July 2012

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

Foreward

FICCI has presented a Twelve Point Action Agenda for Stimulating Indian Economy's Growth as follows:-

- Government should eschew the temptations of a premature welfare state and announce an immediate moratorium on any additional expenses on doles
- Expedite the implementation of the Goods and Services Tax
- Ease the monetary policy and bring down interest rates by 200 bps and CRR by 100 bps
- Do not pass the Land Acquisition Bill in its present form
- Provide fiscal stimulus for investments across sectors
- Push through with FDI policy reforms in areas where action is possible outside of the Parliament
- Extend the price decontrol mechanism to diesel and other oil products
- Take steps to energize the coal sector by fostering competition
- Strengthen frameworks for raising funds for infrastructure financing in the economy
- Pursue the objective of food security through productivity increase and agriculture marketing reforms
- Fast-track implementation of critical policies and projects
- Address the issue of repatriation of black money to immediately mitigate the BOP situation by entering into global revenue sharing agreements

On 28 June 2012 the Central Board of Direct Taxes (CBDT) issued draft guidelines on General Anti-Avoidance Rules (GAAR). The guidelines have recommended prospective application of the provisions, monetary thresholds for invoking the GAAR and specified time limits.

The new service tax regime based on the concept of a negative list of services has come into effect from 1st July, 2012. FICCI welcomes this advance as a step towards GST.

FICCI was invited on 15th June, 2012, for an Oral Evidence before the Standing Committee of Parliament attached to the Ministry of Finance, to present its views and submissions on the Constitution Amendment Bill for empowering the Central and the State Governments to make laws on the taxation of goods and services (GST). We are now revising our White Paper for submission to the Standing Committee.

On the judicial front, the Delhi High Court, in the case of Havells India Ltd., has held that when the taxpayer has manufactured goods in India and concluded export contracts from India, the source of income was created in India. The customer located outside India was not the source of the income though they were the source of the monies received. Therefore, the income from

export sales could not be brought under the exception provided under Section 9(1)(vii)(b) of the Income-tax Act, 1961 and cannot be treated as a source of income outside India.

This is the second issue of the monthly newsletter and we would welcome views and comments of our members on its contents. We would also welcome suggestions for improving the news-letter. A line in response, will encourage us to continue with this effort.

Recent Case laws

I. DIRECT TAX

High Court Decisions

Certification Income to enable the taxpayer to export its products cannot be construed as a source of income outside India

The taxpayer paid an amount to a USA based company for 'KEMA' certification. This certification enables the taxpayer to sell its products in the European market.

The taxpayer claimed that amount was paid for the purpose of earning income from a source outside India by way of exports and therefore, the payment is covered under the exception provided under Section 9(1)(vii)(b) of the Act and hence is not taxable. The Assessing Officer (AO) disallowed the payment in the hands of the taxpayer on its failure to deduct tax at source.

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

- The export activity having taken place or having been fulfilled in India, the source of income was located in India and not outside India;
- The taxpayer manufactured goods in India and concluded the export contracts in India. The source of income was created the moment the export contracts were concluded in India. The customers located outside India were not the source of the income though they were the source of the monies received;
- In order to fall within the exception provided under Section 9(1)(vii)(b) of the Act, the source of the income, and not the receipt, should be situated outside India;
- Since the source of income from the export sales could not be said to be located or situated outside India, it could not be brought under the exception provided under Section 9(1)(vii)(b) of the Act.

Accordingly, the matter was remanded to the Tribunal to examine the applicability of India-USA tax treaty in respect of the payment in question.

CIT v. Havells India Ltd. (ITA No. 55/2012 & 57/2012)(Del)

Tribunal Decisions

Authority to conclude contracts is a must condition to constitute a Dependent Agent Permanent Establishment

The taxpayer, a tax resident of Mauritius, was engaged in the business of telecasting of TV channels. During the year under consideration, the taxpayer's revenue from India consisted of collections from time slots given to advertisers from India, which were collected by the Indian advertisement collecting agents (the Agents).

The AO held that the Agents constituted a Dependent Agent Permanent Establishment (DAPE) of the taxpayer in India under the India-Mauritius tax treaty and the payment of arm's length remuneration does not extinguish the tax liability of the taxpayer in India.

The Mumbai Tribunal, based on the facts of the case, observed and held as follows:

- The Agents had no authority to fix the rate or to accept an advertisement. It merely forwarded the advertisement and the taxpayer had the right to reject. There was neither a legal existence of authority to conclude contracts nor was there any evidence to show that the agent had habitually exercised such an authority;
- When the Agent had no authority to conclude contracts, the tax department could not ask for contrary evidence as nobody could prove the negative.
- Under Article 5(5) of the India-Mauritius tax treaty, the wording 'when the activities of such an agent are devoted exclusively or almost exclusively on behalf of the enterprises', refers to the activities of an agent and its devotion to the non-resident and not the other way round. During the year under consideration, the income of the Agent from the taxpayer constituted merely 4.69 percent of its total income;
- Therefore, the Agent could not be treated as dependent agent of the taxpayer in India; and
- Since the payments made by the taxpayer to the Agent were at arm's length, relying upon the decision of DIT v. Morgan Stanley & Co. [2007] 292 ITR 416 (SC), Set Satellite (Singapore) Pte Ltd. v. DDIT [2008] 307 ITR 205 [Mum] [HC] and DIT v. BBC Worldwide Ltd. [2011] 203 Taxman 554 [Del] [HC], the Tribunal held that no further profits of the taxpayer could be attributed to, and taxed in, India.

DDIT v. B4U International Holdings Ltd (ITA No. 880/Mum/2005) (Mum)

Provision of service amounts to 'make available' under the India-USA tax treaty

The taxpayer, a tax resident of US, entered into a contract with an Indian company for providing qualified technocrats for its project in India. For the services, the taxpayer charged salary cost of expats plus six percent to the Indian company.

The issue for consideration before the Mumbai Tribunal was whether the amount received by the taxpayer was taxable as 'Fees for Included Services' (FIS) under the India-USA tax treaty.

In connection with the above, the Mumbai Tribunal, observed and held as follows:

- The technical personnel supplied were the employees of the taxpayer, inter alia, for the following reasons:
  - The personnel were not the employees of the Indian company;
  - The Indian company did not take responsibility of any personnel provided by the taxpayer;
  - The taxpayer was responsible for all the compliances in respect of the personnel deployed;
  - The contract was entered for providing technical personnel to the Indian company and the expertise of the taxpayer was made available to the Indian company for its business; and
  - Therefore, the payment received by the taxpayer was taxable in India under the tax treaty as FIS.

Avion Systems Inc. v. DDIT [ITA No. 1745/ Mum/2009][Mum]

Sale on a 'going concern' basis is taxable as Capital Gains and not as business income. AO not justified in 'lifting veil' and rewriting agreement

The taxpayer was operating a proprietary concern engaged in providing consultancy in Civil Engineering. During the Assessment Year (AY) 2008-09, the proprietary concern was taken over by another entity named ICT-SD Engineering Consultants P Limited (ICT-SD). As per the agreement between the parties, proprietary concern along with all the assets and liabilities was taken over as a 'going concern'. As per the agreement, the sale was for a lump sum consideration, without assigning value to individual assets. During assessment proceedings, the AO held that the consideration received by the taxpayer was taxable as 'business income' under Section 28(va) of the Act and not as 'capital gains' as the taxpayer had received a 'compensation' for 'not carrying out any activity in relation to business'.

The Delhi Tribunal referring to various clauses of the agreement and annual accounts of proprietary concern held that the business was taken over as a 'going concern' and the consideration received by the taxpayer was not in the context of agreeing not to carry out any business activity, but for transfer of the business itself. Further the Tribunal relying on various rulings held that the 'lifting of the veil' by the AO was unwarranted, in light of the lucid and unambiguous terms of the agreement. The AO could not rewrite the agreement and the intention of the parties was to be gathered from the form of the agreement and its contents, considered in entirety.

