certain machinery to KGS Scan in 2002 on payment of taxes applicable under the Tamil Nadu General Sales Tax Act, 1959 ("Act"). Pursuant to the same, in 2005 KGS Scan resold the same machine to Siemens Ltd who in turn sold the machine to a customer outside the state, for which Siemens Ltd discharged tax on the interstate sale. Siemens Ltd instructed KGS Scan to deliver the goods to a carrier for transport of the machine to the customer outside the state.

The Revenue authorities made a surprise check and detained the machinery on the grounds that the machine belonged to KGS Scan and KGS Scan being a casual dealer had not made payment of tax on the sale of the machinery to Siemens Ltd.

The Revenue authorities proceeded to pass an order directing KGS Scan to make payment of taxes on the sale of the machine to Siemens Ltd along with compounding fee amounting to two times the tax payable. In response to the above, both Siemens Ltd and KGS Scan filed writ petitions before the Madras High Court wherein it was contended that KGS Scan was not a "dealer" for the purpose of the Act and therefore, the sale of the machinery would not attract tax. It was also contended that the detaining of the goods was not tenable in law.

The Madras High Court did not address the issue of whether KGS Scan qualified to be a dealer and therefore, whether the sale made by KGS Scan attracted tax. The High Court merely restricted its judgment as to whether the detaining of the goods by the Revenue authorities was valid in law.
On the said question, the High Court held that on account of the sale made by KGS Scan to Siemens Ltd, the ownership of the said goods had already been transferred to Siemens Ltd. Further, as Siemens Ltd had already discharged the taxes applicable on sale of the machine to the interstate customer, no taxes were due from Siemens Ltd. Hence, the Revenue authorities could not detain goods belonging to Siemens Ltd for an alleged default committed by KGS Scan. Further, in respect of the alleged default by KGS Scan, it was held that the Revenue authorities always have the option of recovering taxes by initiating proceedings on issuance of a show cause notice.

Siemens Limited and another v Assistant Commissioner (Commercial Taxes – Enforcement), Madurai and another (2012) (51-VST-124) (Madras High Court – Madurai Bench)

No deduction permissible in respect of discounts if they are not shown on the tax invoice – not open to the Tri-

bunal to opine contrary to the judgments of the High Court

The taxpayer was engaged in the manufacturing and trade of domestic appliances. In the course of his business, pursuant to the issuance of a tax invoice, the taxpayer issued credit notes to customers based on monthly sales performances, in order to provide a discount. In the credit notes, the taxpayer deducted the tax applicable on the discount provided and remitted only the balance tax with the Revenue authorities.

On audit of the taxpayers books of accounts, when the Revenue authorities observed the above practice, proceedings were initiated to collect the taxes deducted by passing of credit notes on the ground that rule 3(2)(c) of the Karnataka Value Added Tax Rules, 2005 ("KVAT Rules") makes it mandatory for a dealer to disclose the discount amount separately, on the tax invoice. Further, the Revenue also contended that there was no provision in the VAT law that provided for allowing discounts on future dates.

Pursuant to the above, while the first appellate authority passed an order in favour of the Revenue, the Tribunal passed an order in favour of the taxpayer. In response to the order of the Tribunal, the Revenue filed an appeal before the Karnataka High Court and reiterated their contention.

In response to the above, the taxpayer contended that while the constitutional validity of rule 3(2)(c) of the KVAT Rules had been upheld by a single member bench, the same was challenged by a writ petition and the matter was remanded for fresh consideration. Hence, it could not be said that rule 3(2)(c) of the KVAT Rules was constitutionally valid. The taxpayer in fact contended that the said rule was *ultra vires* the Constitution of India.

In light of the above submissions, the primary question before the High Court was whether the Tribunal was justified in allowing the deduction, against the provisions of the KVAT Law.

The High Court held that as the tax invoice did not contain discount, the subsequent credit notes could not be treated as discount. Hence, as the Tribunal had grossly erred in passing an order contrary to that of the High Court, the order of the Tribunal was to be set aside and the order of the assessing authority was restored.

