February 2015

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

KPMG cutting through complexity

BMR & Associates

Foreword

I am pleased to enclose the February 2015 issue of FICCI's Tax Updates. This contains recent case laws, circulars and notifications pertaining to direct and indirect taxes.

FICCI has last week submitted a study paper titled 'Widening of tax base and tackling black money' to the Government. The paper identifies the root causes of generation of black money in India, sectors where black money generation is prevalent and makes suggestions to uncover the generation, accumulation and distribution of black money within the Indian economy.

On January 27, 2015, a FICCI delegation led by Mr. Sidharth Birla participated in a stakeholder consultation meeting on General Anti-Avoidance Rule (GAAR) convened by the Hon'ble Finance Minister, Shri Arun Jaitley. FICCI requested for deferment of implementation of GAAR which is due to be effective from April 1, 2015.

A delegation from FICCI attended a meeting convened by the Central Board of Direct Taxes on February 9, 2015 to look into the problem areas in litigation concerning taxpayers, analyzing causes thereof and suggesting possible remedial measures.

On the taxation regime, the Pune Tribunal in the case of iGATE Computer Systems Ltd. held that in the absence of any human intervention while transmitting the data through a data link, the payment made for utilizing such services was not in the nature of technical services under Section 194J of the Act. The taxpayer, a software company made payments for data link charges to various telecom service providers. The Connection/link is used for the transmission of data from one service provider to the designated client server.

In a case involving repair of vehicles involving change of defective parts, the Tribunal has ruled that Service Tax is not applicable on value of materials involved in the repairs when separate invoices were raised for the material.

We do hope that this newsletter keeps you updated on the latest tax developments.

We would welcome any suggestions to improve the content and the presentation of this publication.

A. Didar Singh

Recent Case laws

I. Direct tax

High Court Decision

Premium paid on premature redemption of debentures is revenue in nature

The taxpayer paid premium on redemption of debentures. The AO as well as the Commissioner of Income Tax (Appeals) [CIT(A)] held that premium on redemption of debentures was in the nature of capital expenditure since the taxpayer derived the benefit by paying the sum on premature redemption of debentures. Accordingly, both the AO and the CIT(A) have disallowed the premium paid on redemption of debentures. However, the Mumbai Tribunal allowed the same.

The Bombay High Court held that the Tribunal had correctly observed that if the debentures were redeemed by the taxpayer prior to the period for which they were issued and if there was a mutual arrangement for premature redemption thereof, then, the premature redemption premium cannot be said to be a capital expenditure and need not be spread over the entire period of debentures. This was because the contract was brought to an end due to premature redemption. There was no obligation thereafter on the taxpayer to redeem it. The Supreme Court's decision in the case of Madras Industrial Investment Corporation Ltd. v. CIT [1997] 225 ITR 802 (SC) relied upon by the tax department is distinguishable on the facts of the present case. Accordingly, the premium paid on premature redemption of debentures was treated as revenue expenditure.

CIT v. Grindwell Norton Ltd. (ITA No. 694 OF 2012) (Bombay High Court)

Tribunal Decisions

Taxability of fees for technical services for installation and commissioning activities

The taxpayer is engaged in the business of manufacturing and selling cement. The taxpayer made certain remittances to foreign parties without deducting tax at source. These foreign parties also provided services for installation and commissioning of plant and machinery. The technicians of the respective foreign party visited India for the purpose of the said installation/ commissioning. The taxpayer claimed that the income embedded in these payments was not chargeable to tax in India as these payments were for imports of plant, and machinery. Accordingly, there was no requirement of withholding of tax from these payments.

The Assessing Officer (AO) held that the contract was a composite contract for supply of plant and machinery and also for ancillary services of installation, commission and erection of such plant and machinery. Accordingly, the taxpayer was required to deduct tax at source from these payments.

The Jabalpur Tribunal held that part of the consideration which can be attributed to installation, commissioning or assembly of the plant and machinery, or any supervision activity in connection thereto, was taxable under the Income-tax Act, 1961 (the Act). Such portion accrues and arises in India, since the related economic activity was performed in India.

The taxpayer's work of installation and commissioning in respect of all transactions did not exceed the time threshold prescribed under the installation Permanent Establishment (PE) clause of all the respective tax treaties. The India-Belgium and the India-U.K. tax treaties provide an additional condition of value of such installation/commissioning services to be more than 10 per cent of the sale value. This condition was also not fulfilled in the present case. Accordingly, an installation PE was not created under the relevant tax treaties.

Further, the Tribunal held that services in the nature of installation and commissioning would, de facto, amount to 'technical services'. There is an overlapping effect, such that, there is a general provision [of Fees for Technical Services (FTS)/Fees for Included Services (FIS)] for taxability of technical services and a specific provision (of installation PE) for taxability of technical services in the nature of construction, installation and supervision activities. The Tribunal relied on the Supreme Court's rulings in the cases of Union of India v. India Fisheries (P) Ltd. [1965] 57 ITR 331 1965 (SC) and ITO v. Titagarh Steels Ltd. [2001] 79 ITD 532 (SC) and observed that if there is an apparent conflict between two independent provisions, a specific provision must prevail over the general provision. If one were to proceed on the basis that, even if the PE test fails, taxability can be held under the FTS provisions; such an approach would render the PE provisions meaningless. In a case where there is a specific PE clause for a specific type of service and such services are also covered by the scope of FTS/ FIS provision, the taxability of consideration for such services must remain confined to the relevant specific PE clause. The provisions of taxability as FTS/FIS will not come into play in such cases.

Alternatively, even if the FTS/FIS article was applied to the instant case, the payment might not qualify as FTS/FIS under the India-U.K. and the India-U.S. tax treaties because of 'make available' clause under these tax treaties. Installation or commissioning by the parties does not transfer technology, in the sense that the recipient of these services cannot perform such services on its own, without recourse to the service provider. Therefore, make available condition was not satisfied.