ACIT vs. Smt. Sangeeta Wij [TS-397-ITAT-2012(DEL)]

Sale of development rights is taxable in the year of transfer though the consideration is received over subsequent years

The taxpayer engaged in the business of development and construction of land, was following the mercantile system of accounting. The taxpayer was declaring income from the development project from

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year to year on the basis of 25 percent of the Work in Progress (WIP) of the project. The taxpayer received INR 9.2 million out of 25.2 million during AY 2004-05 for transfer of development rights and the balance was received in installments over the subsequent years.

The taxpayer offered income from transfer of development rights at the rate of 25 percent of the receipt taking the transfer as an integral part of the development project. The AO assessed entire income of INR 25.2 million from transfer of development rights in the first year itself. Further the taxpayer also made alternate claim before the AO that in case the entire income was assessed, the proportionate cost of land should be allowed as deduction which was rejected by the AO on the ground that the taxpayer had transferred only interest in the land and not the land. The Commissioner of Income-tax (Appeals) [CIT(A)] confirmed the stand taken by the AO.

The Mumbai Tribunal observed that the taxpayer instead of developing land parted with the development rights in respect of part of the land forever. The possession of the land was also been given during the year along with development rights. This transfer of a part of the development rights by the taxpayer was an independent activity having no connection with the development of the remaining part of the land. The taxpayer was following the mercantile system of accounting as per which the income accrued when it became due for payment. In the instant case, the entire amount accrues to the taxpayer on signing of the development agreement and on handing over of the possession of the land. The postponement of payment does not stop accrual of income. Thus the Tribunal held that even if part of the payments were received in subsequent years, the entire income had accrued during the year and thereby was taxable in this year. However, the Tribunal allowed the deduction in respect of cost of acquisition of development right.

Hillside Construction Company Pvt Limited v. DCIT (ITA No.402/Mum/2008 dated 30 May 2012)(Mum)

In the absence of specific valuation of assets, liabilities and goodwill, depreciation on goodwill created in the books of account at the time of amalgamation is not allowable

The taxpayer is a company engaged in the business of providing technical consultancy services. A wholly owned subsidiary (WOS) of the taxpayer was amalgamated with the taxpayer. The taxpayer accounted for the Scheme under the purchase method prescribed under Accounting Standard (AS) 14 dealing with amalgamation and recorded the assets and liabilities received from the WOS at their respective book values. The scheme of amalgamation provided that the excess of taxpayer's investment in WOS (which would stand cancelled on amalgamation) over the value of net assets taken over from WOS represents goodwill. In the return of income the said goodwill was treated as commercial rights and depreciation was claimed under Section 32(1)(ii) of the Act. The primary asset of the WOS was land and had no intangible assets. The assessment was completed under Section 143(3) of the Act inter-alia disallowing depreciation claim on goodwill.

The Mumbai Tribunal was of the view that AS 14 does not support the contention of the taxpayer that the investment by the taxpayer over the net assets taken over should be treated as goodwill. It was held that unless the fair valuation of assets, including any goodwill, is carried out and investment is earmarked towards purchase of goodwill, there is no question of apportioning any amount of consideration towards purchase of goodwill. The consideration in the form of cancellation of investments cannot be said to have been made for purchase of assets at book value, when the fair value of each asset and liability is much higher. Fair value of the primary asset being land should have been considered. The Tribunal has observed that if the taxpayer had paid more than the fair market value of assets then the company could have a case to claim that certain amounts were incurred for goodwill.
In the absence of such exercise, there was no goodwill in the nature of commercial rights purchased by the taxpayer. It was only a book entry which was only another way of disclosing the intrinsic value of the fixed asset of the company. The Tribunal also ruled that the argument of the Scheme being sanctioned by the High Court was not of any help as the issue on hand was not before the court. Further the decision of the Delhi High Court in the case of CIT vs. Hindustan Coco Cola Beverages P. Ltd. [2011] 331 ITR 192 (Del) was distinguished on facts.

DCIT v. Toyo Engineering India Ltd. (ITA No. 3279/Mum/2008 dated 25 May 2012)(Mum)

Section 10AA of the Act is a deduction provision hence Section 14A disallowance is not applicable to Special Economic Zone income; Rule 8D is applicable from AY 2008-09 onwards

The taxpayer earned dividend income from mutual funds during the Financial Year (FY) 2006-07. In its return for AY 2007-08, the taxpayer claimed exemption for dividend income, but did not make any disallowance under Section 14A of the Act. The AO computed disallowance under Section 14A of the Act by applying Rule 8D of the Income-tax Rules, 1962 (the Rules). Inter alia while computing the disallowance as per Rule 8D of the Rules based on average investments, the AO considered not only the investment yielding exempt dividend income but also investment in a Special Economic Zone (SEZ). The AO observed that since SEZ income was covered under 'Chapter III – Incomes which do not form part of total income' it was also to be considered for disallowance under Section 14A of the Act.

The Mumbai Tribunal observed that the income of a developer from SEZ operations was deductible under Section 80-IAB as well as Section 10AA and under both these provisions legislature had used the word 'deduction' and not `exemption'. In spite of Section 10AA of the Act falling in 'Chapter III' it was still a 'deduction' provision. The Tribunal thus held that disallowance under Section 14A of the Act was contemplated in respect of exempt income and not income which was eligible for deduction under any relevant provision and hence it would be impermissible to mix both the deduction and exemption provisions and then take them in one stride for computing disallowance under Section 14A of the Act. Therefore, disallowance under Section 14A

of the Act was not applicable to SEZ income. Further the Tribunal relying on the decision of Bombay High Court in the case of Godrej & Boyce Mfg Co Ltd [TS-125-HC-010(BOM)] also held that Rule 8D of the Rules was applicable from AY 2008-09 and onwards.

Meditap Specialities Private Limited v. ACIT [TS-393-ITAT-2012(Mum)]

Provisions of Section 50C of the Act would be applicable to the transfer of depreciable capital assets covered under Section 50 of the Act

During the AY 2006-07, the taxpayer sold a flat for a consideration of INR 0.85 million. The taxpayer had claimed depreciation under Section 32 of the Act (on a Straight Line Method basis) on the said flat. Since the written down value (WDV) of property was less than the sale consideration, the resulting short term capital gain was offered to tax under Section 50 of the Act. The AO, in the course of assessment proceedings, noticed that the value of the property according to the stamp duty valuation was INR 1.767 million, which was higher than the sales consideration. Applying the provisions of Section 50C of the Act, the AO treated the difference between the deemed sale consideration, i.e. the stamp duty valuation, of INR 1.767 million and the cost of acquisition of INR 0.546 million as short term capital gains. The CIT(A) affirmed the stand of the AO by following the decision of Special Bench of the Mumbai Tribunal in the case of ITO v. United Marine Academy [2011] 138 TTJ 129 (Mum)(SB).

The Indore Tribunal observed that the deeming fiction in the case of Section 50 of the Act modifies the term 'cost of acquisition' used in Section 48 of the Act for the purpose of computing the capital gains arising from the transfer of depreciable assets. The deeming fiction created in Section 50C of the Act modifies the term 'the full value of consideration received or accruing as a result of transfer of the asset' used in Section 48 of the Act for the purpose of computing the capital gains arising from the transfer of capital asset consisting of land or building or both. The deeming fiction created in Section 50C of the Act operates in a specific field which is different from the field in which Section 50 of the Act is applicable and there is nothing to prevent the application of both the legal fictions in a given case. There is no conflict even in a case in which two legal fictions operate in different fields. If there was any legislative intention to exclude the applicability of the provisions of Section 50C of the Act to cases involving transfer of land and building covered by Section 50 of the Act, this could have been provided for in the provision of Section 50C of the Act. Further, under the provisions of Section 50C of the Act there is no distinction made between a depreciable asset and a non-depreciable asset and thus, it cannot be said that the said provision is not applicable in a case of transfer of depreciable asset which is covered by the provisions of Section 50 of the Act. Thus, it was held that the provisions of Section 50C of the Act are applicable to transfer of depreciable asset covered by Section 50 of the Act and the capital gain arising there from has to be computed by adopting the stamp duty valuation.