State of Karnataka v Kitchen Appliances India Limited (2012) (51-VST-439) (Karnataka High Court)

Tribunal Decision

Trade discount allowed through credit notes does not form part of sale price, for the purpose of levying tax

The taxpayer was engaged in the business of manufacture and trading of chemical fertilizers. In the course of carrying on its business activities, the taxpayer provided for a cash discount, quantity discount and special discount. The said discounts were provided through the issuance of credit notes to the customers.

In light of the above, the Revenue authorities sought to disallow the deduction of the said discounts from the sale price *inter alia* on the following grounds:

- The original invoices do not disclose the discounts;
- The discounts were allowed through credit notes and allegedly no documents were made available in support of the same;
- The definition of sale price as per section 2(31) of the West Bengal Sales Tax Act, 1994 ("WBST Act") does not provide for any deduction other than cash discount and the cost of freight or delivery or the cost of installation or interest where such cost of interest is charged separately; and
- The cash discount, in particular was not separately shown in the original invoice.

In response to the same, the taxpayer contended as follows:

- The volume linked discounts and the special performance discounts had to be offered in a competitive business environment as other players also offered the same as part of the usual trade practice.
- Rebate or discount offered at the time of sale or subsequently, has an effect on the sale price and the definition of sale price defines sale price to *inter alia* mean the amount paid or payable to the dealer as valuable consideration for the sale.
- Further, with regard to the non disclosure of the cash discount in the invoice, the taxpayer contended that the invoice mentions that a customer would receive the discount if the payment was made within the prescribed time period.
- In respect of the volume/ quantity discounts and the special discounts, the taxpayer argued that it would not be possible to ascertain such discounts at the time of sale as the customers would only be eligible for the same subsequently.

In view of the above contention of the Revenue and the submissions of the taxpayer, the Tribunal held as follows:

- Cash discount was deductible from the turnover as it was in accordance with normal trade practice and in case of credit sales there was no scope to disclose the cash discount in the invoices/ bills.
- With regard to the volume discount, it was held that such a system of granting discounts was not uncommon and while the discount would be known of at the time of sale, it was merely quantified later. Hence, the deduction of volume discount from the sale price was permitted on issuance of credit notes.
- However, with regard to special discounts, it was held that this discount was contingent upon the customer's

future purchase from the taxpayer and therefore it could not be termed as a trade discount. Accordingly, the said discount was not permitted to be deducted from the sale price.

Nagarjuna Fertilizers Chemicals Limited v ACCT, Corporate Division and Others (2012) (51-VST-453) (West Bengal Taxation Tribunal)

IV. CUSTOMS

Tribunal Decisions

Value of preloaded software is to be included in the assessable value of telecommunication hardware

The taxpayers, Bharti Airtel Limited ("BAL") and Bharti Hexacom Limited ("BHL"), imported telecommunication equipment from Ericsson AB, Sweden. The equipment consisted of hardware and related software. At the time of import, BAL and BHL paid customs duty only on the value of hardware.

Revenue authorities alleged that the software that was imported was already preloaded in the equipments at the time of import and the separate import of software in CDs was only with a view to evade payment of customs duty on the entire value of the equipment. The Revenue further alleged that the software was an intrinsic part of the hardware and the two cannot be separated. Basis the same, the Revenue demanded duty on the combined value of hardware and software and also levied interest and penalty in addition to confiscation of the goods.

The taxpayers contested the demand and confiscation *inter alia* on the following grounds:

- The preloading of software by Ericsson AB, Sweden was only for the purpose of 'factory testing' and such preloading was not made in the integrated chips in the equipment. Further, such preloading is not same as etching or embedding of software.

- Therefore, the software ought to be treated as a separate commodity and cannot be treated as embedded software merely for the reason that the software is essential for operating the hardware.

The Tribunal considered the submissions of the taxpayers and the Revenue and held as follows:

- There was a single contract and price for the telecommunication equipment *per se* and the software in question was not capable of being marketed independently.

- Though the taxpayers imported the software on a CD as well, the said CD was not used by the taxpayers and the same was lying unused at the time of their confiscation, thereby establishing that the software was already preloaded in the equipment.

- The imported equipments cannot get their identity and function as telecommunication equipment in

the absence of the preloaded software.

- Hence, there is no justification to exclude the value of preloaded software from the value of the imported equipments.