In view of Most Favoured Nation (MFN) clause under the India-Belgium tax treaty, benefit of 'make available' clause under the India-U.K. and the India-U.S. tax treaties is available under the India-Belgium tax treaty, in view of the same, payment made to Belgian parties cannot be treated as FIS.

Article 12(5)(a) of the India-Switzerland tax treaty specifically excludes services which are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of a property from taxation i.e. plant, equipment or machinery. Accordingly, even if there be any income embedded in the payments, in respect of installation, commissioning or assembly activities, or supervisory activities connected therewith, the same cannot be brought to tax.

The receipts in the hands of the parties were in the nature of business income and the same were not taxable in India in the absence of a PE under the relevant tax treaties. The matter was remanded to the AO to verify the existence of a PE of foreign parties.

Birla Corporation Limited v. ACIT (ITA No. 251 and 252/Jab/13) –Taxsutra.com

Reimbursement of salary paid to deputed employees by a foreign company having Service PE in India, taxable as business profit and not FIS under the India-USA tax treaty

The taxpayer is a resident of USA and is a 100 per cent subsidiary of Morgan Stanley USA. The taxpayer entered into an agreement with an Indian company for providing support services. In respect of this agreement, the taxpayer deputed its employees to the Indian company. The taxpayer made payment of salary after deduction of tax at source under Section 192 of the Act to such employees. Such a payment of salary was made on behalf of its Indian subsidiaries, only for administrative convenience and the same amount was reimbursed by the subsidiaries without any mark-up.

The Mumbai Tribunal observed that that the seconded employees were the real employees of the taxpayer who have come to India to render services and once they are rendering services on behalf of the taxpayer in India, they constitute Service PE in India. Article 12(6) of India-USA tax treaty provides that provisions of Article 12 shall not apply to 'royalty' and FIS arising through PE situated in India. In such a situation provisions of Article 7 (Business Profits) of the tax treaty shall apply. In other words, if there is a PE, then Royalty or FIS cannot be taxed under Article 12, but only under Article 7 of the tax treaty.

The Delhi High Court had not considered this concept in the case of Centrica India Offshore (P.) Ltd v. CIT [2014] 364 ITR 336 (Del). Further in all other decisions relied upon by the tax department, this concept was not considered and therefore such decisions will not apply to taxpayer's case.

In view of above, the Tribunal held that the payment made by the Indian entity to the taxpayer on account of reimbursement of salary cost of the seconded employees will have to be examined under Article 7 of the tax treaty. Further, under Article 7 of the tax treaty, payment received by the taxpayer is to be treated as revenue receipt and any cost incurred had to be allowed as deduction including salary payment. Accordingly, the AO was directed to compute the payment strictly as business profit under Article 7 of the tax treaty and not as FIS under Article 12 of the tax treaty.

Morgan Stanley International Incorporated v. DIT (I .T.A.No.6882/Mum/2011) (Mum) –Taxsutra.com

Data link is a standard facility without human intervention, hence not liable for deduction of tax at source on its payment

The taxpayer, a software company made payments for data link charges to various telecom service providers. The Connection / link is used for the transmission of data from one service provider to the designated client server. Further, there was no human intervention for the transmission of the data. The taxpayer had not deducted tax at source (TDS) from the data link charges paid to various telecom service providers.

The Assistant Commissioner of Income-tax - TDS held that the taxpayer was liable to deduct tax at source on such amounts in view of Section 194J of the Act.

The Pune Tribunal held that when the taxpayer makes any FTS payment, the tax needs to be deducted under Section 194J of the Act. FTS involves rendering of any managerial, technical or consultancy services. In order to provide such services, the element of human involvement is necessary.

In the present case, data link and inter-connection facilities were provided. The technical equipments were utilized for inter-connection purposes only. The same does not result into managerial, technical or consultancy services. In absence of any human intervention between the taxpayer and the services provided by the data link provider, the payment made by the taxpayer was not for technical services. Merely because for the purpose of maintenance certain human intervention was provided, this cannot lead to the conclusion that the data link charges paid to various telecom service providers were in the nature of technical services. In the absence of any human intervention while transmitting the data through such data link, the payments made for utilsing such services was not in the nature of technical services under Section 194J of the Act.

iGATE Computer Systems Ltd. v. DCIT [ITA Nos.1301 to 1303 & 1616/PN/2013)

Depository charges paid without TDS are allowable expenditure on the basis of Special Bench decision in the case of Merilyn Shipping, and SLP dismissal by the Supreme Court in the case of Vector Shipping

The taxpayer is engaged in the business of share and stock broking. It had debited certain sum to the Profit & Loss Account under the head 'depository charges' which was payable on account of services provided with regard to transactions in securities through the stock exchange. The taxpayer paid depository charges in accordance with the agreement made with depository participants for the execution of work, without deducting the tax on such payments. The AO held that such payments were for technical services covered under Section 194J and 194C of the Act. The taxpayer had not deducted tax at source while making such payments and therefore was liable for disallowance of the business expenditure under Section 40(a)(ia) of the Act.

The Mumbai Tribunal in the case of Amit Naresh Shah (ITA No.4154/Mum/2013), relied on the dismissal of SLP by the Supreme Court in the case of CIT v. Vector Shipping Services (P) Ltd. [CC No(s). 8068/2014], and held that Section 40(a) (ia) is not applicable to payments already made since the term 'payable' has to be satisfied for invoking provisions of Section 40(a)(ia) of the Act.

In the present case, the amount was already paid and the taxes were discharged by the recipient and therefore, the decision of the Special Bench in the case of Merilyn Shipping & Transports [2013] 136 ITD 23 (Del) (SB) was applicable. Accordingly, the provisions of Section 40(a)(ia) of the Act cannot be invoked.

