June 2012

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

Foreward

FICCI Tax Updates is an attempt by the Taxation Division to keep our members informed about recent developments in the field of tax law and procedures. **FICCI Tax Updates** is intended to be issued as a monthly newsletter containing information regarding recent judgments / decisions of the Courts and Tribunals as also notifications and circulars issued by the Government. It would provide only a gist of the important judgments / decisions which are expected to impact large number of our members. Similarly, only a summary of important notifications and circulars would be made available.

The economy is presently in a rather difficult situation with GDP, industrial and export growth rates declining and the inflation proving to be persistent and sticking. In addition the sovereign debt crisis in the Euro zone and prevailing uncertainty domestically is causing investors to adopt a cautious approach resulting in the outflow of capital from India. This is exerting pressure on the Rupee. Much depends on how global uncertainties and situations unfold and the degree to which the government is able to implement some critical reform. FICCI has issued a twelve point agenda for urgent reforms. This can be viewed at
http://www.ficci.com/SEdocument/20193/FICCIs12-Point-Agenda-for-Economy.pdf

The implementation of pending reforms towards stimulating foreign investment and the execution of structural changes to resolve supply-side bottlenecks are expected to help India combat its current economic challenges.

Under the taxation regime, the Karnataka High Court, in the case of De Beers Minerals Pvt. Ltd. held that services consisting of conducting an air borne survey for providing geophysical data for selecting kimberlite targets for prospecting and mining diamonds and other minerals do not make available technical knowledge, skill or experience to the taxpayer. Further, the reports and maps provided to the taxpayer did not amount to development and transfer of technical splan or technical design. Accordingly, it was held that payment made by the taxpayer does not amount to Fees for Technical Services (FTS) under the India-Netherland tax treaty.

The Madras High Court in the case of High Energy Batteries (India) Ltd. held that while ascertaining the legal nature of the transaction one has to look at the entire transaction as a whole and not to adopt a dissecting approach. Accordingly, it was held that the transaction of sale and lease back of machinery was not a sham or a colourable device just to enable the taxpayer to claim the benefit of depreciation. The High Court has followed the ‘Look at’ approach which was upheld by the Supreme Court in the case of Vodafone International Holdings B.V.

We would like to convey its thanks to Shri Dinesh Kanabar, Chairman-FICCI Taxation Committee and Deputy CEO and Chairman Tax, KPMG as also Mr Rajeev Dimri, Co-Chairman-FICCI Taxation Committee and Partner, BMR Advisors, for providing the contents for the compilation of this newsletter.

The exercise to issue a monthly newsletter is being initiated on an experimental basis and we would welcome views and comments of our members on the contents of the newsletter. We would also welcome suggestions for improving the contents and the format. These may please be sent to Mr J K Batra, Advisor-Taxation at jitendra.batra@ficci.com.

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Recent Case laws

I. DIRECT TAXES

High Court Decisions

Provision of services taxable only if 'made available'

The taxpayer, an Indian company, is engaged in the business of prospecting and mining for diamonds and other minerals. The taxpayer engaged the services of a non-resident, based out of the Netherlands, to conduct the air borne survey for providing high quality, high resolution, geo-physical data suitable for selecting probable mining targets.

The Assessing Officer (AO) treated the payment made by the taxpayer to the non-resident for its services as FTS under Article 12 of the India-Netherlands tax treaty and treated the taxpayer as an assessee in default for failure to deduct tax at source.

The Karnataka High Court observed and held as follows:

- The service provider, in order to render technical services uses technical knowledge, experience, skill, know how or processes. To attract tax liability under the India-Netherland tax treaty, that technical knowledge, experience, skill, know how or process which is used by the service provider to render technical service should also be 'made available' to the recipient of the services, so that the recipient also acquires technical knowledge, experience, skill, know how or processes so as to render such technical services;

- The use of a product which embodies technology shall not per se be considered to make the technology available;

- In the instant case, the non-resident performed the surveys using substantial technical skills. However, it had not made available the technical expertise in respect of such collection or processing of data to the taxpayer, which expertise the taxpayer could apply independently and without assistance of the non-resident.

- Therefore, the payment does not satisfy the requirement of FTS under the tax treaty. Hence the taxpayer could not be treated as an assessee in default for failure to deduct tax at source.

CIT v. DE Beers India Minerals Pvt. Ltd. (ITA No. 549 to 551 of 2007) (Kar)

Validity of reassessment proceedings is not affected if reasons are recorded by the AO for reopening the assessment but not furnished to the taxpayer within the limitation period

The taxpayer filed its return of income for Assessment Year (AY) 2004-05 on 23 March 2005. The return of income was accepted under Section 143(1) of the Income-tax Act, 1961 (the Act). On 15 March 2011, a notice was issued by the AO under Section 148 of the Act on the ground that income chargeable to tax had escaped assessment for AY 2004-05. In response to the notice, the taxpayer filed a return of income and also filed a letter dated 7 April 2011 in which a request was made to supply the reasons recorded for reopening the assessment. The AO supplied the reasons recorded for reopening the assessment to the petitioner on 30 August 2011. Thereafter on 8 November 2011 the taxpayer filed its objection to the validity of reassessment proceedings. The AO disposed of the objections of the petitioner by order dated 8 November 2011. Relying on the decision of Haryana Acrylic Manufacturing Co. v. CIT [2009] 308 ITR 38 (Del) the taxpayer had filed a writ petition before the Delhi High Court challenging the reopening of the assessment on the ground that reasons for reopening of the assessment were furnished after expiry of six years i.e. after 31 March 2011 being the limitation period imposed by Section 149 of the Act.

The Delhi High Court in the present case observed that Section 148(2) of the Act only mandates that the reasons for reopening the assessment should be recorded by the AO before issue of notice under Section 148 of the Act. There is no specific requirement that the reasons recorded should be supplied along with the notice of reopening the assessment. The High Court distinguished the decision in the case of Haryana Acrylic Manufacturing Co. relied upon by the taxpayer stating that in the said case there were two sets of reasons that had been recorded by the AO and the second set of reasons alleging non-disclosure of material facts surfaced for the first time in the counter affidavit filed by the tax department before the High Court. The date of filing the counter affidavit was considered as the date of recording reasons for reopening the assessment which was after the expiry of six years, and hence it was held that the reassessment proceedings were invalid. However in the taxpayer's case the reasons for reopening assessment were recorded by the AO on 9 March 2011 and thereafter the notice under Section 148 of the Act was issued on 15 March 2011 which was before the expiry of six years. Thus, both the mandatory requirements, namely the issue of notice under Section 148 of the Act within the limitation period and recording reasons before the issue of notice, had been complied with by the AO in the present case.

Thus it was held that merely a delay of five months in supplying the recorded reasons to the taxpayer cannot invalidate the reassessment proceedings.

A.G. Holdings Pvt Ltd v. ITO (WPC 031/2011, dated 25 April 2012) (Del)

Indexation benefit under Section 48 of the Act is available on redemption of non-cumulative redeemable preference shares

The taxpayer was engaged in the business of share broking and also dealt in shares.

The taxpayer had subscribed to four lakh non-cumulative redeemable preference shares in 1992. These shares carried fixed rate of dividend and were redeemable after 10 years. The preference shares were issued by a group company, Enam Finance Consultants Pvt. Ltd. During AY 2002-03, the taxpayer redeemed 3 lakh shares at par and claimed a long term capital loss, after availing the benefit of indexation. The AO treated non-cumulative redeemable preference shares as 'bonds or debentures' since the instrument carried a fixed holding period and fixed rate of return and hence denied the indexation benefit on the said transaction. Further, the AO also denied the benefit of long term capital loss on the ground that the taxpayer as well as issuer company were part of the same group and there was no 'transfer' upon redemption of preference shares as per the provisions of the Act.

The Bombay High Court relying on the decision of the Supreme Court in the case of Anarkali Sarabhai v. CIT [1997] 224 ITR 422 (SC) held that the redemption of preference shares amounts to 'transfer' as per the provisions of Section 2(47) of the Act. The High Court further observed that the terms 'bonds' or 'debentures' are not defined under the Act, but have a settled connotation under the Companies Act, 1956 (Companies Act). After observing various provisions under Company law, the High Court observed that there is distinction between bonds or debentures and preference shares. The High Court inter alia relied on the decision of Supreme Court in the case of R.D. Goyal v. Reliance Industries Ltd. [2003] 113 Com Cases 1 (SC) to arrive at the conclusion that there is clear distinction between bond and share capital.

Thus it was held that the redemption of preference shares results into 'transfer' under Section 2(47) of the Act and benefit of indexation is also available upon redemption. Further, as regards AO's allegation that it was a sham transaction since the management of the taxpayer company and the issuer company was the same, it was held that since the management of the taxpayer company and the issuer company was the same, it was held that since the transaction was not questioned by the revenue for over ten years, that both the taxpayer and the Company of which the taxpayer held redeemable preference shares were juridical entities and the mere fact that both were under common management would not necessarily indicate that the transaction was not genuine. The tax department did not bring any material on record whatsoever to substantiate the contention that the transaction was sham and it does not give rise to any substantial question of law.