ACIT v. ETC Industries Ltd. (ITA No. 134/ Ind/2012 dated 10 May 2012)(Ind)

Transfer of shares by a holding company to its director hit by Section 79 of the Act. The holding company held shares on its own behalf and not as the beneficial owner of the director

The taxpayer company had reported brought forward business loss for AY 1998-99. The taxpayer company claimed set-off of the said brought forward business loss against the income for AY 2006-07. From the shareholding pattern of the taxpayer, the AO observed that as on the year ending 31 March 1998, Concept Reality & Securities Limited held 1,22,280 equity shares, being 58.12 percent of the total capital whereas as on 31 March, 2006 the said company did not hold even a single share in the company. The AO held that there was a change in the shareholding pattern of the applicant company from the year in which loss was incurred i.e. AY 1998-99 and the year in which set-off of loss was claimed i.e. AY 2006-07 and denied the set off of brought forward loss by invoking provisions of Section 79 of the Act.

The Mumbai Tribunal rejected the taxpayer's argument that the shares were held by the company as a beneficial owner by stating that a person is said to be a beneficial owner of shares when they are held by someone else on his behalf, meaning thereby that the registered owner is different from the actual or the beneficial owner. Where the shares are not so held by one for and on behalf of another, the concept of beneficial ownership cannot be invoked. Further Mumbai Tribunal rejected the argument of cross gifts between family members on the ground of lack of necessary evidence to prove the same.

Thus, the Tribunal held that the taxpayer was not entitled to carry-forward and set-off business loss under Section 79 in view of the change in shareholding. In so far as the taxpayer's argument that change in the shareholding pattern took place in an earlier year and not the previous year relevant to the AY under consideration was raised, the Tribunal remanded the matter back to the AO to examine the year of change in shareholding, without ruling on the merits.

Tainwala Trading and Investments Company Limited v. ACIT (ITA No.5120/Mum/2009 dated 6 June 2012)(Mum)

Non-compete fee received along with transfer of shares is liable to tax as business income

The Mumbai Tribunal held that non-compete fees of INR1,161 per share received simultaneously with the transfer of shares is liable to tax as business income under Section 28(va) of the Act and not as capital gain as held by the CIT(A).

Sterling Re-rolling Mills Pvt. Ltd. v. ACIT (ITA No.2793/Mum/2010)(Mum)

Non- compete fee or Goodwill

The taxpayer sold its training division to its sister concern for INR 8,942.1 million and claimed INR 5,442.1 million to be towards brand, Intellectual Property Rights (IPR) and non-compete fees, which were not taxable in the relevant AY 2000-01. The taxpayer had not considered any amount towards goodwill. The AO treated the amount of INR 3.174 million as goodwill and brought this to tax as short-term capital gains under the provisions of Section 55(2)(a)(ii) of the

Act.

The Tribunal held that when sister companies are under same management, having a common chairman/CEO, there is no de-facto situation which demands payment of a non-compete fee by the taxpayer's sister concern to the taxpayer company and held it to be an attempt to suppress the true colour of the payment towards the goodwill and held that part of the consideration was towards Goodwill.

It was also held that Section 50 of the Act does not automatically apply to a depreciable asset but applies to those assets on which depreciation was allowed and the block of assets reflected the WDV. Since depreciation was not allowed to the taxpayer on goodwill, it was held to be a long-term capital asset.

Pentamedia Graphics Ltd. v. DCIT [2012] 22 taxmann.com 216 (Chen)

Sale of unlisted shares by promoters is taxable as business income

The taxpayer sold 45 percent shares in an unlisted company to its co-promoters. The agreement to sell included clauses relating to non-compete commitments. However, the taxpayer did not allocate any portion of the consideration towards non-compete fees.

The Tribunal, on the facts of the case, held that the profit on substantial sale of unlisted equity shares by the promoters of the company will be treated as business income under Section 28(va) of the Act and not as capital gains in the hands of the transferor.

Sumeet Taneja v. ACIT (ITA No.1101/Chd/2009)(Chd)

Profit in the hands of partners considered as exempt income for disallowance under Section 14A of the Act

The Special Bench of the Tribunal held that the share of profit received by a partner from a firm, which is exempt in the hands of such partner under Section 10(2A) of the Act, attracts the provisions of Section 14A of the Act. It was also held that depreciation cannot be considered as an expenditure to be disallowed under the provisions of Section 14A of the Act.

Shri Vishnu Anant Mahajan v. ACIT (ITA No. 3002/Ahd/2009)(Ahd)

The Bangalore Tribunal upheld significance of a robust Functional, Assets and Risk analysis for business characterization of an entity and selection of comparables

The taxpayer's parent company made direct sales to customers in India. The taxpayer sourced spare parts from parent company and facilitated their delivery to the parent company's customers and was compensated with a mark-up on the landed cost of the imported spares and a mark-up on the logistics, warehousing and other expenses in providing these services.
The taxpayer selected the Transactional Net Margin Method (TNMM) with logistic services providers as comparables. The TPO re-characterized the functional operations of the taxpayer to a distributor/trader, selected comparables

accordingly and adopted the Resale Price Method (RPM) to determine the Arm's Length Price (ALP). At the appellate level the taxpayer contended that it was holding spare parts only as a custodian of the parent company and is responsible for delivery of the spares to customers of parent company in India and functions as a 'product replacement service provider'. Such functions are comparable to clearing and forwarding (C&F) agent/logistics service providers.

The Tribunal held that the taxpayer cannot be characterized as a trader/distributor as the taxpayer had no right to fix the resale price or to choose customers and merely acted as the custodian of goods imported till the goods were delivered to the client. The Tribunal further rejected the RPM and upheld the TNMM. The Tribunal acknowledged the importance of Functional, Assets and Risk (FAR) analysis in conducting the benchmarking exercise for selecting the comparables and held that the services provided by the taxpayer were akin to that of C&F agents who are responsible for the safe keeping and transport of the goods to the clients on the direction of the principal.

CISCO Systems (India) Private Limited v. DCIT (I.T.A. No.1410/Bang/2010)(Bang)

Chennai Tribunal held that the concepts of 'ALP' and 'ordinary profit' are different and any excess profit over arm's length profit cannot be the basis for denial of tax holiday deduction under Section 10A of the Act

The taxpayer was engaged in back office operations and enjoyed tax holiday benefits under Section 10A of the Act. The Transfer Pricing Officer (TPO) accepted the transactions to be at arm's length and stated that profit reported by the taxpayer were above the arm's length profit. The AO held that the excess profit worked out in the context of Transfer Pricing (TP) was not entitled for deduction under Section 10A of the Act and passed a draft order denying deduction under Section 10A of the Act. At the Appellate level the taxpayer contended that the provisions of Section 10A(7) and Section 80-IA(10) of the Act, do not state that 'ordinary profits' are to be computed with reference to TP provisions. The ALP has to be determined using the most appropriate method as per the TP provisions whereas 'ordinary profits' is a commercial concept. As no TP adjustment was recommended by the TPO, the AO had no jurisdiction to pass a draft assessment order and the final order passed by the AO was barred by limitation.

The Tribunal ruled that the anti-avoidance provisions contained in Chapter X of the Act are a separate code enacted for the specific purpose of computing income from international transactions having regard to the ALP. Any adjustment that the AO would like to make with reference to the income would have to be made independent of the order of TPO. Further, the Tribunal held that ALP cannot be used to determine 'ordinary profits' for the purpose of Section 10A(7) of the Act.

Visual Graphics Computing Services (India) Pvt. Limited v. ACIT (ITA No.2073/Mds/2011) (Mds)

Delhi Tribunal held that the taxpayer had placed substantial evidence on record and successfully demonstrated benefits received from management services rendered by an Associated Enterprise

The taxpayer entered into various international transactions and applied the TNMM to determine their ALP. The TPO accepted the ALP of all the international transactions using the TNMM except management service fee and coordination cost. The TPO characterised these as intra group services received from the Associated Enterprise (AE) and computed the ALP of these payments as 'Nil'. The Dispute Resolution Panel (DRP) held that due to some evidence submitted, it cannot be said that no services were received and directed the TPO to verify the costs of services based on appropriate allocation keys. The TPO gave ad hoc relief of 40 percent.