Arcadia Share & Stock Brokers Pvt. Ltd. v. DCIT [ITA No.1871/Mum/2013 (AY: 2006-07)]

Telecom license is non-exclusive and does not secure any enduring advantage, hence such license fees are allowable as revenue expenditure

The taxpayer is engaged in providing Cellular Mobile Telephony services. The taxpayer charged license fee paid to the Department of Telecommunication (DOT) as revenue expenditure and claimed deduction while computing income under the Act. However, the AO held that the payment of license fee was a capital expenditure as the same was incurred to acquire and keep in force license/right to operate the telecommunication services and accordingly, granted pro-rata deduction under Section 35ABB of Act.

The Ahmedabad Tribunal in the taxpayer's case in earlier years, on the same issue, had decided the issue in favour of the taxpayer. Similarly, in relation to the present case, the Tribunal held that without utilizing the network, the taxpayer cannot provide telecommunication services. The payment does not secure for taxpayer any asset or right of permanent character. The license does not acquire any enduring advantage because the license granted under Section 4 of the Indian Telegraph Act, 1885, can be revoked for breach of any of the condition subject to which it was issued or any default of payment of any consideration payable for license. License is a non-exclusive license and it is open to the Government of India to grant similar license to other enterprises. Thus, the taxpayer was not an exclusive user of such facility. Accordingly, license fees paid to DOT is an allowable expenditure under Section 37(1) of the Act.

Idea Cellular Ltd. v. ACIT [2014] 47 taxmann.com 341 (Mum)

The Mumbai Tribunal held that no adjustment on account of location savings is required when arm's length price is determined on the basis of appropriate comparables

The taxpayer is engaged in providing contract manufacturing and contract research and development services to its Associated Enterprise (AE). The AEs compensate the taxpayer on a total cost plus arm's-length mark-up basis. The taxpayer used Transactional Net Margin method (TNMM) as Most Appropriate Method to benchmark the transaction relating to contract manufacturing and contract research and development services.

During the course of the transfer pricing assessment and proceeding before the Dispute Resolution Panel (DRP), both the Transfer Pricing Officer (TPO) as well as the DRP contended that location saving arises as manufacturing activities, which were being undertaken in the U.S./European countries, are transferred to India which is a low cost jurisdiction; and location savings is computed based on certain articles appearing in some journal and websites. The location savings so computed was then allocated on ad-hoc basis by dividing the savings equally between the taxpayer and its AEs.

Tribunal ruling

The Tribunal observed that the taxpayer as well as the AE operates in a perfectly competitive market and the taxpayer does not have exclusive access to the factors that may result in location specific advantages.

The Tribunal relied on Action 8: Guidance on Transfer Pricing Aspects of Intangibles which is part of Organisation for Economic Co-operation and Development (OECD) and G20 Base Erosion and Profit Shifting (BEPS) project which provides that where local market comparables are available, specific adjustment for location saving is not required.

The Tribunal agreed with the taxpayer's submission that reliance placed by the TPO on the United Nations Practical Manual on Transfer Pricing for Developing Countries (UN TP Manual) was incorrect, because Chapter 10 of the UN TP Manual is basically a view of the Indian tax administration and not binding on Appellate Authorities.

Further, the Tribunal placed reliance on the decision in the case of GAP International Sourcing (India) Pvt Ltd v. ACIT (2012) 149 TTJ 437 (Del) and held that comparables selected by the taxpayer, being local Indian comparables do not require additional allocation on account of location savings.

On the point of non-submission of details called for by the TPO, the Tribunal relied on the Special Bench decision in the case of UCB India (P) Ltd. v. ACIT (2009) 124 TTJ 289 (Mum SB) wherein it was held with respect to requirements of Rule 10(D)(1)(f) that, 'The maintenance of these records is procedural and non-maintenance of the same is not such that it would affect the determination of ALP...' The Tribunal noted that the Special Bench interpreted use of the words 'if any' in the provisions as meaning that 'non-submission of records cannot form the basis of making adjustments in the ALP on bald assertions'.

Further, the US Tax Court cases relied upon by the TPO were found by the Tribunal to be different from the taxpayer's facts as these case laws were related to fiscal years 1970s and 1980s in which the economic scenario was completely different. Further, in these case laws, taxpayers were not operating in a perfectly competitive market unlike in the case of taxpayer.

The Tribunal also held that the TPO has based his computation on a method, which is not ascribed by the provisions of the Act. Further, the calculation of location savings made by the TPO is based on assumptions since it is based on articles published in the year 2012, whereas the taxpayer's case is for the financial year 2008-09. Further, the said web articles have not been accepted by any forum.

Thus, based on the above, the Tribunal deleted the adjustment made on account of location savings.

Watson Pharma Pvt Ltd (ITA No. 1423/Mum/2014 and 1565/Mum/2014)

Assets purchased by spouse from interest free loan given by taxpayer should not be included in taxpayer's net wealth

The taxpayer's wife had purchased assets from the interest free loan given by taxpayer. The AO treated it as an indirect 'transfer of asset' within the meaning of

Section 4(1)(a)(i) of the Wealth Tax Act (Wealth Tax Act) and clubbed the value of loan amount in the net wealth of the taxpayer. Aggrieved by the decision of the AO and subsequent decision of the Commissioner of Wealth-tax (Appeals), the taxpayer appealed before the Tribunal.

The Tribunal held that extending cash loan to wife does not come within the definition of 'asset' as provided under Section 2(ea) of the Wealth Tax Act. The fact that the wife of the taxpayer is having an independent source of income, filing her return of income and even subsequently repaying part of the loan strengthened the taxpayer's case. The Tribunal also commented on the taxpayer's decision to not purchase the assets directly and follow the loan mechanism as an internal family matter which cannot be questioned by the Revenue.

Thus, the Tribunal held that the impugned loan amount was not includible in the wealth of the taxpayer and there was no unjustified method used to avoid taxability.

Shah Rukh Khan v. Asst. Commissioner of Wealth Tax [2014]52 taxmann.com 252 (Mum)

Notification & Circulars

Tourist visa on arrival to India extended to 43 countries

The Tourist Visa on Arrival (TVoA) scheme was introduced in 2010 and the facility is currently available to the nationals of 12 countries. To boost tourism in India, the Government of India has made positive changes in the original TVoA scheme and extended this facility to 31 more countries.