CIT v. Enam Securities Private Limited [TS-324-HC-2012(BOM)]

Sale & lease back of machinery not a 'sham' or 'colourable' device to avail benefit of depreciation

The taxpayer had purchased igni-fluid boilers from its sister concern for a total consideration of INR 25 million in Financial Year (FY) 1994-95. The taxpayer paid INR 5 million to its sister concern and for the balance it entered into a finance agreement with Wipro Finance Limited by way of a hire purchase agreement. On the same day the taxpayer entered into a lease agreement with its sister concern for the

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same boilers. The AO claimed that the sale and lease back arrangement was a sham and colourable device adopted by the tax-payer to avail benefit of depreciation and the alleged purchase by the taxpayer was merely a financial accommodation for its sister concern.

The Madras High Court observed that the AO was not correct in rejecting the taxpayer's claim on the ground that it had not taken actual possession of boilers. Since the law recognised constructive delivery as an acceptable mode of delivery and possession and the fact that the taxpayer had not taken physical possession, per se, did not pronounce anything against the sale that took place between the taxpayer and its sister concern. The High Court further observed that the genuineness of the said transaction could not be questioned as there was no material on record to show that the sale between the taxpayer and its sister concern was a sham transaction. Further the fact that the sister concern of the taxpayer had undertaken responsibility to meet the liability of the taxpayer to pay the hire purchase amount was not relevant to decide whether the sale transaction was colourable. It was also observed that in subsequent years the revenue itself had accepted the transaction to be a genuine. Further, relying on the Supreme Court ruling in the case of Vodafone International Holdings B.V. the High Court held that while ascertaining the legal nature of the transaction one has to look at the entire transaction as a whole and not to adopt a dissecting approach and hence it was held that the transaction was not a sham or a colourable device just to enable the taxpayer to claim the benefit of depreciation.

CIT v. High Energy Batteries (India) Ltd. [T.C.(Appeal) No. 579 to 581 of 2005, dated 17 April 2012] (Mad)

Despite concealment no penalty under Section 271(1)(c) can be levied if taxes are paid as per Section 115JB on the book profits

The taxpayer filed a return of income for AY 2001-02 declaring a loss of INR 434.7 million under the normal provisions of the Act and declared book profits of INR 38.6 million under Section 115JB of the Act. The AO assessed the loss at INR 369.5 million as per normal provisions of the Act and the book profits at INR 40.1 million under Section 115JB of the Act. As there was a reduction in the loss under the normal provisions ow-ing to various additions and disallowances, the AO levied penalty under Section 271(1)(c) of the Act in accordance with Explanation 4 to Section 271(1)(c) of the Act and the Supreme Court's decision in the case of Gold Coin 304 ITR 308 (SC), wherein it was held that even where the assessed income and returned income both were at a loss, penalty could be levied under Section 271 (1) (c) of the Act.

The Delhi High Court observed that there was concealment but it would have its repercussions only when the assessment would be done under the normal provisions of the Act. In the instant case, the assessment as per the normal provisions of the Act was not acted upon and it was the book profits under Section 115JB of the Act which were assessed. Thus the tax was paid on the income assessed under Section 115JB of the Act and not the normal provisions of the Act. Hence, when the

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computation was made under Section 115JB of the Act, there could not be any concealment. Therefore, the concealment did not lead to tax evasion at all and hence no penalty was leviable under Section 271(1)(c) of the Act.

The Special Leave Petition filed by the Revenue to the Supreme Court against the order of the Delhi High Court was dismissed by the Supreme Court.

CIT v. Nalwa Sons Investment Ltd [Petition for Special Leave to Appeal (Civil) No.18564/2011, dated 4 May 2012] (Del)

Consideration received by existing partners for reduction of their share in the firm on admission of new partners not taxable as capital gains

In a partnership firm, constituted with three partners, four new partners were admitted. With admission of new partners, the profit sharing ratio of the existing 3 partners was reduced. The new partners introduced INR 35 million into the firm as their capital contribution and the same was withdrawn equally by the three existing partners. According to the AO, the amount so received by existing partners was consideration for reduction of their share in the firm and was taxable in the hands of the existing partners.

The Karnataka High Court held that there is no provision in the Act for levying capital gains on such consideration received for reduction of share in the firm. It was also held that there is no relinquishment of share in the firm. In addition, the existing partners did not retire from the firm on admission of new partners but continued as partners albeit with reduced shares.

CIT v. P N Panjwani [2012] 21 taxmann.com 458 (Kar)

Severance benefits (including Leave Encashment) received outside India from a former employer for services rendered outside India are not taxable in the hands of an individual who is 'Not Ordinarily Resident'

The Delhi High Court has held that the severance/ retirement benefits/Leave Encashment received outside India from a former employer in respect of employment outside India does not accrue or arise in India. Consequently, the same are not taxable in India for taxpayers qualifying as NOR.

CIT v. Anant Jain [TS-283-HC-2012(DEL)]

Tribunal Decisions

Taxability of export commission paid to non-resident

The taxpayer was engaged in the business of manufacturing and exporting of hand embroidery and handicraft items. For procuring export orders from overseas customers, the taxpayer paid commission to a non-resident. The taxpayer made the payment without deducting tax at source.

The AO disallowed the commission expenses in the hands of the taxpayer on failure to deduct tax at source.

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

- The non-resident was only acting as an agent on a commission basis and was not providing any managerial/ technical services;
- The services were rendered outside India and the nonresident did not have a Permanent Establishment (PE) in India;
- Therefore, the provisions of Section 5 of the Act could not be applied to the commission paid so as to make it taxable in India. Further, since the payment was remitted directly abroad, it could not be held to have been received by or on behalf of the agent in India; and
- Hence, the payment made to the non-resident was not taxable in India and could not be disallowed for non-deduction of tax at source.

Armayesh Global v ACIT [ITA No. 8822 /Mum/2010] (Mum)

Loss from derivative transactions could not be disregarded for set-off treating it as Speculation loss

The Tribunal held that Explanation to Section 73 of the Act refers to the business of purchase and sale of shares and not of derivatives. Therefore, loss from derivatives transactions could not be disallowed as speculation loss and should be allowed to be set-off against business income.

DCIT v. Madanlal Ltd [2012] 21 taxman.com 444 (Kol)

No adjustment required for Amalgamation Reserve for computation of Book Profit under Section 115JB of the Act

Two subsidiaries were merged with the taxpayer. The taxpayer recorded the assets received on amalgamation at fair value and the surplus arising on such recording was credited to the general reserve. Consequently, Work in Progress (WIP) was debited to the profit and loss account at fair value. The AO noted that the general reserve was created out of debit to the profit and loss account and therefore was to be added back in computation of profit under Section 115JB of the Act.

The Tribunal held that for creation of reserve, there must be a debit to the profit & loss account and the same must be carried to reserve. The taxpayer has debited the fair value of WIP to the profit & loss account which cannot be said to be consisting of reserve. Therefore, it was held that the general reserve was not debited to the profit & loss account and no adjustment was required in the computation of book profit under Section 115JB of the Act.

ITO v. United Estate P. Ltd. [2012] 20 taxmann.com 588 (Mum)

Amalgamation Reserve neither taxable as business income nor as Capital Gains or income from Other Sources

The Tribunal held that general reserve resulting from fair value accounting, under the 'Purchase Method' prescribed under Accounting Standard 14 and as per the order of the court, of assets received on amalgamation is neither taxable as business

income nor under the head capital gains nor under income from other sources.

Spencer & Company Ltd. v. ACIT [2012] 21 taxmann.com 459 (Chen)

The Mumbai Tribunal held that Resale Price Method (RPM) is a standard method in the case of distribution and marketing activities (despite the losses at net level on account of huge selling and distribution expenditure)

The taxpayer, a wholly owned subsidiary of L'Oreal SA France, was engaged in the business of manufacturing and distribution of cosmetic and beauty products.

Import of finished goods from Associated Enterprises (AEs):

The Transfer Pricing Officer (TPO) rejected the RPM and applied the Transactional Net Margin Method (TNMM). The Tribunal held that there is no order of priority in selection of methods. RPM is one of the standard methods and the Organisation for Economic Cooperation and Development (OECD) guidelines also state that in the case of distribution and marketing activities (where goods are purchased from AEs and sold to unrelated parties), the RPM is the most appropriate method. The Tribunal further held that there is no dispute of the fact that the taxpayer buys products from its AEs and sells to unrelated parties without any further processing.

Marketing cost contribution to AEs

The taxpayer paid marketing cost contribution for availing common marketing services. The TPO/AO disallowed the expenditure due to lack of documentary evidence. During the Commissioner of Income-tax (Appeals) [CIT(A)] proceedings, the taxpayer submitted evidence of receipt of services. The Tribunal restored the matter back to the file of the AO to examine the additional evidence.

Advertising expenditure on production of films and models –Revenue/Capital in nature:

The taxpayer incurred advertising expenditure in respect of promoting its 'on-going products'. The Tribunal held that the expenditure has been incurred for promotion of the taxpayer's 'on-going products' and hence was revenue in nature.