At the Appellate level the taxpayer contended that illustrative documentary evidences were submitted to the TPO substantiating and demonstrating description of services, explanation on the type of services received, how these services have been received and in what manner and to what extent benefits have been derived by the taxpayer. The payment has been quantified by an allocation methodology adopted by the group companies.

The Tribunal held that the taxpayer had placed substantial evidence on record and had been able to establish the nature and benefits of services provided by the AE and the Revenue had not brought out anything to negate such evidence. Also, only a business expert can evaluate the true intrinsic and creative value of such services and it is difficult to accurately measure these benefits in terms of money value separately. The taxpayer is engaged in only one class of business and thus entity level benchmarking using the TNMM shall be the most appropriate for all international transactions with AEs.

McCann Erickson India Pvt. Ltd. (ITA No. 5871/Del/2011)

Mere transfer of money from one bank account (overseas) to another bank account (in India) of an individual cannot be considered a receipt of income

The Kolkata Tribunal in a recent case has held that the residential status of an individual returning from UK to India remains the same for the entire tax year. Accordingly, if the individual qualifies as Not ordinarily Resident (NOR) in the tax year in which such individual returns permanently to India the capital gain from sale of property in the UK where the sale consideration is first received in a UK bank account and subsequently transferred to an Indian bank account, is neither received or deemed to be income received in India.

A NOR is taxable in India on income accruing or arising outside India only if such income is received or is deemed to be received in India or where it is derived from a business controlled or a profession set up in India.

Dr. Sarmishtha Mukherjee v. ITO [ITA No 743/Kol/2010 (AY 2006-07)][Kol]

Exemption on reinvestment in property available in respect of deemed capital gains, arising on sale of property whose cost was utilized for claiming exemption on sale of an earlier long term asset

An exemption is available in respect of long term capital gains (LTCG) arising from the sale of the original capital asset (not being a residential house), where the net sale proceeds is invested in the purchase of a new residential house (new asset) within the prescribed time limits. Where the new asset is sold within a period of three years from the date of its purchase, the LTCG claimed as exempt is deemed to be a long-term capital gain taxable in the previous year in which such new asset is transferred.

Recently, the Chennai Tribunal has held that the taxpayer was eligible to claim an exemption in respect of such deemed LTCG arising from the sale of the new asset, by investing the sales proceeds in another new residential house within the specified period.

Further, in the absence of evidence submitted by the taxpayer, the sale consideration reported in excess of the registered value of the property was held to be taxable as the taxpayer's "unexplained income".

ACIT v. Ms. Sultana Nazir [2012] 21 Taxmann.com 385 (Chen)

Decisions of Authority for Advance Rulings

Income from composite contract entered by a consortium including Offshore supplies fully taxable in India considering the Consortium as an AOP

The applicant, a tax resident of France, along with other members formed a consortium and obtained a contract from Bangalore Metro Rail Corporation Limited (BMRC) for design, manufacture, supply, installation, testing and commissioning of signaling/train-control and communication systems.

The question for consideration before the Authority for Advance Ruling (AAR), inter alia, was whether the amounts received by the applicant for offshore supply i.e. supply of overseas plant and materials and offshore designing and training of personnel for operation and maintenance would be taxable in India under the provisions of the Act and India-France tax treaty.

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

- The tender floated by BMRC was a composite tender for installation and commissioning of a signaling and communication system;
- A contract for the installation and commissioning of a project cannot be split up into separate parts as consisting of independent supply of goods and for installation at the work site;

- The basic principle in interpretation of a contract is to read it as a whole and to construe all its terms in the context of the object sought to be achieved and the purpose sought to be attained by implementation of the contract [relying on the rulings in the case of Linde A.G. (AAR No. 962 of 2010) (AAR) and in Roxar Maximum Reservoir Performance WLL (AAR No. 977 of 2010)(AAR)];

- The AAR relied on the decision of the Supreme Court in the case of Vodafone International Holdings BV [2012] 341 ITR 1 (SC) wherein the Apex Court observed that it is the task of the Revenue/Court to ascertain the legal nature of the transaction and while doing so it has to 'look at' the transaction as a whole and not to adopt a dissecting approach;

- Accordingly, the contract could not be split-up to treat a part of it as confined to offshore supply of equipment not capable of being taxed in India; and

- Therefore, the income from the contract had to be taxed as a whole, under the Act and the tax treaty. The AAR also held that the applicant along with the other members of the consortium were liable to be taxed as an 'Association of Person' (AOP) in respect of the income arising from the contract.

Alstom Transport SA [AAR No. 958 of 2010] [AAR]

Subsidiary in India attending to the business of the Multinational Group constitutes a Permanent Establishment in India

The applicant, a tax resident of Singapore, was engaged in the business of door-to-door express shipments by air and land and performing related transport services. The applicant entered into an agreement with one of its group company in India for movement of packages to and from India i.e. inbound and outbound.

The question for consideration before the AR, inter alia, was whether there was a Permanent Establishment (PE) of the applicant in India under the India-Singapore tax treaty.

The AAR, based on the facts of the case, observed and held as follows:

- The business of the Aramex Group as regards the articles sent to India could not be performed without the association of the Indian company;

- The Indian company had a fixed place of business and branches in India and business of the Aramex Group was being carried on by the Indian company i.e. obtaining order, collecting articles and transporting them to a destination so as to be taken over and delivered by the Group. Thus, the Indian company was a fixed place PE of the Aramex Group in India under Article 5(1) of the tax treaty;

- The Indian company secured orders in India wholly for the Aramex Group and had the right to conclude contracts for the Group for its express shipment business. Therefore, the Indian company was also an Agency PE of the Aramex Group under Article 5(8) of the India-Singapore tax treaty;

- The exception with respect to control over a subsidiary not constituting a PE under Article 5(10) of the tax treaty was not applicable as the whole business in India of the Group was carried on within the geographical contours of India. Further, mere description of the Indian company as an independent entity or non-exclusive agent was not good enough; and

- Therefore, the Indian company constituted a PE of the applicant in India under Article 5 of the tax treaty and the receipt from outbound and inbound consignments attributable to PE in India was liable to tax in India.

Aramex International Logistics Private Limited [AAR No. 1061of 2011][AAR]

Notifications/Circulars/ Press Releases

India and Netherlands sign protocol amending the tax Treaty

India and Netherlands have signed a protocol to amend Article 26 of the tax treaty concerning exchange of information. The amended tax treaty will allow exchange of banking information as well as information without domestic interest and will allow use of information for non-tax purpose if allowed under the domestic laws of both the countries, after the approval of the supplying state.

Press release dated 25 May 2012

India notifies the tax treaty with Norway

India and Norway signed a revised tax treaty on 2 February 2011. The revised tax treaty has now been notified and shall be given effect to in India in respect of income and on capital gain arising in any fiscal year beginning on or after 1 April 2012.

Notification No. 24/ 2012 dated 19 June 2012

India notifies tax treaty with Nepal

India and Nepal signed a revised tax treaty on 27 November 2011. The revised tax treaty has now been notified and shall be given effect to in India in respect of income derived in any fiscal year beginning on or after 1 April 2013.

Notification No. 20/ 2012 dated 12 June 2012

India and Bahrain signs an agreement for exchange of information with respect to taxes

India and Bahrain signed an agreement for exchange of information with respect to taxes on 31 May 2012. The agreement, inert alia, provides for effective exchange of information including banking information between the tax authorities of the two countries. The agreement also provides that the exchange of information shall be on request and without regard to domestic interest.