As per the amended scheme, eligible foreign nationals need to obtain Electronic Travel Authorisation (ETA) as per the procedure laid down under the TVoA scheme before coming to India.

Key Changes

- TVoA facility is available to foreign nationals of 43 countries whose sole objective of visiting India is for recreation, sight-seeing, casual visit to meet friends or relatives, short duration medical treatment or casual business visit.

- The TVoA facility can be availed twice in a calendar year and the foreign national should possess onward journey ticket or return ticket and have sufficient money to spend during his stay in India.

- TVoA will be valid for a period of 30 days from the date of arrival in India.

Source: www.mha.nic.in

II. SERVICE TAX

Supreme Court Decisions

SC stays the decision of the Delhi HC quashing audit by service tax authorities

The Delhi High Court ('HC') in the case of Travelite (India) vs UOI and others had quashed Rule 5A(2) of the Service Tax Rules, 1994 ("ST Rules"), which prescribed for the conducting of audit by an officer authorized by the Commissioner for the purpose of carrying out any scrutiny, verification and checks as may be necessary to safeguard the interest of revenue on the ground that the said rule was ultra-vires the governing statutes and the same did not have any substantial legal backing. The Supreme Court ('SC') has stayed the aforementioned decision of the Delhi HC.

UOI and others vs Travelite (India) [Appeal No. 34872/2014, SC]

Tribunal Decisions

CENVAT credit on outdoor catering services eligible even after amendment in the definition of 'Input services' from April 1, 2011

The taxpayer availed CENVAT credit on outdoor catering services which was used by all the employees in general and the cost of such expenses were borne by the taxpayer and was not recovered from the employees.

The Revenue Authorities ('RA') denied CENVAT credit on the ground that the definition of 'Input services' given under Rule 2(l) of the CENVAT Credit Rules, 2004 ('Credit Rules') has been amended with effect from April 1, 2011 to specifically exclude any input service used for personal use or consumption by any employee. The taxpayer contended that the outdoor catering services were availed by the taxpayer in relation to their business of manufacture of excisable goods. Further, cost of the input services formed part of the cost of final products which was not recovered from the employees

The Customs, Excise and Service Tax Appellate Tribunal ("CESTAT") held that CENVAT credit on outdoor catering services is per se eligible unless it is used 'primarily for personal use or consumption of any employee', as opposed to the services mentioned under sub-clause (B) of the definition of input services which are excluded from the ambit of CENVAT credit unconditionally. The Government clarified in the budget clarification and subsequent circular that what is not eligible is that service which is meant for personal use or consumption by an employee or the cost of which is included as part of salary of the employee as a cost to company basis. Hence, in the present facts as catering services procured by the taxpayer are used by the all employees in general, it cannot be construed as services used primarily for personal use of any employee.

The CESTAT further reasoned that since in the instant case cost of such services are borne by the taxpayer, i.e., the employer and not by the employee, and the same forms part of the cost of final product, the tax payer was eligible for credit on such services.

Hindustan Coca Cola Beverages Pvt Ltd vs Commissioner of Central Excise, Nashik [Order Nos. A/1479-1480/2014/SMB/C-IV, CESTAT Mumbai]

‘Club membership’ and ‘Club privilege’ charges collected from subscribers for extra benefits offered as a part of a telephone connection scheme not includible in value of telephone connection service.

The taxpayer, engaged in the business of providing telephone connection services, entered into an agreement with its agent whereby the agent was responsible for marketing of tariff plans of the taxpayer through various schemes. As per the agreement, the agent was allowed to combine certain products, services and privileges for marketing the tariff plans. Accordingly, the taxpayer’s agent floated a scheme whereby apart from telephone connection, the subscriber was entitled to avail benefits such as complimentary mobile handset, reduced call rates, free unlimited SMS, etc. The consideration was split as rental and usage charges for telephone connection, and certain ‘club membership’ and ‘club privilege’ charges for extra benefits offered as a part of the scheme. The agent reimbursed the taxpayer only the consideration for telephone connection services and not for the aforesaid additional benefits. The taxpayer accordingly discharged service tax liability on such consideration for telephone connection services.

The RA contended that the ‘club membership’ and ‘club privilege’ charges retained by the agent for such extra benefits should also be taxable as ‘telephone connection service’ defined under Section 65(105)(b) of the Finance Act, 1994 (“Finance Act”) in the hands of the taxpayer.

The Mumbai Bench of the CESTAT observed that for any service to be covered under the taxable category of ‘telephone connection service’ defined under section 65(105)(b) of the Finance Act, it has to be provided by a telegraph authority in relation to telephone connection. Telephone connection in common parlance would mean connecting two telephone apparatus so as to enable the caller to avail the speech transmission facility with desired person.

In the present case, all the services are being provided by the agent ie the person other than the telegraph authority. Further, such services and privileges such as free incoming, call waiting has no nexus with telephone connection services and hence is not covered under the telephone connection service liable to service tax. The handset provided to subscriber is in the nature of ‘goods’, the value of which is distinguishable and applicable sales tax liability has been duly discharged on such handsets. Thus, the CESTAT dismissed the RA’s appeal.

Commissioner of Service Tax, Mumbai vs Reliance Infocomm Ltd [Order No. A/1757/14/CSTB/C-I, CESTAT Mumbai]

Taxability of excess baggage charges collected separately by airlines from passengers; Matter referred to Third member

The dispute before the Mumbai CESTAT was whether excess baggage charges collected by the taxpayers from the customers is exigible to service tax under the category of 'transportation of goods by air' service. The taxpayers contended that the excess baggage charges are incidental to the main service of 'transport of passengers by air' on which service tax is already being paid under the composition scheme. On the other hand, the RA contended that the excess baggage charges, being in the nature of a separate service should be taxable under the category of 'transportation of goods by air'.