ITO v. L'oreal India P. Ltd. (ITA No. 5423 /Mum/2009) (Mum)

Hyderabad Tribunal confirms 'ordinary profits' and 'Arm's Length Price' are different

The taxpayer, a domestic company, engaged in the provision of software development services to its parent company, claimed a tax holiday under Section 10A of the Act. For the services rendered to its AE, the taxpayer maintained Transfer Pricing (TP) documentation, based on which the AO contended that the margin of the taxpayer being higher than the average margin of the comparables is tantamount to 'more than the ordinary profits'. The AO invoked the provisions of Section 10A(7) read with Section 80-IA of the Act

and reworked the deduction allowable under Section 10A of the Act.

The Tribunal placed reliance on the Chennai Tribunal ruling in the case of Tweezerman (India) Private Limited v. Addl. CIT [2010] 4 ITR (Trib.) 130 (Chen) which ruled that provisions of Section 80-IA(10) of the Act do not give an arbitrary power to the AO to determine the profits of the taxpayer. The phrase 'more than ordinary profits' referred to in Section 80-IA(10) of the Act is different from 'Arm's Length Price' (ALP). The Tribunal set aside the case to the AO with the direction to verify the comparables in the light of the decision in the case of Tweezerman (India) Private Limited.

Weston Knowledge Systems & Solutions (India) Private Limited v. ITO (ITA Nos. 914 & 915/HYD/2006 and 1797/HYD/2008) (Hyd)

The Mumbai Tribunal held that average advertisement expenditure of the comparable companies cannot be considered an arm's length benchmark to disallow excess advertisement expenditure

The taxpayer was engaged in the business of manufacturing and export of pharmaceutical products and had reimbursed to its AE advertisement and marketing expenditure. The TPO compared the advertising expenditure of the taxpayer with the average advertising expenditure of top 17 pharmaceutical comparable companies and made a TP adjustment using the TNMM on account of excessive advertisement expenditure.

The Mumbai Tribunal observed that the CUP method used by the taxpayer to benchmark reimbursements paid by it on account of advertisement expenditure incurred by the AE could not have been rejected without giving any cogent reasons. The Tribunal further held that the arithmetic mean of advertisement expenditure of the comparable companies cannot be considered an arm's length benchmark for advertisement expenditure incurred by the taxpayer and such a methodology was not the TNMM as defined in the India TP regulations.

ACIT v. Genom Biotech Pvt. Ltd. (ITA No. 5272/Mum/2007) (Mum)

Living allowance exempt from tax, if paid to employees of an Indian company who are temporarily deployed in the US to work for an Indian Company

The Kolkata Tribunal has held that living allowance paid (in addition to the regular salaries and benefits in India) to the employees of an Indian Company when they are temporarily deployed in the US, will be exempt from tax.

ITO v. Saptarshi Ghosh [2011] 15 taxmann.com 328 (Kol)

Decisions of Authority for Advance Rulings

Composite contract and taxability of offshore supply of goods

The Applicant entered into a composite contract with ONGC for 'services for supply,

installation and commissioning of manometer gauges'.

The Applicant claimed before the AAR that the amount received for offshore supply of the manometer gauges was not taxable in India. The Applicant placed reliance, inter alia, on the Supreme Court's decision in the case of Ishikawajima-Harima Heavy Industries v. DIT [2007] 288 ITR 408 (SC).

The Authority for Advance Rulings (AAR), based on the facts of the case, observed and held as follows:

- In the case of Ishikawajima-Harima Heavy Industries, a two judge bench of the Supreme Court had adopted a dissection approach, by dissecting a composite contract into two parts and held that income from one of the parts was not taxable in India. However, the same principle could not be followed in view of the three judge; verdict in Vodafone International Holdings B.V. v. UOI [2012] 341 ITR 1 (SC), wherein the Supreme Court has held that a transaction had to be 'looked at and not looked through' and seen as a whole and not by adopting a 'dissection approach';

- A contract for installation and commissioning of a project is different from a contract for sale of goods;

- In the instant case, it was a composite contract for supply and erection at sites within the territory of India; and

- Therefore, the income is accrued in India, and was covered under Section 44BB of the Act.

Roxar Maximum Reservoir Performance WWL [AAR No. 977 of 2010] [AAR]

Payments for subscription services amounts to royalty

The Applicant, a tax resident of Singapore, is engaged in providing social media monitoring service for companies, brands or products. The clients who subscribed for the Applicant's service could login to its website to do a search on what is being spoken about different brands on various blogs, forums, social networking sites etc.

The question for consideration before the AAR was whether the subscription fee received by the Applicant from its Indian customers was taxable in India.

Based on the facts of the case, the AAR held that the subscription payments are taxable as 'royalty' on account of the following:

- The Applicant was engaged in the business of gathering, collating and making available or imparting information concerning industrial and commercial knowledge, experience and skill, and consequently, the payment received from the subscribers/clients in India would be taxable as 'royalty' under the Act; and

- The said payment would also qualify as 'royalty' under the India-Singapore tax treaty since the payment was for the grant of use or right to use the process or information concerning industrial, commercial or scientific experience, for consideration.

Thought Buzz Pvt. Ltd. [AAR No. 1036 of 2010] [AAR]

Notifications

Takeover Regulation

Dr. Reddy's Holdings Limited (DRHL), one of the promoters, held 23.08 percent shares in Dr. Reddy's Laboratories Ltd. (DRL), a listed Company. Other promoters and group entities held 2.53 percent shares in DRL. Thus, the promoter group held 25.61 percent in DRL. The Reddy family owned 83.17 percent shares of DRHL. The APS Trust was settled for the benefit of some of the members of the Reddy family and the same members were trustees. It was proposed that the Reddy family shareholders would gift their holding in DRHL to the APS Trust.

The Securities Exchange Board of India (SEBI) observed that the proposed transfer of shares of DRHL would take place between two entities, namely the Trustees of the APS Trust and promoter-transferors of the Target Company who comprised the same set of individuals, namely members of the Reddy family. Further that such transfer would not result in change in the promoter group shareholding or in change in control of the Target Company. Therefore, SEBI granted exemption to the APS Trust from complying with the requirements of Regulation 3(1) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 on the proposed indirect acquisition of shares of the Target Company

WTM/RKA/CFD-DCR-1/19/2012, dated 3 May 2012

Reserve Bank of India relaxes facilities available to Non-Resident Indians to transfer funds between bank accounts

The Reserve Bank of India (RBI) has recently amended the regulations concerning the permitted credits into a Non-Resident (External) Account (NRE) held by a Non-Resident Indian (NRI), subject to certain conditions. These amendments are expected to benefit citizens of India or Persons of Indian Origin (PIOs) who qualify as a 'person resident outside India' under the Foreign Exchange Management Act, 1999.

With this amendment it is now permissible for NRI individuals to transfer funds from their Non-Resident (Ordinary) Account (NRO) into their NRE account. A recommendation to effect this change had been made by the Kishori J Udeshi Committee to the RBI in August 2011, keeping in mind the liberalised foreign exchange remittance facilities that were introduced in 2003 by the RBI for NRI's permitting them to remit up to USD 1 million per financial year outside India, provided the applicable taxes in India on these funds had been paid.

Circular No. 117, dated 7 May 2012 (RBI-2011-12/536)

II. SERVICE TAX

High Court Decisions

Refund of CENVAT credit under Rule 5 – Tribunal's order not accepting departmental circular set aside but directions for manner of processing refund claims given

In this case, the High Court had to consider whether the Tribunal, in the taxpayer's own case (reported in 2010 (18-STR-281)), was correct in an passing order which was beyond the scope of the show cause notice; since the show cause notice did not dispute the powers of the Central Government to grant refund of CENVAT credit; and whether, the Tribunal was justified in holding that Circular 120/01/2010-ST dated January 19, 2010 was not in accordance with law.

The taxpayer filed refund claims under Rule 5 of the CENVAT Rules, which were partially granted by the refund authority and further (partial) relief was granted by the Commissioner (Appeals), with the remaining refund rejected being on account of lack of nexus of input services with the output services exported. The Tribunal rejected the appeals of the taxpayer on the ground that the Circular issued by the department was not in accordance with law, apart from giving certain additional directions, and remanded the cases for fresh adjudication in light of the Tribunal's observations.

The High Court held that the Tribunal failed to provide any reasons to hold that the circular was not in accordance with law and therefore, the comments of the Tribunal dismissing the validity of the circular was set aside.

However, the High Court accepted the observations of the Tribunal that the authorities at the ground level are required to examine not only the eligibility of a particular service as an input service, but also that the input services received under a particular invoice were consumed for providing export of output services, and hence, did not interfere with the remand order to this extent.
Shell India Markets Pvt Ltd Vs CCE, Bangalore – 2012 (278-ELT-50) (Karnataka HC)

Definition of input service (prior to April 1, 2011) – Eligibility of CENVAT credit on services used for maintenance of staff colony

In this case, the High Court examined eligibility of CENVAT credit on maintenance related services availed for a staff colony by the taxpayer, such as lawn mowing, garbage cleaning, maintenance of swim-

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ming pool, collection of household garbage, harvest cutting, weeding etc.

The taxpayer contended that CENVAT credit on such services should be available since its factory was located in a remote location, and therefore, providing residential accommodation to employees was essential for carrying out manufacturing activity.