Press release dated 1 June 2012

No tax to be deducted at source under Section 194J of the Act from 1 July 2012 on software acquired from a resident if such software is

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acquired without any modifications and tax has already been deducted

No deduction of tax shall be made on payment to a transferor, being a resident, by the transferee for acquisition of software, where -

(i) The software is acquired in a subsequent transfer and the transferor has trans ferred the software without any modification,

(ii) Tax has been deducted-

(a) Under Section 194J on payment for any previous transfer of such software; or

(b) Under Section 195 on payment for any previous transfer of such software from a non-resident, and

(iii) The transferee obtains a declaration from the transferor that the tax has been deducted either under sub-clause (a) or (b) of clause (ii) along with the Permanent Account Number of the transferor.

Notification No. 21/2012 [F.No.142/10/2012-SO (TPL)] S.O. 1323(E), Dated 13-6-2012]

India and Finland sign Social Security Agreement

India has recently signed a social security agreement (SSA) with the Republic of Finland. This is the twelfth SSA signed by India. India has already signed SSAs with Belgium, Germany, Switzerland, France, Luxembourg, the Netherlands, Hungary, Denmark, the Czech Republic, Republic of Korea and Norway. Such SSAs generally help employers and their mobile employees in avoiding double social security contributions.

Source: Pib.nic.in

II. SERVICE TAX

Tribunal cases

Service tax applicable on "construction services" provided to the land owner in a Joint Development Agreement

The taxpayer, a real estate developer, entered into Joint Development Agreements ("JDAs") for constructing residential units on lands owned by third parties. As per the JDAs, the developer transferred a specified number of constructed residential units in exchange for land provided by land owners.

The Revenue demanded service tax on "construction services" provided to land owners in exchange for transfer of rights in land.

The taxpayer stated that service tax was inapplicable due to the absence of service provider-service recipient relationship between the taxpayer and land owners. It was contended that the relationship between the two parties was only in the nature of a joint venture for profit.

The Tribunal noted that:

- The JDA did not specify any terms indicating that the taxpayer and land owners took risks jointly or carried out any common activity.
- Further, there was no participation of land owners in construction of flats as such.

Hence, the argument of joint venture was dismissed.

It was thereby concluded that once undivided share in land was transferred, the land owner became like any other prospective buyer for whom construction was carried out by the taxpayer, except that the land owner had a guaranteed right to get his share of the constructed flats. Therefore, service tax would be applicable. Further, considering the area allotted to the land owners, it could not be said that the flats were meant for personal use of the land owners. Hence, exclusion from the definition of residential complex was also unavailable.

Additionally, the taxpayer's argument that construction undertaken was classifiable as work contract services and liable to tax only from June 1, 2007 was also rejected on the ground that these services cover certain activities which were earlier covered individually by entries in section 65(105) of the Finance Act, 1994, and this cannot be understood as an altogether new entry.

Accordingly, the Tribunal upheld the demand of service tax on construction services provided by the taxpayer to land owners under the JDAs.
LCS City Makers Pvt Ltd Vs CST, Chennai – (2012-TIOL-618) (Chennai Tribunal)

Training provided to employees of purchasing entity while selling goods does not qualify as Commercial Training or Coaching services

The taxpayer provided training to employees of the buyer of its machinery. The department sought to tax this activity as 'commercial training or coaching services' ("CTC services").

The Tribunal held that neither was training the primary commercial activity of the taxpayer, nor was any commercial activity of the nature defined in the service tax law carried out by the taxpayer. Further, training was provided only to buyers of the taxpayer's machinery, and not to any outsiders. Therefore, such training does not qualify as CTC services for service tax purpose. *CCE, Chandigarh Vs Punjab Communication Ltd – 2012 (5-TMI 490) (Delhi Tribunal)*

Individual components of a composite contract cannot be artificially split to claim tax benefit

The taxpayer commissioned and installed Wind Turbine Generators ("WTGs") manufactured and supplied to customers by Suzlon Energy Limited ("SEL"). As part of this activity, the taxpayer supplied and installed some electrical items like cables and wires for executing the project.

The taxpayer claimed abatement benefit on the amount attributable to electrical installations under Notification 19/2003-ST dated August 21, 2003, which states that, in case of a contract for erection, commissioning or installation services along with supply of plant, machinery or equipment, service tax would be payable on 33% of the value charged. This abatement was claimed on the basis that supply and installation of electrical items was separate and distinct from commissioning of the WTGs supplied by SEL.

The Tribunal held that although the taxpayer raised separate invoices for electrical installation and commissioning of the WTGs, it would be incorrect to split the contract since the taxpayer was undisputedly providing integrated services of "erection, commissioning and installation" of wind-farm projects, with electrical installations being essential for commissioning the project. Therefore, the contract was essentially a composite contract for services, with electrical installations being incidental to completion of the project.

Further, since the taxpayer did not supply any plant, machinery or equipment, but provided only the composite service of erection, commissioning and installation, benefit of abatement would be unavailable. *Suzlon Infrastructure Vs CCE, Pune III – 2012 (35-STT-331) (Mumbai Tribunal)*

Refund of unutilized CENVAT credit on closure of unit

The Larger Bench examined whether the taxpayer, upon closure of a production unit, was entitled to claim refund of unutilized MODVAT/ CENVAT credit in cases where duty was paid through PLA account, despite the taxpayer having sufficient MODVAT/ CENVAT balance.

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It should be noted that the case was referred to the Larger Bench due to non-existence of provisions in the Central Excise Act, 1994 (the "Excise Rules") permitting the same.

While answering the question is favor of the Revenue, the Tribunal stated as follows:

- There is no specific provision in the Excise Rules to grant refund of unutilized CENVAT credit upon closure of a unit. In the absence of such an express grant, entitlement to refund cannot be assumed.

- The decision in Gauri Plasticulture (P) Ltd v CCE [2006 (202) ELT 199 (Tribunal-LB)], relied on by the taxpayer was inapplicable since the refund was "otherwise due" in that case.

- The Larger Bench, in Gauri Plasticulture held that wherever a taxpayer was unable to utilize CENVAT credit due to an objection raised by the Revenue, and for that reason, had to pay duty in cash; on the dispute being ultimately decided in the taxpayer's favor, refund of credit could be permitted in cash upon closure of unit. Hence, unlike the present case, the Gauri Plasticulture decision dealt with a situation where refund becomes "otherwise due" to the taxpayer.

- The other circumstance permitting refund of MODVAT/ CENVAT credit is export of goods/ services by the taxpayer. The taxpayer's case did not pertain to refund on account of export either.

Hence, no refund could be permitted.
Steel Strips Vs CCE, Ludhiana – 2012 (26-STR-270) (Delhi Tribunal – Larger Bench)

Retention money includable in value of works contract services

The taxpayer was a provider of works contract services. Out of the gross value charged by the taxpayer, the service recipient retained some amount to be paid at a later date upon successful completion of the contract. For the purpose of calculating taxable turnover, the taxpayer claimed deduction of this retention money (which accrued in the taxpayer's books, but was to be received only at a later date).

The Revenue demanded service tax on retention money (at the time of accrual itself) on the basis that it formed part of the taxable turnover.

The Tribunal held that as per Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax), Rules, 2007, retention money is not a permissible deduction from taxable turnover, and that service tax is payable on the 'gross turnover'. Further, the retention money was only a deferred payment and the taxpayer was entitled to receive the gross amount charged in the RA Bill at a later date. Therefore, it was held that service tax was payable on retention money as well.
M/s Ramky Infrastructure Ltd - V Satya Murthy Joint Venture M/s Maytas - Nagarjuna Construction Company Ltd Joint

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Venture Vs CST, Hyderabad – (2012-TIOL-613) (Bangalore Tribunal)

Revenue sharing arrangements prima facie do not attract service tax – Stay order

The taxpayer was a franchisee of BCCI-IPL and received payment from BCCI-IPL as its share in receipts towards media rights and other income collected centrally by BCCI-IPL. The key issue in appeal was whether the amount received by the taxpayer would be liable to service tax as business support services provided to BCCI-IPL.