Member Judicial held that 'excess baggage charges' form an integral part of the service of transport of passengers by air service which is subject to the levy of service tax. Further, in terms of section 65A of the Finance Act, when more than one kind of services are involved, the service that gives the essential character shall be considered for the purposes of classification of such services. In the case of airlines, the essential character of the service is transportation of passengers by air. Accordingly, demand of service tax on excess baggage charges under the head 'transportation of goods by air' is not tenable.

Member Technical held that the 'transport of passenger by air' service inherently includes some free baggage allowance. However, as soon as the baggage exceeds the permitted limit, there is a separate service being provided to the passengers with respect to transportation of goods by air. At times, such excess baggage can be unaccompanied baggage as well in which case the excess baggage comes in cargo for which the passenger files a Bill of Entry separately. Therefore, 'excess baggage charges' clearly fall within the definition of 'transport of goods by air' and are liable to service tax.

In light of the divergent views of the Members of the CESTAT, the matter is now before the President of the CESTAT for referring it to a Third Member.

Kingfisher Airlines Ltd & Another vs Commissioner of Service Tax, Mumbai [Order No. M/2026/14/CSTB/C-I] (CESTAT, Mumbai)

Service tax not applicable on value of materials involved in the repair of vehicles when separate invoices have been raised for the material

The taxpayer was an authorized service station engaged in the business of repair and servicing of vehicles. While servicing vehicles, certain defective parts were replaced and invoices for these were raised separately showing payment of VAT. The RA demanded service tax in respect of materials supplied while carrying out the repair of the vehicle since the predominant nature of work of the taxpayer was servicing of vehicles.

The CESTAT, relying on the Central Board of Excise & Customs ("CBEC") Circular no 96/17/2007 dated August 23, 2007 rejected the claims of the RA and held that since the taxpayer had raised separate invoices for the value of goods on which VAT had already been paid by the taxpayer, there was no obligation to pay service tax on the same amount.

Safeway Motors vs Commissioner of Central Excise, Nagpur [Order No. A/1684/14/CSTB/C-I, CESTAT Mumbai]

Service tax paid on Installation / erection undertaken at customer's premises allowable as credit to manufacturer.

The taxpayer manufactured and cleared machines and parts thereof to customers on payment of duty and undertook the responsibility of installing the same at the customer's premises. No amount over and above the invoice price was being charged from the customer for erection and installation of the machines. The RA contended that the taxpayer was not entitled to the CENVAT credit on the installation and erection charges as these were incurred beyond the place of removal and were not included in the assessable value.

The Mumbai CESTAT allowed the CENVAT credit since erection and installation was an essential activity for the machine to function and the said activity was part of the taxpayer's business.

M/s. Hercules Hoists Ltd vs Commissioner of Central Excise, Mumbai III [Order No. A/1477/14/SMB/C-IV, CESTAT Mumbai)

Giving buses on hire to State Road Transport Corporation is liable to service tax under 'rent-a-cab' service

The taxpayer entered into an agreement with the Andhra Pradesh State Road Transport Corporation ("APSRTC") for providing buses on hire to APSRTC. The taxpayer was directed by the APSRTC to operate the buses in the allotted routes during fixed timings. Conductors were employed by APSRTC to collect fares decided by the Government from the passengers. It was the sole responsibility of the taxpayer to obtain the required permits and the taxpayer was liable for all the claims that may arise due to statutory violations during the operation of the buses. However, APSRTC would reimburse the fines and penalties imposed by the State Transport Authority. The RA contended that giving buses on hire to APSRTC would be liable to service tax under 'rent-a-cab' services.

The CESTAT observed as follows:

- APSRTC would have to pay per kilometer hire charge whether the buses run empty and no passengers travel in the bus or they run with double capacity. Therefore there is no joint operation by APSRTC and the taxpayer;

- The stage carriage permit was not transferred from the taxpayer to APSRTC since as per the terms of the agreement, the taxpayers would have the sole liability for fines and penalties on account of contravention of the provisions under the Motor Vehicle Act. APSRTC was only responsible for reimbursing the fines and penalties imposed by the State Transport Authority;

- The control of the vehicle is with APSRTC as APSTRC is free to run the vehicle wherever they want provided it bears the consequences of plying it in a different route. There is no provision in the agreement which restricts APSRTC from directing the driver to take a different route or to go elsewhere.

- The following essential requirements of the rent-a-cab service under section 65(105)(o) of the Finance Act, as laid down by the Uttarakhand HC in the case of Sachin Malhotra and others [2014 SCC Online Utt 1855] are fulfilled in the present case:

  - The hirer should be able to be use the vehicle at any time and place he desires; and

  - The control of the vehicle is given to the hirer and he is given possession for howsoever a short period.

Based on the above, the CESTAT held that service tax would be applicable on giving on hire buses to APSRTC under 'rent-a-cab' service and remanded the matter to the RA for quantification of demands while the penalties were set aside.

S K Kareemun & 198 Others vs Commissioner of Central Excise, Customs and Service Tax, Hyderabad – III [Order Nos. 22119 to 22317/2014,CESTAT Bangalore]

'Basic fare' on which service tax is payable at a composite rate by air travel agents shall not include fuel surcharge

The taxpayer was engaged in booking of air tickets for their customers both as an agent of International Air Ticketing Association ("IATA") and by purchasing tickets on principal to principal basis from other agents of IATA. The taxpayer was discharging service tax liability as an air travel agent in terms of Rule 6(7) of the ST Rules ie at a composite rate on the value of basic fare. Basic fare is defined to mean that part of the air fare on which commission is normally paid to the air travel agent by the airlines.

The RA alleged that the taxpayer has received commission on the basic fare inclusive of fuel surcharge and thus fuel surcharge amount has to be included in the value for purpose of payment of tax under Rule 6(7) of the ST Rules. The taxpayer contended that most airlines do not normally pay commission on the basic fare mentioned in the air tickets (ie inclusive of fuel surcharge).