The High Court examined the definition of input services and opined that the phrase "input service" has to be given the widest amplitude. The definition by its very nature is inclusive, and words used therein leave no room to doubt that all services used directly or indirectly, in relation to the manufacture of final products and clearance of such products up to the place of removal are covered.

The High Court opined that, as it would be unfeasible to carry on manufacturing in the absence of the staff colony provided by the taxpayer, it was directly and intrinsically linked to manufacture. Consequently, services for maintaining the staff colony like lawn mowing, garbage cleaning etc would qualify as input services.
CC & CE Vs ITC Limited – 2011 (TMI-212614) (Andhra Pradesh HC)

Tribunal Decisions

Rule 5 refunds – Commissioner (Appeals) order directing adjudicating authority to "re-quantify" refund is not a remand order

The taxpayer preferred an appeal to the Commissioner (Appeals) against an order rejecting a portion of the taxpayer's refund claim filed under Rule 5 of the CENVAT Credit Rules, 2004 (the "CENVAT Rules").

The Commissioner (Appeals), being satisfied that the taxpayer was entitled to full refund, set aside the original order and directed the adjudicating authority to re-quantify the refund in line with the Statutory Auditor's declaration prescribed under Circular No 120/01/2010 dated January 19, 2012 (the "Refund Circular").

The issue was whether the Commissioner (Appeals)'s order directing the adjudicating authority to re-quantify refund could be considered as a 'remand order', and therefore, beyond the jurisdiction/ powers conferred on the Commissioner (Appeals).

The Tribunal held that the Commissioner (Appeals)'s order could not be treated as a remand order inasmuch as the order pronounced a clear view on the specific issue of nexus between input services and output services, and only directed re-quantification of refund in terms of the Refund Circular.
CCE Vs Kbace Technologies Pvt Ltd – (2012-TIOL-452) (Bangalore Tribunal)

Input service - Eligibility of CENVAT credit on construction services used by a provider of "renting of immovable property services"

The Ahmedabad Tribunal has adopted seemingly contrary views in deciding two similar cases regarding eligibility of CENVAT

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credit on services of construction of immovable property which was subsequently leased out. A gist of both these cases is provided in the following paragraphs:

(a) Case I – Decided in favour of Revenue

In the first case, the Tribunal upheld the Revenue's contention that no CENVAT credit is admissible on services used towards construction of immovable property. While passing the order, the Tribunal relied on Circular No 98/1/2008-ST dated January 4, 2008 (the "Construction Circular"), submitted by the Revenue, which clarifies that credit of services used for construction of immovable property would be inadmissible since the input service is used in the creation of immovable property, which is neither a 'service' (resulting in levy of service tax) nor 'manufacture of excisable goods' (resulting in levy of excise duty).

The Tribunal also referred to the Ahmedabad Tribunal's earlier decision in *Mundra Port and Special Economic Zone Ltd v CCE [2009 (13-STR-178)], and the* Larger Bench decision in *Vandana Global Ltd v CCE [2010 (253-ELT-440) (Delhi Tribunal - Larger Bench)] to hold that CENVAT credit would be inadmissible.*

(b) Case I – Decided in favour of Revenue

The taxpayer availed CENVAT credit on construction service, works contract service and also inputs like cement, steel etc for construction of warehouses rented out by them, and utilized the CENVAT credit to pay service tax under renting of immovable property service. This CENVAT credit was disputed by the Revenue.

In a stay hearing before the Commissioner (Appeals), the taxpayer was ordered to predeposit 50 percent of the service tax and penalty, which it failed to do. Hence, the taxpayer's appeal was rejected by the Commissioner (Appeals) and the entire demand was confirmed along with interest and penalty.

The Tribunal, while deciding the taxpayer's appeal against the Commissioner (Appeals)'s order, stated that since the immovable property itself was going to be rented out, prima facie there was a case in favour of the taxpayer. Therefore, the Tribunal remanded the case to the Commissioner (Appeals) with a direction to decide the appeal on merits without insisting on any predeposit. It should be noted that the Tribunal did not provide any reasoning for its view in this case.

Both the cases were decided by a Single Member Bench.

Case I – Venus Investments Vs CCE (2012-TIOL-474) (Ahmedabad Tribunal)

Case II – Mahalaxmi Warehouse & Allied Industries Vs CCE – 2011 (TMI-212052) (Ahmedabad Tribunal)

Convention services - No service tax chargeable on amounts charged to delegates/ participants

The taxpayer, a college, organized a conference for schools/ educational institutions at its college premise, and collected an

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amount from each delegate/ participant for organizing the conference.

The Revenue demanded service tax on the amounts collected by the taxpayer under the taxable category of 'convention services'.

The Tribunal examined the definition of taxable service in respect of convention services, and noted that in order to be taxable, convention services should be provided to a client. On the other hand, the taxpayer collected money from delegates and arranged a conference for their mutual benefit. Hence, conference delegates/ participants could not be treated as "clients" of the taxpayer.

Given the above finding, the Tribunal, relying on earlier decisions in Precot Mills Ltd v CCE [2006 (2-STR-495)] and Ahmedabad Management Association v Commissioner [2009 (14-STR-171)], held that no service tax could be recovered on amounts collected by the taxpayer for organizing the conference since the taxpayer had effectively provided services to itself.
Mayo College Vs CST (2012-TIOL-387) (Delhi Tribunal)

Export of goods through a canalizing agency entitled to export benefits

The taxpayer was a manufacture-exporter of chrome concentrate. As per the Foreign Trade Policy 2004- 2009, export of chrome concentrate could take place only through a canalizing agency, ie, MMTC Ltd.

The taxpayer claimed refund of service tax paid on services used in export of goods through MMTC Ltd. The Revenue rejected the taxpayer's refund claim under Notification 17/2009-ST dated July 7, 2009 on the ground that goods were sold to a domestic entity, ie, MMTC Ltd.

The Tribunal observed that although the contract between the taxpayer and MMTC Ltd was termed as a 'sale agreement', other clauses in the agreement indicated that there was an inextricable link between the goods exported and the taxpayer, for instance, in case of a dispute between MMTC Ltd and the foreign buyers and a liability fell upon MMTC thereupon, the taxpayer would accept full liability without dispute.

The Tribunal further relied on the decision of the Supreme Court (pronounced in the context of sales tax) in State of Karnataka v Azad Coach Builders Pvt Ltd [2010 (36-VST-1) (Supreme Court)], and held that when there is an inseverable link between the transaction of sale or purchase of goods and export of goods by the exporter to the foreign buyer, the benefit of export should not be denied. Accordingly, the matter was remanded to the Commissioner (Appeals) for fresh consideration.
Orissa Mining Corporation Ltd Vs CCE – 2012 (TMI-211915) (Kolkata Tribunal)

Classification of services - Tour operator's services

The taxpayer was engaged in the business of plying buses on intra-state and inter-state routes under contract carriage/ tourist permits. The Revenue demanded service tax from the taxpayer under the taxable service category of "tour operator services". The taxpayer contended that only a service

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provider, operating tours in tourist vehicles covered under the Motor Vehicles Act, 1988, would qualify as "tour operator".

The Tribunal examined the definitions of "tour" and "tour operator" and held that the activities of the taxpayer would fall within the definition of "tour" and accordingly the taxpayer fell within the ambit of "tour operator" as defined from time to time. Therefore, the arguments made by the taxpayer to the effect that they were only transporting passengers and not operating any "tour" were not acceptable. As they were running the buses on pre-determined routes in scheduled hours under permits granted under Motor Vehicles Act, 1988, they can be held to have undertaken the business of planning, scheduling, organizing or arranging tours.

However, the Tribunal held that the alternate plea of the taxpayer, for the benefit of notification 20/ 2009-ST dated July 7, 2009, merits consideration, as the referred notification granted full exemption from payment of service tax for services provided by a tour operator having contract carriage permit or tourist vehicle permit for inter-state or intra-state transportation of passengers, excluding tourism, conducted tours, charter or hire services. The Tribunal held that the exemption provided under the referred notification was extended retrospectively upto April 1, 2000 and hence remanded the case to the adjudicating authorities to examine the claim of exemption on merits.
Ideal Travels Vs CCE – 2012 (35-STT-7) (Bangalore Tribunal)

'Relevant date' for period of limitation on short/non-payment of tax

In this case, the disputed amounts were reported in two ST-3 returns, first when billed and second when realized from clients.

The issue was which of the above two service tax returns would be relevant for calculating the period of limitation (for short-payment of service tax) under section 73(6)(i)(a) of the Finance Act, 1994 (the "Finance Act"), as per which the period of limitation shall be counted from the date of filing the service tax return.

The Tribunal held that in order to give full effect to the provisions of the Finance Act, "relevant date" has to be interpreted in the context of short payment. Hence, relevant date would be counted from the date of service tax return in which short payment occurs (ie, the date on which consideration is received from clients), and not with reference to the date of billing.
Indfos Industries Ltd Vs CCE – 2012 (26-STR-129) (Delhi Tribunal)

Notification & Circulars

Committee to review electronic refunds of service tax to exporters

Notification 52/2011-ST dated December 30, 2011 was issued to facilitate electronic refund of service tax paid on taxable services used for export of goods. The Central Board of Excise and Customs ("CBEC") has announced that a committee has been

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formed to review the scheme for these electronic refunds. The Committee shall:

- Evolve a scientific approach for fixing refund rates;
- Propose a revised refund rate schedule, taking into account the increase in service tax rate from 12 percent with effect from April 1 , 2012, and the proposed taxation of services based on a 'Negative List'.