The Tribunal prima facie accepted that BCCI and the taxpayer are jointly engaged in a business venture, where there may be profit or loss. Hence, relying on the Circular No 109/03/2009-ST dated February 23, 2009, which states that there is no provision of taxable services in case of revenue sharing arrangements between film distributors and theatre owners, the Tribunal waived pre-deposit and granted stay.
KPH Dream Cricket (P) Ltd Vs CCE Chandigarh – 2012 (26-STR-362) (Delhi Tribunal)

Service tax liability on import of services cannot be discharged through CENVAT credit – Stay order

The taxpayer, a recipient of taxable services from service providers located outside India, contended liability on import of services could be discharged by utilizing available CENVAT credit, since it was deemed a "service provider" for reverse charge purposes.

In a stay application hearing, the Tribunal ordered pre-deposit and made the following prima facie observations:

- Output service, for purposes of CENVAT Credit Rules, 2004 (the "CENVAT Rules"), is understood as any taxable service provided by the provider of taxable service to a customer, client etc.

- While the taxpayer satisfied the first part of this definition, ie, it was a deemed provider of taxable service, the second part of the definition was not fulfilled. Therefore, services imported from overseas did not qualify as output services.

- Further, while the Finance Act, 1994 ("the Finance Act") contains provisions deeming the taxpayer as 'provider of output services', no similar provision exists for deeming a recipient of taxable services. The deeming fiction introduced for the purpose of paying service tax, cannot be extended to the mode of payment of tax.

- Additionally, it was observed that the imported services would qualify as the taxpayer's input service under the CENVAT Rules. Consequently, the service could not qualify as the taxpayer's output service and input service at the same time.

- As per Rule 3(4) of the CENVAT Rules, the eligibility to utilise credit is only against "service tax on any output service", and as the services received do not qualify as "output

service" (specifically in light of the deletion of the Explanation under the same), CENVAT credit prima facie cannot be utilized for such liability.

Hence, pre-deposit was ordered in the above matter.
Sangam India Ltd Vs CCE, Jaipur-II – 2012 (26-STR-241) (Delhi Tribunal)

Toll fee collected by NHAI prima facie falls within the purview of service tax – Stay Order

The taxpayer collected toll on behalf of the National Highway Authority of India ("NHAI"). The taxpayer retained a fixed sum and remitted the rest of the earnings from toll collections as consideration towards services. The department sought to levy service tax on these toll collections under the category of "Business Auxiliary Services".

The taxpayer contended that services provided to NHAI were in the course of NHAI discharging its sovereign functions and accordingly, no service tax was applicable. Further, it was contended that the NHAI develops and maintains roads and thus this activity cannot be construed to be a 'business activity'.

The Tribunal stated that prima facie the NHAI is not a constitutional body/ authority set up under an act of the Parliament but is only a statutory authority. Therefore, the services provided by NHAI are not a sovereign function, and would thus fall within the purview of service tax levy.

It was also noted that as per section 10 of the NHAI Act, 1998, NHAI was required to discharge its functions on business principles. Hence, it could not be construed that the activity carried out by NHAI is not a business activity and prima facie the functions sub-contracted to the taxpayer would also be liable to service tax. Basis this, the taxpayer was directed to pre-deposit part of the amount demanded.
Ideal Road Builders Pvt Ltd Vs CST, Mumbai – 2012 (26-STR-316) (Mumbai Tribunal)

Notifications & Circulars

Circular clarifying scope of Business Support services ("BSS")

Agricultural Produce Marketing Committee ("APMC") is a statutory body issuing licenses to dealers, traders and other buyers of agricultural produce for a fee, which is used by the APMC towards development and maintenance of agricultural market infrastructure.

The CBEC has clarified that the above activity does not fall under BSS since these are not in the nature of 'outsourced activities'. It cannot be held that the licensees have outsourced the development and maintenance of the agricultural market to APMC, which could have been otherwise undertaken by them. Further, APMC is set up under a statute, and development and maintenance of agricultural market infrastructure is for the benefit of all users, and not restricted to license holders alone.

Hence, APMC cannot be said to be rendering BSS.

Circular No 157/8/2012-ST dated April 27, 2012

Supplementary invoice to be issued to recover the differential tax on account of change in rate of service tax

The CBEC has clarified that in respect of the 8 services specified under Rule 7 of the of Taxation Rules 2011, if the invoice issued mentions the erstwhile rate of 10% service tax, but the applicable rate of service tax is 12%, as per the above mentioned Rule, the differential service tax is to be recovered by way of issue of a supplementary invoice. Further, CENVAT credit may be availed on the basis of this supplementary invoice by the service recipient.

Circular No 158/9/ 2012-ST dated May 8, 2012

III. VAT/ CST

High Court Decisions

As the agreement for sale executed under the Maharashtra Ownership of Flats Act (MOFA) conveys right, title and interest in the flat to the purchaser, it is in the nature of a works contract

In the present case, the taxpayer filed a writ petition before the High Court ("HC") of Maharashtra stating that the amendment of section 2(24) of the Maharashtra Value Added Tax Act, 2002 ("MVAT Act") by the State Legislature has brought within the purview of the expression "sale", an agreement for the building and construction of immovable property which is not a works contract.

The taxpayer inter alia contended that the amendment to section 2(24) is beyond the legislative competence of the State Legislature as the State Legislature has attempted to split a contract of sale of an immovable property into three parts: ie (i) a contract for supply of goods and materials; (ii) a contract for supply of labour and services; and (iii) the cost of the immovable property. The taxpayer contended that a contract for the sale of immovable property does not fall within the ambit of Article 366(29A) of the Constitution and therefore the State Legislature cannot expand its scope by a deeming fiction that was brought in through an amendment.

Further, the taxpayer stated that in case of a works contract the transfer of property in the goods takes place only as a result of accretion and hence, where a contract involves a transfer of immovable property no accretion take place. Therefore it cannot be treated as a works contract. The taxpayer also contended that tax has already been paid on the transaction between the contractor and the promoter and therefore, taxing the sale transaction between buyer and the promoter would be double taxation of the same deemed sale.

In response to the above, the Revenue authorities inter alia contended that the expression 'works contract' is not restricted to contracts that have only two components ie the sale of material and goods and the sup-

ply of labour and services. Certain contracts also involve sale of land.

Further, in an agreement which is governed by the MOFA, a conveyance of the interest in the flat is created at the stage of the execution of an agreement under section 4 of the MOFA. The doctrine of accretion is always subject to a contract to the contrary. The provisions of the MOFA contain a statutory stipulation to the contrary where the accretion to the property accrues to the benefit of the flat purchaser.

Hence, the main issue before the HC was whether an agreement (governed by the MOFA) is an agreement of sale of immovable property simplicitor, in light of the provisions of MOFA. Further, whether the amendment to section 2(24) of MVAT Act, is within the constitutional framework envisaged under Article 366(29A) of the Indian Constitution?

In light of the above, the HC held as follows:

- The key test is whether the contract is principally for the transfer of a property in a chattel as a chattel to the buyer or whether it is for carrying out work by the bestowal of labour and service and materials are used in the execution of the work.

- As a result of the statutory provisions, an agreement which is governed by the MOFA is not an agreement simplicitor involving an ordinary contract under which a flat purchaser has agreed to take a flat from a developer but is a contract which is impressed with statutory rights and obligations. There is hence a statutory recognition of the right and interest created in favour of the purchaser upon the execution of a MOFA agreement.

- So long as the definition of 'sale' under State VAT legislations covers 'works contracts' which are within the ambit of Article 366(29A) of the Indian Constitution, the definition would cover contracts which are not mere agreements simplicitor for transfer of immovable property but recognizes transfer of rights and interests in favour of the purchaser by application of the principle of accretion. Works contract have numerous variations and it is not possible to accept the contention that a contract for work in the course of which title is transferred to the flat purchaser would cease to be a works contract. Hence, Section 2(24) remains within constitutional boundaries in the context of works contract, as it covers those transactions where there is a transfer of property in goods, whether as goods or in any other form, involved in the execution of a works contract.

- Section 45(4) of MVAT Act lays down that a principal contractor and a sub-contractor are to be regarded as principal and agent, jointly and severally liable to pay VAT and that sub-contractor need not pay VAT if principal contractor has paid tax and vice versa. Therefore, the MVAT provisions clearly cater to take care of the issue of plurality of deemed sales and the resulting double taxation.