The CESTAT held that the definition of 'basic fare' clearly indicates that it is the airfare on which the airlines normally pay commission to the air travel agent, ignoring stray cases in which commission is paid on a different part of air fare. The CESTAT remanded the matter to the adjudicating authority

M/s Kafila Hospitality & Travels Ltd vs Commissioner Service Tax, Delhi [Order No 54843/2014, CESTAT New Delhi)

If no service is provided after receipt of advance, the advance has to be considered as a 'deposit' and limitation provisions do not apply for claim of refund

The taxpayer entered into works contract and received mobilization advance on which service tax was duly paid. The contract was terminated and the advance paid was recovered for services not provided. The taxpayer filed a refund application for refund of service tax paid on advance amount received which was subsequently returned on termination of contract. The refund claim was rejected on the grounds of limitation.

The CESTAT held that the amounts paid by the taxpayer cannot be termed as payment of duty but has to be considered as a 'deposit' to which limitation provisions prescribed under Section 11B of CE Act will not be applicable. Thus, the refund claim of the taxpayer was allowed.

Commissioner of Central Excise and Service Tax, Bhavnagar vs M/s Madhvi Procon Pvt Ltd [Order No.A/11993/2014, CESTAT Ahmedabad]

III. VAT/ CST/Entry Tax

Supreme Court Decisions

Battery charger is an 'accessory' to cell phone and not part of the cell phone, even if it is sold along with cell phone in the same package

The taxpayer sold cell phones along with battery charger in a single package and paid VAT at the rate of 4 percent on the sale value of the cell phone and battery charger and the cell. However, the RA contended that battery charger was a distinct commodity from cell phones and therefore would be exigible to tax at the rate of 12.50 percent. The HC held that the battery charger is a part of the composite package of cell phone and therefore would attract the same rate as cell phone. Aggrieved against the order of the HC, the RA appealed to the SC.

The SC, relying on the dictionary meaning of the term 'accessory' observed that a charger is an accessory to a cell phone and not a part of the cell phone. The SC further reasoned that a charger cannot be said to be a part of the cell phone as there are other means of charging the battery of the phone. The battery charger was held to be an independent product which can be sold separately without the cell phone. Further, since the entry pertaining to cell phone under the Punjab VAT Act did not include accessories to cell phones, the SC held that tax at the rate of 4 percent would not apply to battery charger (even if they were sold in the same package as the cell phone).

State of Punjab & Ors vs Nokia India Pvt Ltd [Civil Appeal Nos. 11486-11487/2014, SC)

High Court Decisions

Provisions of Gujarat VAT Act law restricting input tax credit in case of interstate sale of goods held constitutionally valid

The taxpayers had filed writ petitions requesting the Gujarat HC to declare section 11(6) of Gujarat VAT Act, 2003 ("the GVAT Act") as unconstitutional and invalid. The said section read with the Notification no (GHN-14) VAT-2010-S 11(6)(2)-TH dated June 29, 2010 has the effect of reducing the input tax credit ("ITC") on (i) goods sold in the course of interstate trade or commerce or (ii) goods used as input in the manufacture of goods which are sold in the course of interstate trade and commerce.

The taxpayers contended that ITC is a statutory right conferred by the statute itself and therefore cannot be restricted by way of any notification of the State Government. It was also argued by the taxpayers that the impugned legislation was excessive and unreasonable as it went against the overall scheme of the GVAT Act, which was to levy tax on a value added basis. It was also argued that section 11(6) of the GVAT Act is violative of Article 14 of the Constitution of India as it simply gives the State Government power to specify goods and class of dealers which shall not be entitled to ITC and does not provide for any guidance so as to under what circumstances such power should be exercised by the Government.

The HC held that the GVAT Act itself confers power on State Government to curtail ITC and therefore neither section 11(6) of the GVAT Act nor the Notification issued thereunder can be said to be unconstitutional / arbitrary. The HC further observed that the impugned Notifications were issued in the larger public interest with a view to ensure the availability of adequate funds for the development programs of the State, specifically keeping in mind the fact that the Central Government had failed to compensate the states for losses on account of reduction in the rate of CST. Accordingly, the HC upheld the validity of section 11(6) of the GVAT Act and the notification issued thereunder.

Kadwani Forge Ltd vs State of Gujarat [Spl Civil Appln No. 17439/2011, Gujarat HC)

No VAT on resale of used motor vehicle by a dealer, subject to fulfilment of conditions

The taxpayer was a registered dealer under the Delhi Value Added Tax Act, 2004 ("DVAT Act"), engaged in manufacturing / trading in commodities other than motor vehicles. ITC was not availed by the taxpayer on the purchase of motor vehicles procured for his business purposes. Subsequently on sale of the used motor vehicle, the taxpayer did not pay VAT on the same. The RA disputed the non-inclusion of the sale price of the used motor vehicle in the business turnover and contended that VAT was payable by the taxpayer on the sale consideration received on sale of used motor vehicle.

The Delhi HC held that sale of the used motor vehicle is a part of the business turnover given the broad definition of the term 'business' under the DVAT Act. However, the sale price was exempt from tax by virtue of section 6(3) of the DVAT Act which provides for exemption on sale of used capital goods on which ITC has not been claimed and which have been 'used exclusively for making non-taxed sales under the DVAT Act'.

The HC observed that motor vehicles fell within the definition of 'capital goods' and the taxpayer has not claimed ITC on their purchase. As the taxpayer did not use the vehicles exclusively for making non-taxed sales, the HC held that all the conditions of section 6(3) of the DVAT Act are satisfied and therefore, the sale price received by the taxpayer on sale of used motor vehicles would not be included in the turnover and is exempt from tax.

Anand Decors and Others vs Commissioner of Trade & Taxes, Delhi [ST Appl No. 37/2014, Delhi HC]

Concessional tax benefit denied in absence of inter-state movement of goods occasioned by sale

The taxpayer, a dealer in the State of Andhra Pradesh ("AP"), sold finished goods, ie, paperboards to a buyer situated in AP, whereby the goods were delivered ex-factory to the transporter, passing the ownership and risk of the goods to the buyer at the factory gate itself. Such goods instead of being shifted to the buyer's factory were directly sent to Tamil Nadu ("TN") for converting paperboards into cigarette packets and cartons.