Basis the above, the Tribunal confirmed the demand, confiscation of goods and imposition of penalties on the taxpayers.

CC, Bangalore v Bharti Airtel Limited, Bharti Hexacom Limited and Another – (2012 TIOL 746) (Bangalore Tribunal)

Notification & Circulars

Clarifications on parallel imports

The Department of Industrial Policy and Promotion has clarified certain aspects on parallel imports. A summary of the key aspects clarified is as under:

- Import of patented products from persons duly authorized under law to produce, sell or distribute the products would not amount to infringement of patents under the Patents Act, 1970 ("Patents Act");

- Where goods bearing a registered trademark are lawfully acquired, subsequent sale of such goods by the purchaser (of the goods with the trademark) is not considered as infringement under the Trade Marks Act, 1999;

- Section 22 (1) (b) of the Designs Act, 2000 does not allow parallel import of "designs";

- Geographical Indications of Goods (Registration and Protection) Act, 1999 does not contain provisions similar to that contained in the Patents Act and hence, parallel import of geographical indications cannot be addressed.

- With regard to parallel import of copyrights, clarifications are awaited from the concerned authority and hence, provisions of the Copyright Act, 1957 have to be followed in the interim.

Circular No. 13/2012-Customs, dated May 8, 2012

Public Notice

High sea sales agreement to be executed on Rs. 100 stamp paper

While High Sea Sales ("HSS") agreements are typically executed on a stamp paper, there are mixed practices, whereby, such agreements are executed on stamp paper of denomination of either Rs 20 or Rs.100.

The Commissioner of Customs (Imports), Mumbai vide this public notice has clarified that since the contract value of a HSS agreement is considered for the purposes of valuation and determination of customs duty, such HSS agreements are equivalent to a "Customs Bond". Accordingly, it has been clarified that the HSS agreements are

to be executed on a stamp paper having a denomination of Rs.100.

Commissioner of customs (Imports), ACC, Mumbai, Facility Notice No. 18/2012, dated May 22, 2012

V. CENTRAL EXCISE

Supreme Court Decision

Doctrine of merger cannot be applied where an appeal is dismissed by the first appellate authority on grounds of limitation and not on merits

The taxpayer, a manufacturer, had purchased certain capital goods and had availed MODVAT credit of duty paid on such capital goods. As per the provisions of the prevailing central excise law and MODVAT rules, the taxpayer was required to file a declaration with the adjudicating authority for availing the credit. However, the taxpayer filed the declaration beyond the due date prescribed in this regard. The Revenue therefore disallowed the MODVAT credit and demanded the same along with penalty.

The taxpayer preferred an appeal before the Commissioner (Appeals). However, such appeal was filed belatedly and basis the same, the Commissioner (Appeals) dismissed the appeal on grounds of limitation. The period of delay was such that the Commissioner (Appeals) was not statutorily empowered to condone the same. The subsequent appeals filed by the taxpayer before the Tribunal and High Court were also dismissed affirming the decision of the Commissioner (Appeals).

Before the Hon'ble Supreme Court, the taxpayer contended the following:

- The Tribunal ought to have considered its appeal not only on grounds of limitation, but also on merits.
- This is because, as per the "doctrine of merger" the order-in-original had merged with the order-in-appeal and therefore, the Tribunal's *in toto* rejection without considering the case on merits, was inappropriate.

The Hon'ble Supreme Court considered the above submissions and relied on a plethora of judgments on the concept of "doctrine of merger" and held that, the said doctrine would apply only in cases where an appeal is dismissed on merits. Hence, in the present case, as the rejection was on the technical ground of limitation, the order passed by the adjudicating authority shall not merge with the order passed by the first appellate authority.
Raja Mechanical Co Private Limited v CCE, Delhi – I 2012 (279 ELT 481) (Supreme Court)

High Court Decision

The word "site of construction" should be given a liberal interpretation to include "off road sites"

The taxpayer was engaged in the manufacture and supply of 'pre-fabricated structural components' to Delhi Metro Rail Corporation Limited ("DMRC") to be used in a metro rail project of DMRC. The Revenue initiated proceedings on the taxpayer on

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grounds that the taxpayer had neither obtained central excise registration nor made payment of excise on its supplies. The taxpayer filed a writ petition before the High Court seeking to quash the order-in-original and further seeking to avail the benefit of exemption under Notification 1/2011 CE (NT) dated February 17, 2011 which provided for exemption on goods manufactured at "the site of construction".