The report of the committee is expected to be submitted to the Chairman, CBCE before June 20, 2012. The Circular through which this announcement has been made also invites views and suggestions from the general public at: feedbackonestr@gmail.com
Circular No 156/7/ 2012–ST dated April 9, 2012

Common registration for Central Excise and Service tax

Circular F No 334/1/2012-TRU dated March 16, 2012 ("Budget TRU") proposed common registration for service tax and central excise.

In pursuance of this, the CBEC has issued a draft circular proposing the detailed registration process as well as cancellation of registration.
Draft circular [F No 137/22/2012-Service Tax]

Common return for service tax and central excise

Budget TRU had also proposed introduction of a common return for service tax and central excise. The CBEC has issued a draft circular proposing the format of the new common return for service tax and central excise, called the 'EST Return'.

Further, the draft circular has proposed the following changes to the Service Tax Rules, 1994:

- Quarterly payment and quarterly return for all new assesses;
- Quarterly payment and quarterly return for assesses who paid service tax of Rs 25 lakhs or less in the preceding financial year; and
- Monthly payment and monthly return for all other assesses.

The draft circular invited views and opinions on the proposed EST return and the amendments, which were to be e-mailed to vp60singh@gmail.com by 15th May 2012.
Draft circular [F No 201/05/2011-CX.6]

III. VAT/ CST

High Court Decisions

Revenue cannot issue notifications having retrospective effect if the statute does not provide for the same

The taxpayer, a dealer engaged in the manufacture, sale and supply of PVC pipes and

plastic tanks, with its principal place of business in Assam, was registered under the Assam General Sales Tax Act, 1993 (the "AGST Act").

In order to provide relief to dealers making local supplies to the Government, (ie, local sales of tax of 13.2% vis-à-vis CST at 4.4%), a notification was issued in terms of section 9(3) of the AGST Act, on April 28, 1998 ("Notification 1") reducing the local sales tax rate on PVC pipes from 13.2% to 4.4%.

As per section 9(3) of the AGST Act, a notification could only be valid for a period of 3 years from the date of its issue. As Notification 1 was issued on April 28, 1998, it was valid for a period of 3 years from the date of issuance (ie April 27, 2001). While the Government of Assam intended to levy a lower rate of tax on PVC pipes for the period pursuant to April 27, 2001 as well, no notification was issued to the said effect.

However, on January 3, 2003, a notification ("Notification 2") was issued levying a lower rate of tax on the sale of pipes with retrospective effect from May 1, 2001.

In the course of its business, the taxpayer had discharged VAT at 4.4% in respect of sale of pipes to the Government during the period 2004-05. In light of the same, the Revenue contended that since Notification 2 was issued with effect from May 1, 2001, in terms of section 9(3) of the AGST Act, it would be valid only for a period of 3 year ie, up to April 30, 2004. Hence, the taxpayer should have charged sales tax at 13.2% from May 1, 2004 onwards.

In response to the above, the taxpayer contended that the notification was valid for three years from the 'date of its issue' in terms of section 9(3) of the AGST Act and since Notification 2 was issued on January 2, 2003, it would be valid up to January 2, 2006.

The question before the HC in the present case was whether the validity of 3 years in respect of Notification 2 was to be considered from its 'date of issue' or from the prior date from which it was made effective. Given the above, the HC observed as follows:

- A microscopic reading of the provisions of Section 9, as a whole, and, in particular, the proviso to Section 9(3) clearly shows that the validity of a notification, issued under Section 9, shall not exceed beyond a period of three years from the date of its issue. The expression, date of its issue, would, without doubt, mean the date on which the notification is issued and it is from the date of issuance of the notification that the validity period of the notification would start running. The notification, as contemplated by the second proviso to Section 9(3), has to be, therefore, prospective in effect.

- It is trite that an authority, which has the power to make a subordinate legislation, cannot make the subordinate legislation with retrospective effect unless it is so authorized by the legislature, while confer-

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ring on the authority concerned, the power to make the subordinate legislation.

- Accordingly, Notification 2 could not have been given retrospective effect, as the parent legislation (ie the "AGST Act") only provided for issuance of notifications prospective in nature.

Kamakhya Plastics (P) Ltd Vs The State of Assam and Others – 2012 (49-VST-345) (Gauhati HC)

When a property is purchased for a valid consideration, without any knowledge of tax arrears due from the seller, the Revenue cannot collect the taxes due by the seller, from the purchaser of the property

The taxpayer was engaged in the business of providing services in relation to information technology and software consulting. The taxpayer had purchased large tracts of land for setting up a world-class software centre from a company that owned the said land tracts. The taxpayer purchased the land with a bonafide belief that the land was free of all encumbrances, and that there were no proceedings pending against the vendor.

Pursuant to purchase of the land, the Revenue issued a demand notice demanding that the taxpayer pay the arrears of sales tax due from the seller from whom the taxpayer had purchased the land. The demand notice was issued under Section 26(ii) of the Tamil Nadu General Sales Tax Act, 1959 (the "TNGST Act"), on the ground that the taxpayer was a person holding money for, or on account of an assessee in default.

In response to the above, the taxpayer filed a writ petition in the High Court and contended that, the purchase of land was a bonafide purchase, for adequate consideration and the taxpayer was unaware of any notice of the charges or encumbrances, in respect of the property in question. The taxpayer further argued that the proviso to section 24A of the TNGST Act states that a charge or transfer of property shall not be void if it is made for adequate consideration and without notice of the pendency of proceedings under the Act, or without notice of such tax or other sum payable by the dealer.

The Revenue alleged that the writ petition was not maintainable since the question whether the purchase of the taxpayer was a bonafide purchase or not has to be heard in a civil forum and not before the High Court. The Revenue also contended that a charge had been created vide section 24(1) of the TNGST Act on the land due to default in payment of taxes by the vendor company and therefore, the taxpayer's contentions are not valid.

Pursuant to the above, the High Court setting aside the demand notice observed as follows:

- The taxpayer had purchased the property in question for a valid consideration, without notice of the charge said to have been created on

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the property in question, in respect of the sales tax due.

- The Revenue has failed to establish their claim that the taxpayer had purchased the property in question, with the knowledge of liability towards the sales tax arrears.

- Hence, as long as the transaction between the seller and the taxpayer is not fraudulent in nature it cannot be said that such a transaction is void, as per Section 24A of the TNGST Act.

Tata Consultancy Service Vs CTO & Another – 2012 (VIL-31) (Madras HC)

No VAT is leviable on leases in the course of import, since such transactions are exempt as per section 5(2) of the Central Sales Tax Act, 1956

The taxpayer, a bank entered into an agreement with Hindustan Power Plant Limited ("HPPL") for importing and leasing of machinery on rental basis. A master lease agreement was entered into between the two parties. Thereafter, the taxpayer ordered for certain machinery as per the specification of HPPL from a foreign manufacturer in Japan. While the goods were in transit, the taxpayer and HPPL entered into a supplementary lease agreement which was stated to be part of the master lease agreement and basis the same, the taxpayer claimed that the goods were exempted under section 5(2) of the Central Sales Tax Act, 1956 (the "CST Act") as sales in the course of import.

The Revenue rejected the taxpayer's claim for exemption and contended that, since the master lease agreement made no reference to the purchase order placed with the foreign manufacturer, the supplementary agreement is totally unconnected with the master agreement. The master agreement spells out only the general terms of the lease and the supplementary agreement was entered only after the import of the machinery to HPPL's premises. Therefore, since the delivery of the goods was taking place inside the State of Tamil Nadu, the question of the taxpayer claiming exemption under the CST Act does not arise.

The taxpayer argued that HPPL had placed a purchase order before executing the master lease agreement with all specifications and details, therefore the movement of goods was occasioned as a result of such prior agreement. The taxpayer further contended that there were no two independent transactions, one between the taxpayer and the foreign manufacturer and the other between the taxpayer and the actual user. The various clauses in both the deeds point out that the agreement had occasioned the import of goods and therefore, the agreements could not be read in isolation as it had to be read together to understand the entire transaction. Accordingly, the taxpayer was eligible for the exemption under the CST Act.

The matter was decided in favour of the taxpayer at all lower levels and accordingly, the Revenue an appealed to the High Court. The High Court rejecting the Revenue's

claims and referring to several decisions of various courts, observed as follows:

- There is an inextricable link between the master agreement and the supplementary lease agreement on the one hand and the import of specific goods based on the purchase order on the other.

- The various documents placed by the taxpayer, in particular the Bill of Lading, indicating the name of HPPL show that the import is linked to the purchase order placed on behalf of HPPL. Thus, but for the purchase order placed by HPPL and later thereon approaching the taxpayer for financial arrangement, the question of the taxpayer ever placing any purchase order with the Japanese manufacturer/ supplier would not have arisen.

- The purchase order placed by the taxpayer with the foreign supplier in turn clearly refers to the purchase order of HPPL with the Japanese firm and the import itself was in connection with the master agreement between the taxpayer and HPPL. On the arrival of the goods, the clearing agent cleared the goods and delivered it to HPPL.