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Maharashtra Chamber of Housing Industry and Others Vs State of Maharashtra and Others – 2012 (VIL-35) (Bombay HC)

When the parties to the contract have agreed on a consolidated price inclusive of tax, and when there was no material to find on which portion of the consideration the dealer collected the tax payable, no deduction on account of tax collected can be availed and the tax so collected will form part of the turnover

The taxpayer is engaged in retreading of tyres on a works contract basis. For executing the said works contract, the taxpayer charged a consolidated amount which it claimed to be inclusive of taxes. Since the taxpayer had not maintained separate accounts in respect of goods and labour charges, the taxpayer apportioned 70 per cent of the amount received towards goods based on the VAT law and disclosed the same as the taxable turnover in the monthly return. The Revenue rejected the same and proceeded to tax the entire amount received as sale of goods as the invoice mentioned that the consideration was inclusive of taxes.

The taxpayer contended that the tax on the turnover of 70 per cent of the contract merited exclusion from the turnover under explanation (1A) to section 2(r) of the Tamil Nadu General Sales Tax Act, 1959 ("TNGST Act"). It also contended that the Revenue has committed a serious error in ignoring the books maintained by the assessee wherein the tax was shown separately.

In response to the above, the Revenue contended that explanation (1A) to section 2(r), allows deduction only if the tax component is shown separately without including the same in the price of the goods. Therefore, when a consolidated amount is charged bifurcation of taxes would not arise. Mere bifurcation of the turnover in the books of accounts would not satisfy the provisions of the TNGST Act.

Hence, the issue before the HC was whether disclosure of the tax amount collected, in the books of accounts, was sufficient compliance of the provisions of the TNGST Act and based on the same, whether the entire turnover should not be subject to tax.

The HC, dismissing the appeal, observed as follows:

- The indivisible works contract showed no bifurcation as regards labour and materials. Even in the accounts, the taxpayer did not have the details on the cost of the materials used to have a deduction of the labour charges from the consolidated price charged. Even for claiming deduction on the labour charges, the taxpayer adopted the statutory percentage only.

- The mere fact of distribution under different heads in the accounts would not qualify for deduction under the TNGST Act.

- The question whether the tax element charged is part of the consideration or not would ultimately depend on how the parties to the

transaction have dealt with what is to constitute a consideration for the sale of goods. When the parties to the contract have agreed on a consolidated price inclusive of tax, it is clear that irrespective of how they make up the bill or the accounts, the entire consideration will be the turnover, and in which event, the question of application of explanation (1A) to section 2(r) of the TNGST Act, does not arise.

Sundaram Industries Limited Vs State of Tamil Nadu – 2012 (50-VST-147) (Madras HC)

The right to obtain a set off is a right conferred by statute and the legislature is lawfully entitled to prescribe the conditions subject to which a set off can be obtained. Condition that purchasing dealer can avail input credit only if VAT is paid by the selling dealer upheld.

In the present case, the taxpayer was engaged in the business of trading in cotton bales. For the year 2009-10, the taxpayer filed its returns and based on the purchases made, claimed input tax credit (ITC) by way of a set off under section 48 of the Maharashtra Value Added Tax Act, 2002 ("MVAT Act"). As the ITC exceeded the tax liability, the taxpayer claimed refund of the excess ITC. The taxpayer substantiated its refund claim by furnishing the purchase invoices.

The Revenue contended that the data submitted by the taxpayer was not in coherence with the purchases made and therefore, the amount eligible for refund was reduced from Rs 21.08 lakhs to Rs 2.17 lakhs, in terms of section 48(5) of the MVAT. In response to the above, the taxpayer challenged the constitutionality of section 48(5) MVAT Act and contended as follows:

- Section 48(5) applies only to a situation involving a variation between the rate of tax mentioned in the schedule and the actual rate contained in an exemption notification;

- Alternatively, if the benefit of a set off is denied in every case because of the non-payment of tax by the selling dealer, the provision will be rendered unreasonable and violative of Article 14 of the Constitution of India;

The Revenue refuted the contentions of the taxpayer and stated as follows:

- Section 48 provides for claiming a set-off. Under section 48(1)(a) a set off can be availed of only where tax is paid and hence section 48(5) is only clarificatory;

- Section 48(1)(a) uses the expression "paid" while section 48(5) uses the expression "actually paid". When a provision of law is constitutional, no question of reading down the provision would arise;

- The power to enact tax legislation includes the power to enact provisions that would prevent the evasion of tax. In enacting the provisions of section 48(5) the State legislature has introduced a provision that would ensure that the benefit

of a set off is granted only where the tax was in the first instance paid into the Treasury. The intention at all material times has been that a set off should be allowed only where the tax has actually been paid into the Treasury.

In response to the above, the HC, upholding the constitutionality of section 48(5), held as follows:

- Section 48(5) uses the expression "actually paid" into the government treasury. The words "actually paid" must receive their ordinary and natural meaning. A set off under section 48(5) would be allowable only to the extent of the tax that has been actually paid into the treasury in respect of the same goods.

- The right to obtain a set off is a right conferred by statute and the legislature while recognizing an entitlement to a set off in certain circumstances is lawfully entitled to prescribe the conditions subject to which a set off can be obtained. A plea of hardship cannot result in the invalidation of a statutory provision in a fiscal enactment which is otherwise lawful.

Mahalaxmi Cotton Ginning Pressing and Oil Industries Vs The State Of Maharashtra & Others – 2012 (VIL-37) (Bombay HC)

Even though no sub contractor deduction is available in the hands of the main contractor, as per mechanism provided in Delhi VAT Act, 2004 ("DVAT Act"), the turnover of the sub-contractor is not taxed in the hands of the main contractor as a mechanism of allowing input tax credit of the tax paid by the sub-contractor to the main contractor and does not result in multiple taxation.

The taxpayer is a contractor who was filing its VAT returns under the DVAT Act after claiming deduction of turnover of the sub-contractors, as the taxpayer had deducted TDS on the same. The department stated that such sub contractor deduction is not permissible as per the provisions of the DVAT Act.

The taxpayer contended that as there is only one transfer of property in goods, ie, between the sub-contractor and the end customer, and as there has been no re-transfer or multiple deemed sales, tax cannot be levied twice on the same transaction. Incidence of levy can happen only once for a particular transaction.

The taxpayer has challenged the constitutional validity of the provisions under the DVAT Act / Rules [section 5(2) and rule 3(2)] on the ground that there is no proper mechanism to compute the taxable turnover after deducting 'turnover of subcontractors' and the provisions do not confirm to the law laid down by the SC in the case of State of Andhra Pradesh Vs Larsen & Toubro Limited [2008 (9-SCC-1) (Supreme Court)] ("L&T Judgement"), where the SC had held that the turnover of the sub-contractor should be deducted from the turnover of the contractor in terms of the

Andhra Pradesh VAT Act / Rules ("APVAT Act / Rules").

Hence, the issue before the HC was whether section 5(2) of the DVAT Act, 2004 and rule 3 2) of the DVAT Rules, 2005 were unconstitutional, essentially on the ground that it does not provide for a proper mechanism to compute the taxable turnover after deducting turnover of sub contractors and does not conform to the principle enunciated by the Supreme Court in the case of the taxpayer itself.

In response to the above, the department argued that each state has different laws and therefore, the L&T judgment in respect of the AP VAT Act would not be applicable in the present case. The department further stated that the turnover of sub-contract is not taxed in the hands of the contractor as the mechanism of allowing input tax credit of the tax paid by the sub-contractor to the main contractor ensures that there is not double taxation.

Further, the DVAT Act and the rules under the DVAT Act provide for the deduction of certain charges in respect of works contract provided books are maintained.