The taxpayer treated such sales as inter-state sales and paid concessional rate of tax on such sales, contending that the movement of goods is occasioned from one State to another in pursuance of a contract of sale. The AP HC observed as follows:

- The nature of a transaction must be determined with reference to section 3 of the CST Act which states that sale / purchase must occasion movement of goods from one State to another to qualify as 'inter-State sale';

- Section 23 of Sale of Goods Act, 1930 provides that sale is deemed to be completed when goods are delivered to buyer / carrier / bailee, without reserving right of disposal by seller;

The HC held that the taxpayer completed the sale in AP as the goods were delivered to the carrier of the buyer for transportation and thereby the taxpayer ceased to be the owner of the goods. The movement of goods by the taxpayer to TN was not in pursuance of contract of sale with the buyer and hence the transaction cannot be said to be an inter-State sale. The HC further held that payment of tax against Form C declaration is not a ground to treat the sale as an inter-State sale, that the taxpayer cannot deny his liability to pay local tax and that the only remedy available to the taxpayer is to claim refund of the tax already paid.

State of Andhra Pradesh vs ITC Bhadrachalam Paperboards Ltd [TS 587 HC 2014 (TEL_and_AP) VAT ITC, Telangana and Andhra Pradesh HC)

Deduction of discount admissible for computation of taxable turnover, where price for sale was pre-fixed by the Government

The taxpayer is engaged in the exploration, development and production of the petroleum products and made sales of these products at Government controlled rates. The taxpayer gave credit to Indian Oil Corporation ("IOC") towards discount on sale price, as directed by the Government of India. The taxpayer claimed credit of tax relating to such discount, on the ground that discount would not form part of taxable turnover.

As per the Government directives, the taxpayer was authorized to collect only the price fixed by the Government. The Government announced provisional prices to be charged by the taxpayer from the Oil Marketing Companies ("OMCs") since the precise computation of the price required complex economic considerations which could not be known before-hand. The taxpayer raised the invoices on the basis of provisional prices and eventually adjusted its accounts in accordance with the actual prices by raising credit or debit notes on the OMCs. The whole mechanism is worked out in order to ensure that the individual consumers do not have to bear the full burden of the international price fluctuations.

The RA however opined that such discounts cannot be considered as trade discounts since by discounting the price; the taxpayer was sharing the losses which cannot be categorized as discount or reduction in the price. The sale price initially fixed between the buyer and seller was not received by the buyer but was certainly receivable, but for the waiver of profit by subsequently granting artificial discount from the sale price. The RA therefore contended that the discount taxpayer was required to pay tax on turnover inclusive of such discount.

The Gujarat HC held that it is the final price which the taxpayer received from the OMCs which alone would form part of the taxable turnover. From the outset, the terms between the taxpayer and the OMCs were clear that the taxpayer would supply the petroleum products at provisional price fixed by the Government of India and the final invoice would be raised by adjusting such provisional price with the finally fixed price by the Government of India. The HC observed that the additional component, other than the final price never entered the turnover and that merely because the precise computation of price was deferred at a later point of time and the adjustments were made post sale, it would not mean that it was a case of waiver of the sale price by the taxpayer. Therefore, the deduction of such discounts from the taxable turnover was held to be valid.

ONGC LTD vs State of Gujarat [Tax Appeal No. 50, 62. 1003-1005, 835/2014,Gujarat HC]

Tribunal Decisions

Value of goods rejected by buyer as per contractual terms is not includible in sales turnover

The taxpayer entered into contract with the buyers for supply of alloy, iron casting for automobile and internal combustion engine. As per the terms of contract, the buyer was given a right to reject goods at two stages: - (i) immediately on inspection of receipt of goods, (ii) during machining process of casting of defects are observed which cannot be eliminated, cured or repaired and noticed only at stage of machining such as shrinkage and blow holes in castings etc. which can be done within three months from receipt of goods. The buyer rejected the castings during the second stage.

The taxpayer claimed that the sale was conditional and the goods rejected fell into second category of rejections i.e. line rejections and at that stage sale was not complete. Hence, taxpayer was eligible to claim deduction of sale price of rejected goods from its turnover of sales both under the sales tax act and under the CST Act. The taxpayer took an alternative plea of sales return although it was not possible to co-relate line rejection with sale bills. The RA contended that there was movement or transfer of goods, hence sale was complete, and ownership of the goods has been passed to the buyer on delivery.

The Maharashtra Sales Tax Tribunal referred to the provisions of the Sale of Goods Act and held that as per Section 4(3) of Sale of goods Act, when there is a condition which is required to be fulfilled, the contract becomes an agreement of sale and therefore it does not become a sale unless the condition is fulfilled. This is regardless of the fact that the property in goods sold is transferred by the seller to the buyer. Further, as per Section 19 of the Sale of Goods Act, reference has to be made to terms of the contract to ascertain the intention of the parties as to when the goods are intended to pass. In the present case, as per conditions of the contract entered into between the taxpayer and buyer, if further defects are noticed while assembling or procession, the buyer had the right to reject such material even if it has been passed / and paid for. Accordingly, the Tribunal held that rejection of goods was unilateral act on the part of the buyer and hence sale was not complete and therefore, value of these rejected goods would not become part of turnover of sales for the purpose of sales tax act and CST Act.

M/s Paranjape Auto Cast Pvt Ltd vs The State of Maharashtra [2015-VIL-03-MSTT, STT Mumbai]

C Forms have to be issued by dealers from the State in which goods are delivered; dealers are liable to register in that State.

The taxpayer is registered in State of Maharashtra and effected inter-state sales at a concessional rate of CST of 2 percent against issuance of Form C. The RA disallowed the concessional rate of CST for the reason that the Form C was required to be issued from the State where the goods were delivered, whereas in the present case, Form C was issued by the buyers from the State of Maharashtra (where they were registered) for the goods delivered in other states.