- Thus, these facts clearly establish that the receipt of rental by the taxpayer was on account of the transaction in the course of import, which is not liable to be taxed by the State.

The State of Tamil Nadu Vs Karnataka Bank Limited – TC(R) No.507 of 2006 (Madras HC)

Input tax credit can be claimed in respect of inputs used to export all goods irrespective of whether the goods are taxable or exempt

The taxpayer, an export house engaged in the business of exporting rice out of India purchased packing material for packing the goods exported. The taxpayer paid VAT on the purchase of packing material, availed input tax credit of the same and applied for refund of the said input tax credit as the taxpayer was exporting goods outside India.

The taxpayer claimed refund of the input tax credit in terms of section 9(1)(b) of the Delhi Value Added Tax Act, 2004 (the "DVAT Act") that provided for availment of input tax credit in respect of the purchase of goods that are to be used by the dealer directly or indirectly for the purpose of making sales which are not liable to tax under Section 7 of the DVAT Act. Section 7(c) of the said Act interalia provided for export of goods without payment of tax.

The Revenue rejected the refund claim of the taxpayer on the ground that rice is a tax-free item covered by Schedule I of the DVAT Act and as section 9(7)(b) of the DVAT Act disallows availment of input tax credit in respect of goods mentioned in Schedule I no input tax would be available in the present case.

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The question before the High Court was whether the taxpayer was entitled to claim input tax credit under section 9 of the DVAT Act in respect of goods purchased and used to export items covered under Schedule I of the DVAT Act.

The High Court, answering the above question in the affirmative, observed as follows:

- There are certain goods, which are liable to tax but have been granted exemption from tax and these goods are listed in Schedule I to the Act. Further, there are certain sales which are not liable to tax at all under the Act as per section 7 of the DVAT Act. There is a difference between sales that are not liable to tax and goods which are liable to tax but have been given exemption from the levy of the tax subject to the conditions and exceptions set out in the Schedule I.

- Section 9(7)(b) of the DVAT Act which states that no input tax credit shall be allowed in respect of goods which are used exclusively for the manufacture, processing or packing of goods specified in the Schedule I, only refers to the sale of exempted goods within the meaning of section 6(1) of the DVAT Act and does not refer to sales which are not liable to tax at all by virtue of the provisions of section 7.

- Hence, section 9(7)(b) of the DVAT Act cannot apply to sales which are in the course of export. Further, the High Court stated that the same goods which are mentioned in Schedule I to the Act can be either exempt from tax or be not liable to tax, depending upon the legal and factual situation.

Jaishree Exports Vs Commissioner of Trade & Taxes Department – 2012 (VIL-22) (Delhi HC)

Sale of goods to a unit located in a Special Economic Zone need not be effected by a registered dealer to claim benefit under Section 7 and 7A of the Andhra Pradesh Value Added Tax Act

The first taxpayer (“taxpayer 1”) was a company engaged in the manufacture of pumps for various segments such as power, water supply etc. It set up a co-generating power plant in a SEZ located at Visakhapatnam along with another entity (“taxpayer 2”). Pursuant to the same, taxpayer 2 placed an order on taxpayer 1 for design, manufacture, supply and erection of pumping equipment on a turnkey basis. In order to execute the purchase order, taxpayer 1 placed an order on a third party (“contractor”) on a turnkey basis. As per the arrangement between taxpayer 1 and the contractor, the goods were to be dispatched directly to the SEZ.

The goods dispatched were accompanied by a tax invoice raised by the contractor on taxpayer 1 and a way bill issued by taxpayer 2. During transit of the said goods, the Revenue authorities detained the goods on account of taxpayer 1 being an unregistered dealer under the Andhra Pradesh Value

Added Tax Act ("AP VAT Act") who had effected the sale without payment of applicable taxes.

Taxpayer 1 contended that the sales were made to a SEZ and therefore, the goods were exempted from the levy of tax under the AP VAT Act. Taxpayer 1 also stated that the Development Commissioner of the SEZ had issued a certificate exempting amongst others, the VAT payable, in respect of execution of works in the SEZ.

The Revenue argued that the goods were sold by another company to the taxpayer 1 and the invoice also showed that the other company consigned goods to taxpayer 1, which was not a SEZ unit. The Revenue sought to deny the VAT exemption on the grounds that taxpayer 1 should be a dealer registered under the AP VAT Act to be eligible for exemption.

Hence, the question before the High Court in the present case was whether a person carrying out the sale of goods to a unit located in a SEZ should be a registered dealer to be entitled to the VAT exemption available to SEZs in terms of Section 7 of the AP VAT Act. Given the above, the High Court held that the seller need not be a registered dealer in order avail the VAT exemption in terms of the AP VAT Act and observed as follows:

- Section 7A of the AP VAT Act provides for exemption of tax on sale of goods by a dealer to a registered dealer (being an SEZ unit) for specified purposes. Hence, when the statue is specific only about the sale being made to a registered dealer and not by a registered dealer, the statute cannot be interpreted to mean that the exemption is available only when the sale is by a registered dealer to a registered dealer.

- Section 45(3) of the AP VAT thereof empowers the Officer in charge of such check post to detain goods only when tax is not paid on the sale or purchase of the goods carried. To attract Section 45(3) of the VAT Act, it should be first shown that the goods checked at the check post were liable to VAT. If the goods are not liable for tax under Section 7 or 7-A of the VAT Act, the question of detaining the vehicle or the goods would not arise.

- A plain reading of the sales invoice shows that though taxpayer 1 is shown as the consignee, the consignment was sent on account of the taxpayer 2. Further, indisputably, the sales invoice contains the TIN number which was assigned to taxpayer 2 and this itself would belie any submission that the goods were dispatched by the contractor in favour of taxpayer 1.

Flow More Limited & Another Vs DCTO – 2012 (VIL-33-AP) (Andhra Pradesh HC)

Doctrine of dominant purpose to be used to determine the main purpose of a multi functional product while ascertaining the correct tariff entry

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In the present case, the taxpayer preferred an appeal against the order of the Appellate Tribunal which affirmed the ruling of the Commissioner holding that multi-functional printers and their spares and consumables are to be taxable under the residuary schedule of the Delhi VAT Act instead of the third schedule, under the entry 41A therein, encompassing Information Technology products (in specific computer peripherals).

On the above facts, the Delhi HC applied the test of dominant purpose as enunciated in the decision of Xerox India Limited v Commissioner of Customs, Mumbai [2010 (260) ELT 161 (SC)] and opined as follows:

- A multi functional printer or machine may be able to perform several functions, but an ancillary or incidental function would not be relevant. The relevant determining factor in such cases even for the period before 31st November, 2005, would be the dominant or main purpose.

- If the principal and predominant purpose was to act as a computer printer or scanner or as an input or output devise of the computer, such multi functional machine would qualify and fall under entry 41A clause XXIII. However, if the machine was designed and manufactured for some other primary purpose, then it would not be covered by entry 41A clause XXIII.

- With regard to the period after 30th November, 2005, the doctrine of dominant purpose of the multi functional machine will determine/ decide whether it is an input or output unit of an automatic data processing machine. In case the principal or dominant purpose is to act as input or output unit, then it would be covered by entry 41A at Sr. No.3.

- However, in case multi functional machine is a duplicator or a photocopying machine, which incidentally can be used as a printer or a scanner etc., the said machine would not qualify and cannot be treated and regarded as input or output unit of automatic data processing machine. Said machines would not qualify under entry 41A and will be covered by the residuary tax rate.

Ricoh India Limited v Commissioner [Sales Tax Appeal No. 06 of 2010 (Delhi HC)]

Order passed by Authority for Clarification and Advance Rulings can be set-aside by the Commissioner under his revisional powers and leave the question to be decided by the Assessing Authority

The taxpayer, a contractor engaged in the execution of civil works contracts, had sought clarification from the Authority for Clarification and Advance Rulings (“ACAR”) on whether tax liability in case of works contracts is restricted to the extent of materials transferred during the course of execution of works contract or on all the materials used in the process.

According to the taxpayer’s understanding, civil works like construction of buildings, roads etc fell under the category of works

contracts and hence only goods which are transferred during the execution of works contract were within the purview of the taxing statute. In case of certain material used in the process of execution of works contract, but not transferred, no tax would be leviable. Based on the above, the ACAR held that only goods which are transferred in the works contract were liable to VAT.

In light of the above ruling of the ACAR, the Commissioner setting aside the ruling of the ACAR observed that the ruling is prejudicial to the interest of the Revenue as it preempts the department from giving a different interpretation of law depending on the facts and circumstances of each case.

Pursuant to the same, the taxpayer filed an appeal in the High Court contending that the Commissioner's scope of revision was limited and if the Commissioner was of the view that the ruling of the ACAR was erroneous, the Commissioner could have corrected the same and laid down the correct law. However, the Commissioner has set aside the ruling and has kept the question open to be decided by authorities at the ground level (ie, Assessing Authority"). In view of the above, the taxpayer argued that the order passed by the Commissioner was without jurisdiction and hence, liable to be set aside.