Based on the above, the HC dismissed the writ petitions filed by the taxpayer and observed as follows:

- DVAT Act / Rules do not have a provision similar to APVAT Act [section 4(7) providing a sub-contractor turnover deduction]. Hence, the decision of the SC referred to above, would not be applicable in the present case as it was in the specific context of the APVAT Act / Rules.
- There is no multiple tax under the DVAT Act despite there being no specific provision for deduction of the amount paid to the sub-contractor. This is on the basis of the fact that the DVAT Act / Rules provide for an input tax credit mechanism wherein the tax paid on the sub-contractor's turnover is available to the contractor, thereby, reducing the output tax impact on the contractor to such an extent.
- Therefore, the mentioned provisions of Delhi VAT Act and Rules are not unconstitutional

Larsen and Toubro Limited and Another Vs Union of India and Others (Writ Petition (C) 1907 of 2012) (Delhi HC)

IV. CUSTOMS

Tribunal Decisions

Bank/ financing company are jointly and severally liable to pay customs duty where a joint bill of entry is filed

A bill of entry for import of certain capital goods was jointly filed by a bank/ financing company and the actual importer-cum-taxpayer who availed duty benefits on the import under the 100 percent export oriented undertaking scheme. Subsequent investigations by customs officers revealed that the capital goods had been imported under fraudulent circumstances pursuant to

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mis-declaration(s) rendering the goods liable to confiscation, customs duty, redemption fine as well as penalty. Further to the same, customs duty as well as penalty was sought to be imposed on the bank/ financing company.

In an appeal filed, the bank/ financing company *inter alia* contended that no duty or penalty can be demanded from it as the actual importer-cum-owner of the goods was the taxpayer who caused the mis-declaration/ fraud. Upon a detailed examination of the facts, the Tribunal held as follows:

- There is nothing wrong in fixing duty liability in respect of either of importers who have jointly filed the bill of entry as both the joint importers are "importers" in the eye of the customs law;

- The bank/ financing company in fact retained ownership in the goods during the period of import as well as afterwards till repayment of the financed amount. Even under the income tax law it is the bank/ financing company that is eligible to claim depreciation in the capacity of owner of the goods; and

- Therefore, the bank/ financing company cannot claim to have divested its ownership from a customs law perspective for discharging customs duty liability.

For the reasons above, the Tribunal upheld the levy of duty as well as penalty (at a reduced amount) on the bank/ financing company.

Sundaram Finance Ltd Vs CC, Chennai – 2012 (279-ELT-220) (Chennai Tribunal)

Import policy restriction on import of secondhand photocopier machines is applicable to all kinds of photocopying machines including multifunctional photocopiers

The taxpayer was engaged in the import of second hand multifunctional photocopiers/ copying machines ("impugned goods"). As per the prevailing Import Policy, import of second hand photocopiers was restricted and allowed only against an import licence. The taxpayer however imported the impugned goods without obtaining any import license from the concerned authority.

The Revenue contested such unlicensed import and sought to levy redemption fine and penalty apart from questioning the declared import value.

In the appeal filed by the taxpayer against such levies, inter alia contending that multifunctional machines (not being photocopies per se) are not subject to the restriction under the Import Policy, the Tribunal held as follows:

- The Import Policy restriction on import of secondhand photocopier machines is applicable to all kinds of photocopying machines including analog photocopiers, digital photocopiers and multifunctional photocopying machines whose primary function is photocopying; and

- Even though some multifunctional photocopying machines may have incidental printing attributes to process and produce a photocopy, such machines would still get covered under the restriction applicable to photocopiers.

Unitech Enterprises Vs CC, Chennai – 2012 (279-ELT-236) (Chennai Tribunal)

Goods suffering VAT/ sales tax under a "deemed" sale transaction shall be eligible for the benefit of refund of Special Additional Duty of Customs ("SAD")

The taxpayer imported set top boxes on payment of customs duty including SAD under section 3(5) of Customs Tariff Act, 1975. Upon import, the set top boxes were supplied to customers on "transfer of right to use basis" and Value Added Tax ("VAT") was charged on the rentals, as the transaction constituted a "deemed" sale under the VAT law.

The taxpayer applied for refund of SAD under Notification 102/ 2007 which inter alia provided for refund of SAD upon subsequent sale of the imported goods upon payment of VAT/ central sales tax. The said claim was however rejected by the Revenue on grounds that the goods imported had not been "sold" by the taxpayer.

In relation to the above, the Tribunal held that:

- Under the state VAT/ central sales tax law, "transfer of right to use goods" is treated as a sale and VAT/ sales tax is levied on the same;
- The word "sale" has not been defined under Notification 102/ 2007 and therefore, has to be understood in the context of the VAT/ central sales tax law; and
- The main purpose of the SAD exemption/ refund is that the same goods should not suffer both SAD as well as VAT/ sales tax.

Basis the above, the taxpayer was held to be entitled to the refund sought for and the appeal filed by the Revenue against sanction of the same was dismissed by the Tribunal.

CC (ICD), New Delhi Vs Reliance Communications Infrastructure Ltd – 2012 (279-ELT-85) (Delhi Tribunal)

Endorsement on the bill of entry regarding issuance of a show cause notice is not the same as final assessment of bill of entry

The taxpayer imported consignments of coal and filed bills of entry declaring a certain assessable value. Such bills of entry were sought to be assessed by the customs officer at a higher value and an endorsement was made on the bills of entry as under:

"Finally assessed - Demand Show Cause Notice issued vide Letter No ………..for differential duty of Rs…………."

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Basis the above, the Revenue contended that the aforementioned endorsement is tantamount to final assessment of the bills of entry and consequently, the taxpayer's only option was to file an appeal against the same.

Given the above fact pattern, the Tribunal held that:

- A Show Cause Notice cannot be equated with the final assessment of a bill of entry.

- Show Cause Notice is only a proposal to enhance the value and by no stretch of imagination can it be held that the mention of such fact in the bill of entry amounts to final assessment of said bill of entry, thus requiring importer to file an appeal there-against.

Further to the same, the Tribunal directed for the Show Cause Notice to be adjudicated upon in accordance with the principles of natural justice and thereafter, final order/ assessment made.
CC, Jamnagar Vs Tata Chemicals Ltd – 2012 (279–ELT–78) (Ahmedabad Tribunal)

Notifications & Circulars

Concessional rate of duty reduced for imports from Japan

The Central Government has reduced the rate of customs duty on a list of goods specified in this notification provided they are imported from Japan.
Notification No 28/2012-Cus dated April 27, 2012

Classification of micro/ mini SD cards

The Central Board of Excise and Customs has clarified that, in case of micro/ mini SD cards wherein the PCB is substituted by substrates, such micro/ mini SD cards, would get classified under sub-heading 8523.51 as "semiconductor media, solid-state, non-volatile data storage devices".
MF (DR) Circular No 12/2012-Cus May 1, 2012

V. CENTRAL EXCISE

High Court Decisions

No prior permission required for transfer of credit from one unit to another in case of an amalgamation

The taxpayer had an export orient unit engaged in the manufacture of personal computers at Bangalore and another manufacturing unit at Pondicherry that was engaged in the manufacture of computers and printers. The unit located at Pondicherry was amalgamated with the unit in Bangalore and subsequent to the amalgamation; the Pondicherry unit stopped production.

When the Pondicherry unit sought to transfer its unutilized CENVAT credit balance to the Bangalore unit basis the amalgmation, the Revenue contested the same on various grounds.

Aggrieved by the order passed, the taxpayer filed an appeal before the Tribunal and obtained relief. While the Revenue filed an appeal before the High Court, the order of the Tribunal was upheld by the High Court on the following grounds:

- In the event of an amalgamation, the taxpayer is entitled to transfer CENVAT credit balance in terms of Rule 10 of the CENVAT Rules;
- While the CENVAT Rules preclude credit benefit in the case of a manufacturer availing exemption based on the value or quantity of clearances in a year, such restriction shall not apply to the present case as the taxpayer had opted for certain exemption under the General Exemption Notification which is not the same as "exemption based on the value of quantity of clearances in a year"; and
- In relation to such transfer, no prior permission is required as long the inputs and capital goods transferred are accounted to the satisfaction of the department.

CC, Bangalore Vs Hewlett Packard India Sales Ltd – 2012 (279-ELT-203) (Karnataka HC)

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