The Revenue sought to deny the exemption on the following grounds:

- The benefit under the said notification was available only upon satisfaction of the following two conditions:
  - The goods should be manufactured at site; and
  - The goods should be used in construction work at such site.
- The Revenue contended that, in the instant case, while the goods were used in construction work, such goods were not manufactured at the "site of construction" but were in fact manufactured at an adjacent location.

The taxpayers relied on a circular issued by the Central Board of Excise and Customs, which had clarified that the word "site" should be given a wider and not restrictive meaning. The circular clarified that certain activities at site may cause traffic congestion problems and hence, the word "site" would also include any adjacent premises made available to the manufacturer of specified goods.

The High Court considered the above, concluded that the taxpayer was eligible for the exemption and allowed the writ petition.

CP Meier v CCE – 2012 (280 ELT 3) (Delhi High Court)

Tribunal Decisions

No requirement to reverse CENVAT credit when capital goods are exported, without payment of duty, under bond, for repairs

The taxpayer was engaged in the manufacture of various products such as caustic soda, liquid chlorine, bleaching powder, hydrogen, etc. The taxpayer had imported capital goods and had availed CENVAT credit of the additional customs duty paid at the time of import. Subsequently, due to certain defect in the equipment the same was exported under bond to the supplier for repairs without payment of duty.

The authorities at the ground level were of the view that CENVAT credit availed at the time of import should have been reversed and on the basis thereof demanded duty along with interest and penalty. The demand was also confirmed by the Commissioner (Appeals).

On appeal to the Tribunal, it was held that:

- Reversal of CENVAT for removal of capital goods, as such, would be required only when such capital goods are removed to domestic buyers.

- Where the capital goods are exported under bond for the purpose of repairs, no reversal is required.

Basis the above, the Tribunal set aside the order of Commissioner (Appeals) and allowed the appeal of the taxpayer.

CCE, Indore v Grasim India Limited – 2012 (279-ELT-440) (Delhi Tribunal)

Exemption under Notification No. 91/2004-Cus and Notification 6/2006 cannot be denied on the ground that the sub-contractor has not taken part in the International Competitive Bidding ("ICB")

The taxpayer was engaged in the manufacture of air cooled condensers and had entered into a contract with Shriram EPC Limited ("SEL") for supply of the said goods which were to be used in a coal based captive power plant. SEL had participated in an ICB and were eligible to procure the goods by claiming exemption from central excise duty under Notification 6/2006. Such exemption was available on the condition that the goods were eligible for exemption under Notification No. 91/2004-Cus when supplied against ICB.

The taxpayer was a sub-contractor to the project who had availed exemption under Notification 6/2006. In the said fact pattern, the Revenue denied exemption *inter alia* on the following grounds:

- Exemption is available only for materials required for making the final product; whereas, the goods supplied by the taxpayer was not the final product by itself;
- The taxpayer had not taken part in the ICB and was hence, not eligible for exemption under Notification 91/2004 Cus.

Basis the above, the Revenue demanded duty along with interest. The taxpayer appealed to the Tribunal against such demand and contended that the goods supplied by them were used by the main contractor in the execution of the project; a project of such a large scale cannot be executed by one contractor and therefore, the contractor has to necessarily obtain goods from other contractors. It was also contended that the exemption provided under Notification 6/2006 is to extend the benefit of exemption to local manufacturers so that they are on par with foreign suppliers under the equivalent customs notification.

The Tribunal considered the above submissions and *prima facie* held that:

- In order to claim exemption under Notification 91/2004 Cus, there is no requisition for a sub-contractor to participate in the ICB.
- "Final goods" for one manufacturer would be raw material or component for another manufacturer. Therefore, the goods supplied by taxpayer being essential for the main contractor for setting up the power project, such goods should *prima facie* qualify for the exemption.

Basis the above the Tribunal granted full waiver of pre-deposit and granted stay of collection of duties during the pendency of appeal.

GEI Industrial Systems Limited v CCE, Bhopal 2012 (279 ELT 553) (Delhi Tribunal)

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