In response to the above, the Revenue contended that the revisional authority is vested with the power to pass such order thereon as the circumstances of the case justify, and in the present case, it was justified in setting aside the ruling of the ACAR and leaving the question of levying tax to be to be decided by the Assessing Authority as it is based on the facts of a case.

The High Court agreeing to the argument of the Revenue and dismissing the appeal of the taxpayer observed as follows:

- Section 64(2) of the Karnataka Value Added Tax Act, 2003 (the "KVAT Act") allows a Commissioner to pass revisionary orders to enhance taxes, modify assessments, cancel assessment, direct a fresh assessment or such order thereon as the circumstances of the case justify.

- The Act does not state that the Commissioner should state that the ACAR is wrong and state the correct law. When the reference to ACAR itself is too vague and when it is answered in very general terms, and as the question of construction work is purely a question of fact, the Commissioner is justified in invoking revisionary powers, setting aside the ruling and leaving the question to be decided by the Assessing Authority.

Vishal Infrastructure Limited Vs State of Karnataka and Another – 2012 (72-KLJ-525) (Karnataka HC)

Decisions of Authority for Advance Rulings

Tax paid on invoice raised by sub-contractors can be claimed as input tax credit by main contractor if taxable turnover does not contain deduc-

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tion of amount paid to sub-contractor. Amount paid as labour and like charges to the sub-contractors not to form part of the taxable turnover.

The taxpayer was engaged in the business of civil works contract of construction of residential apartments. The civil works undertaken by the taxpayer was being executed partly by the taxpayer and partly by sub-contractors, who were dealers, registered under the KVAT Act.

The taxpayer sought clarification from the Authority for Clarification and Advance Rulings ("ACAR") in respect of the following matters:

- Whether the taxpayer, being the main contractor, can claim 'input tax' of the taxes paid to the sub-contractors on works undertaken by them for the taxpayer, on the strength of 'tax invoices', if the taxpayer has not claimed deduction of the amount paid to the sub-contractors in determining its (ie, the taxpayer's) taxable turnover and tax liability?

- Whether labour and other like charges mentioned in the tax invoices raised by the sub-contractors on the taxpayer, are to be considered as a part of the total turnover of the taxpayer and assessed to tax?

The taxpayer contended that as it had not claimed deduction of the amount paid to sub-contractors from the total turnover, and it had claimed input tax deduction. Further, labour and other like charges cannot be included in the taxable turnover as the same are exempted from tax.

The ACAR clarified the taxpayer's questions and observed as follows:

- It is seen that the taxpayer has not claimed deduction from his total turnover, amounts paid or payable to the sub-contractors as consideration for execution of works whether wholly or partly as provided under Rule 3(2)(i-l) of the Karnataka Value Added Tax Rules, 2005 (the "KVAT Rules").

- Section 11(c) of the KVAT Act stipulates that input tax shall not be deducted by any dealer executing a works contract (in respect of amount claimed as deduction) paid or payable to a sub-contractor as consideration for the execution of part or whole of such works contract.

- Conversely, if no deduction of amount paid to a sub-contractor is claimed by the dealer, then he would be eligible for deduction of input tax. The same is re-iterated by the Commissioner of Commercial Taxes in his Circular No.7/2008-09 dated August 4, 2003. Therefore, the taxpayer in the present circumstances is eligible to claim input tax deduction in respect of tax paid to the sub-contractor as per the tax invoice issued by the sub-contractor.

- The total turnover of the taxpayer relating to the works contract executed would be the aggregate of total amount paid or payable to the taxpayer by the contractees even when part of the work is got executed through a sub-contractor. In determining the taxable turnover of the taxpayer, among other things, deduction of amounts paid or payable to sub-contractors towards labour and other like charges expended by the sub-contractor with the part execution of works contract would be allowed as per Rule 3(2) of the KVAT Rules.

ETA Constructions (India) Limited (ARCLR-CR-8) (2011-12)

Service tax paid or payable on the transaction to form part of 'Sale Price' liable to tax under the Maharashtra Value Added Tax Act, 2002. Admissibility of set-off in respect of purchases consumed in the works contract depends on facts of the case

The taxpayer was engaged in the business of carrying out works contracts in the nature of powder coating/ painting on the material supplied by the customer. The taxpayer had *inter alia* sought clarification in respect of the following:

- Whether service tax charged by the taxpayer should form part of the 'Sale Price' liable to tax?

- Whether set-off is admissible on purchases consumed in execution of works contract?

In respect of the question whether service tax is to be included in the sale price, the Commissioner of Sales Tax (the "Commissioner") observed as follows:

- Service tax at 12 percent was charged on 40 percent of the consideration towards processing charges and 50 percent towards the value of goods sold and used for processing. Hence, the quantum towards services, as estimated by the taxpayer, was in respect of goods involved in the execution of a works contract.

- Based on the decision of the Supreme Court, in the case of Hindustan Sugar Mills Ltd reported in 43 STC 13 (SC) that deals with the meaning of 'Sale Price', just like how excise duty is included in the price to be charged by the seller, service tax should also form part of the sale price.

- Further, the definition of 'Sale Price' as per section 2(25) of the Maharashtra Value Added Tax Act, 2002 ("MVAT Act") is an inclusive one to include 'any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof'. Therefore, as service tax is separately charged before delivery of goods, it is to be included in the 'Sale Price'.

In respect of the admissibility of set-off on purchases consumed in the execution of a works contract, the Commissioner highlighted that while rule 52 of the Maharashtra Value Added Tax Rules, 2005 ("MVAT

Rules") provides for set-off in respect of purchases made, rule 53 of the MVAT Rules provides for reduction of set-off in certain cases and rule 54 provides for non-admissibility of set-off. Further, as the language of the said rules is unambiguous, the admissibility of the set-off is a matter of fact which would vary depending on the facts of the case.
Sujata Painters (DDQ-11-2007/Adm-3/16/B-1)

Notifications/ clarifications

Change in rate of VAT - Maharashtra

The VAT rates applicable in the state of Maharashtra have been amended wef April 1, 2012. Going forward, works contracts would be liable to tax at 5% vis a vis the earlier rate of 4%
Notification No JC(HQ)1/VAT/2005/97 dated April 4, 2012 – Government of Maharashtra

Value of goods to be mentioned on way bills issued by dealers

In order to avoid ambiguity with regard to the expression, 'value of the goods' used in the way bills, the Government of Andhra Pradesh has issued a clarification as per which that the 'value of the goods' shall mean 'total amount', set out in the sale invoice.
CCT's Ref. No. B3/1696/2011, dated January 28, 2012 – Government of Andhra Pradesh

Mandatory requirement to get the books of accounts audited in the state of Tamil Nadu in case the total turnover exceeds rupees one crore

A bill has been introduced in the State Assembly of Tamil Nadu for amending the Tamil Nadu Value Added Tax Act, 2006.

As per the bill, a new section (section 63A) is proposed to be introduced mandating audit of books of accounts and submitting a report in the prescribed format in respect of every registered dealer whose annual total turnover exceeds rupees one crore (including zero-rated sales and sales in the course of inter-state trade or commerce as specified in section 3 of the Central Sales Tax Act, 1956).
The books of account need to be audited by a Chartered Accountant/ Cost Accountant. Failure to submit the audit report and failure to comply with the newly proposed section 63A shall attract a penalty of Rs 10,000. The said provision would be applicable upon passing of the bill in the State Assembly.
L.A Bill No 17 of 2012

IV. CUSTOMS

Tribunal Decisions

For availing benefit under the EPCG scheme, the exports should have been made by the actual EPCG authorization holder

The taxpayer, a manufacturer, exported certain goods manufactured by them under a claim of drawback. On a subsequent date,

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the taxpayer sought to amend the shipping bills to the name of another company ie, M/s Infocus Marketing and Services Ltd ("Infocus") as the exporter. Such amendment was sought on account of the fact that Infocus was an EPCG authorization holder, and under the said EPCG authorization, machineries had been imported and installed in the factory of the taxpayer and put to use in the manufacture of goods that were exported. It was the taxpayer's case that, by amending the shipping bills, Infocus would be able to count the export made by the taxpayer towards the export obligation of Infocus under the EPCG scheme.

The request to amend the shipping bills was rejected by the Commissioner of Customs against which the taxpayer filed an appeal to the Tribunal. The Tribunal upheld the order passed by the Commissioner of Customs for the following reasons:

- No exports have been made by Infocus and on the contrary, the exports have been made by the taxpayer under a claim of drawback.
- Infocus could have availed the export benefit sought for if they had been the exporters, clearly indicating the name of their supporting manufacturer (in this case the taxpayer) as envisaged under the EPCG scheme.
- Hence, the customs authorities have rightly refused to make the post facto amendments sought for by the taxpayer.

For the above reasons, the relief sought for by the taxpayer on account of Infocus was not granted.

M/s Lakshmi Automatic Loom Works Ltd Vs CC (Exports), Chennai (2012-TIOL-416) (Chennai Tribunal)

Notification & Circulars

Change in tariff rate in case of supply of electrical from an SEZ to DTA or non-processing areas of SEZ

The Central Government has changed the tariff rate in respect of the supply of electrical power from a SEZ to the DTA/ non-processing areas of SEZ when the power is generated by use of imported coal/ domestic coal/ gas as fuel by 1000 MW and less than 1000 MW projects.

Notification No 26/ 2012-Cus dated April 18, 2012

V. CENTRAL EXCISE

Tribunal Decisions

Indicating manufacturer's name on the package does not amount to affixing brand name

The taxpayer had certain chemicals such as zinc oxide, zinc phosphate etc manufactured on job work basis by M/s Allied Chromes & Chemicals ("AC&C"). On the packages of the product it was printed that the chemicals were manufactured by AC&C and marketed by the taxpayer.

The taxpayer claimed small scale exemption on his clearances under Notification No: 9/ 99 dated February 28, 1999 ("SSI Exemption Notification). The Revenue was of the view that affixation of the name of the manufacturer AC&C amounted to affixing the brand name of another person on the packages and therefore, the taxpayer could not claim the benefit of the SSI Exemption Notification. The appeal filed by the taxpayer against such disallowance of exemption was allowed by the Commissioner (Appeals). Against the first appellate order, the Revenue filed an appeal to the Tribunal.

The Tribunal upheld the order passed by the Commissioner (Appeals) and held that:

- Indicating the manufacturer's name and address on the package is a statutory requirement under the Standard Weights & Measures Act, 1976.
- If such identification/ indication of the manufacturer details are held to be affixture of brand name; it shall lead to an illogical conclusion that all goods containing the manufacturer's name are branded goods.
- It is a settled position of law that mere indication of the manufacturer's name and address on a product does not amount to affixing of brand name as decided in the cases of Rajdoot Paints Ltd Vs Collector of Central Excise, New Delhi [2001 (134-ELT-281) (Delhi Tribunal)] and Kalvert Foods India Pvt Ltd Vs CCE, Mumbai [2003 (152-ELT-131) (Delhi Tribunal)].

Following earlier precedents in the matter, the appeal filed by the Revenue was rejected by the Tribunal.

CCE, Kolkata-I Vs Synotex Industries – 2012 (278-ELT-90) (Kolkata Tribunal)

Suo moto taking of credit is not permissible under the Central Excise Act, 1944

The taxpayer was engaged in the manufacture of excisable goods falling under the Chapters Nos 17 and 22 of the First Schedule to the Central Excise Tariff Act, 1985 and had been regularly discharging excise duty on the same.

As advised by central excise officers during a factory visit, the taxpayer paid differential/ additional duty along with interest under the understanding and advise that duty had originally been short paid. Subsequently, the taxpayer realized that the duty originally discharged by the taxpayer was correct and the additional/ differential duty paid was unwarranted.

Accordingly, the taxpayer wrote a letter to the jurisdictional range officer ("JRO") intimating that the taxpayer was taking re-credit of the additional duty paid. The JRO informed the taxpayer that the re-credit was not admissible and a refund application was required to be filed. Ignoring the information provided by the JRO, the taxpayer intimated the jurisdictional Assistant Commissioner and took re-credit of the excess amount paid for adjustment towards future liabilities.

A show cause notice was issued by the Revenue requiring the taxpayer to substantiate

as to why the amount taken as re-credit should not recovered from the taxpayer under Section 11A of the Central Excise Act, 1944 (“Excise Act”) along with interest and penalty. As against an unfavourable first appellate order, the taxpayer preferred an appeal to the Tribunal. The Tribunal relied on certain earlier precedents in the matter and held that:

- There is no specific provision under the excise law that permits unilateral adjustment of excess duty paid by a taxpayer.
- Claims pertaining to excess duty paid are to be filed under Section 11B of the Excise Act and granted upon adjudication.
- Further, all excess duty paid will have to pass the test of unjust enrichment even if it is not so expressly provided in the statute and no suo moto credit can be taken unless and until the department is satisfied that the incidence of duty has not been passed on.

Based on the above, the appeal filed by the taxpayer was dismissed.

Vighnahar S.S.K Ltd Vs CCE, Pune – 2012 (190-ECR-0135) (Mumbai Tribunal)

If admissibility of credit is not taken up as an issue by issuing show cause notice, then the question of such admissibility cannot be examined by the Tribunal

The taxpayer was engaged in manufacture of excisable goods and filed refund claims of unutilized service tax credit accumulated under Rule 5 of Cenvat Credit Rules, 2004 read with Notification No 5/ 2006 dated March 14, 2006 (“Refund Notification”).

The original adjudicating authority rejected the refund claim filed by the taxpayer in respect of specified input services and on appeal, the Commissioner (Appeals), allowed the taxpayer’s appeal. Disposing off the Revenue’s appeal before it, the Tribunal held as under:

- The contention of the Revenue that the relevant input services cannot be said to have been used in manufacture entails examination of admissibility or eligibility of the credit itself.
- In all show causes notices issued in the matter, the Revenue had merely proposed to reject the refund claims filed and there was no proposal to deny Cenvat credit.
- Having regard to the same, and as held in the case of Capiq Engineering Pvt Ltd Vs CCE, Vadodara [2009 (245-ELT-186) (Ahmedabad Tribunal)], if the admissibility of credit is not questioned vide the show cause notice, the same cannot be disputed/ adjudicated by before the Tribunal.
- Further, with the retrospective amendment to the Refund Notification, the input services could be said to be used “in relation to” manufacture and basis this, the Revenue’s contention on credit admissibility as well as reliance on the decision of

Kbace Tech Pvt Ltd & Others Vs CCE, Bangalore [(2010-TIOL-564) (Bangalore Tribunal)] gets nullified.

Hence, the Tribunal did not find any merits in the case and accordingly, rejected the appeal filed by the Revenue.
CCE, Vadodara Vs Transatlantic Packaging Pvt Ltd – 2012 (278-ELT-353) (Ahmedabad Tribunal)

Credit cannot be claimed based on the photocopy of duty paid document

The taxpayer availed Cenvat credit of additional customs duty paid on imported inputs based on the bill of entry and produced a customs certified photocopy of the same as evidence. It was the case of the taxpayer that the original bill of entry had been available at the stage of credit availment and the same had since been misplaced. The taxpayer further contended that the rules in force neither mandated availment of credit based on the original nor denied credits based on authenticated copies of duty paid documents.

The Revenue was of the view that the credit could not be taken on the basis of photocopy/ true copy of the bill of entry as per provisions of Rule 9 of the Cenvat Credit Rules, 2004 and hence, proceedings were initiated against the taxpayer for recovery of the credits availed. Basis this, the adjudicating authority confirmed the demand and imposed penalty equal to the amount of credit taken. The appeal filed by the taxpayer against such disallowance was allowed by the Commissioner (Appeals) and against the first appellate order, the Revenue filed an appeal to the Tribunal.

The Tribunal, relying on the case of S.K. Foils Ltd Vs CCE, New Delhi [2009 (239-ELT-395) (Punjab and Haryana HC)] and UOI Vs Marmagoa Steel Ltd [2008 (229-ELT-481) (Supreme Court)] held that:

- Although there is no specific stipulation regarding availment of credit basis original/ duplicate/ triplicate copy of the bill of entry, there is no provision allowing credit to be availed on the strength of a photocopied document

- Further, in the present case, the taxpayer has not produced any acceptable explanation regarding non availability of the original

For the above reasons and following certain earlier rulings of the Supreme Court, the Tribunal held that credit cannot be availed on the strength of a photocopied duty paid document.
CCE, Surat Vs Survoday Blending (P) Ltd – 2012 (278-ELT-373) (Ahmedabad Tribunal)

Notification & Circulars

Cutting, slitting and printing of aluminum foils does not amount to manufacture

The Central Government has accepted that the process of cutting, slitting and printing of aluminum foils does not amount to manufacture as held in the case of M/s Printo India Graphics (P) Ltd Vs CCE, Delhi [Appeal

No 3181 of 2010] – upheld by the Supreme Court in Civil Appeal No 8533 of 2011.

Further to the same, it has been ordered that, where an assessee has paid duty of excise on the process of cutting, slitting and printing of aluminium foils, the CENVAT credit taken/ utilized, of the duty or tax/ cess paid on inputs, capital goods and input services used in the making of the said final product, shall not be required to be reversed subject to the following conditions:

- Such non-reversal shall be allowed only for the CENVAT credit taken up to March 15, 2012;
- Such non-reversal shall be allowed only when excise duty has been paid on removal of the said final product; and
- The said assessee shall not prefer a claim of refund of the excise duty paid by him on the said final product.

Additionally, if CENVAT credit has been taken by the buyer of the final product in respect of the excise duty paid by the assessee on the final product made and cleared up to March 15, 2012, the same shall not be required to be reversed.
Notification No 24/ 2012-Central Excise (NT) dated April 19, 2012

Change in the list of goods and rate of abatement available in respect of goods which are to be valued based on their retail sale price under Section 4A of the Central Excise Act, 1944

The Central Government has issued a recent notification amending Notification 49/2008 dated December 24, 2008 ("Notification No 49"). The new notification amends the rate of abatement available in respect of certain goods, liable to be assessed based on their retail sale price or MRP, to 35 percent. Further, the notification seeks to amend the description of the goods covered under the MRP based levy and omit certain items which were covered under Notification No 49.
Notification No 26/ 2012-CX, (NT) dated May 10, 2012