The taxpayer submitted that as per Explanation II of Rule 12(6) of CST (Registration and Turnover) Rules, 1957 ("CST Rules"), if a buyer is not registered in the State in which goods are delivered and is not able to obtain registration under Section 7 of the CST Act in that State, then he can furnish Form C from the State in which he is registered.

The Tribunal observed that the declarations made under Form C should be duly filled in and signed by a 'registered dealer', while in the present case, the buyers have not filled the details of the State in which goods were delivered. Further, the Tribunal also noted that 'registered dealer' in the present case should mean the dealer registered in the State in which goods are delivered. With regard to relaxation provided under explanation II to Rule 12(6) of CST Rules, the Tribunal ruled that the inability of the buyer to produce form by reason of not being registered should flow from the law and not by default of the purchasing dealers in obtaining registration in the State in which goods are delivered. Further, it was also noted that in the present case inter-state sales were affected for more than one occasion by both the taxpayers and buyers. The Tribunal thus held that the buyers were liable to obtain registration in the State in which goods were delivered in the absence of any reason of their inability to obtain registration in that State. The Tribunal disallowed the benefit of concessional rate of tax to the taxpayer.

M/s Adani Enterprises vs The State of Maharashtra [2015-VIL-02-MSTT, STT Mumbai]

IV. CUSTOMS

High Court Decisions

Neither Central Government nor Directorate General of Foreign Trade ("DGFT") have the power make retrospective amendments in Foreign Trade Policy; DGFT Circular struck down

The taxpayers had been granted Duty Credit Scrips ("scrips") on export of certain fabrics, which qualified as 'Technical Textiles' as per Appendix 37D of the Handbook of Procedures ("HOP"), under Focus Product Scheme ("FPS" / "the scheme") of the Foreign Trade Policy 2009-2014 ("FTP"). These scrips were subsequently utilized/sold by them.

The DGFT issued a Policy Circular No.42 (RE-2010)/2009-14 dated October 21, 2011 ("Circular") which had the effect of excluding the products exported by the taxpayers from the definition of 'Technical Textiles' retrospectively, due to which the taxpayers were rendered ineligible to claim the benefit under FPS.

The issues which came up for consideration before the Delhi HC was whether the DGFT had the power to issue the impugned circular to recall a benefit provided to the taxpayers under the FTP, with retrospective effect.

The HC ruled in favor of the taxpayer and held that neither the Central Government, nor DGFT have the power to amend the FTP or withdraw any export benefit with retrospective effect in the absence of any explicit provision enabling such retrospective amendment. The HC highlighted that the role of DGFT was to specify the procedure to be followed by an importer and exporter for implementing the FTP and to clarify any question or doubt in relation to classification of any item in the ITC (HS) Code or the HOP. However, the impugned circular was struck down since it did not clarify any doubt as to the interpretation of the expression "technical textiles" but brought about a substantive change as it restricted the scope of FPS.

Malik Tanning Industries [WP. (C) No 6387/2012 & CM No. 17030/2012] & M/s Kavish Impex Pvt Ltd [WP (C) No. 4754/ 2014 & CM No. 9467/2014] vs Union of India And Others [Delhi HC]

Special Economic Zone ("SEZ") unit eligible to claim exemption of Countervailing Duty ("CVD") based on an exemption notification issued under the CE Act

The taxpayer was a SEZ unit engaged in the manufacture of stone-wool insulators. The goods manufactured were exported as well as cleared in the Domestic Tariff Area ("DTA").

As per section 30 of the Special Economic Zones Act, 2005 ("SEZ Act"), any goods cleared from an SEZ to the DTA is chargeable to customs duty including CVD payable on like goods when imported into India. The taxpayer claimed that no CVD is payable on DTA clearances in view of the fact that like goods manufactured outside SEZ are exempt from payment of central excise duty vide an exemption notification issued under section 5A of the CE Act. The

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RA denied exemption from CVD in light of proviso to section 5A which provides that no exemption from payment of excise duty shall apply to excisable goods manufactured in an SEZ unit.

The Gujarat HC observed that in terms of section 30 of the SEZ Act, clearances from SEZ to DTA are in the nature of 'imports'. Thus, CVD leviable on such clearances would be equal to the excise duty for the time being leviable on a like article if produced or manufactured in India in terms of section 3(1) ("charging section") of the Customs Tariff Act, 1975. In the present case, since excise duty on such products is exempt, accordingly, no CVD would be levied on clearance of such goods from SEZ to DTA. With framing of the SEZ Act, all SEZs were brought within the ambit of the Act and matching amendments were made in the CE Act. The reference to SEZ in proviso to section 5A of the CE Act, however, continued.

The HC observed that this omission to omit the reference to SEZ from the said proviso appears to be a legislative oversight and held that the legislative intention is that an SEZ unit would not be liable to pay CVD, if the local manufacturer of like goods is exempt from payment of whole of such duty.

Roxul Rockwool Insulation India Pvt Ltd vs Union of India [Spl Civil Application No. 8869/2014,Gujarat HC]

Indirect control over another company held to be a sufficient condition to be considered a group company under the FTP

The taxpayer is a company incorporated under the Companies Act, 1956 and has obtained a license to import capital goods at concessional rate of duty under the Export Promotion Capital Goods Scheme ("EPCG") of the FTP subject to the fulfillment of an export obligation.

As per the FTP, the excess exports of a group company can be considered while computing the export obligation on the condition that the group company exercises 26 percent or more of voting rights in the other enterprise or appoints more than 50 percent of members of board of directors in the other enterprise. The taxpayer had requested the authorities to consider the excess exports affected by Tata Consultancy Services ("TCS"), on which the taxpayer did not exercise any direct control but their holding company, Tata Sons Ltd, held more than 50 percent both in the taxpayer and in TCS. The Policy Interpretation Committee ("PIC") rejected the request of the taxpayer while holding that the taxpayer and TCS cannot be considered as group companies. The Bombay HC observed that PIC should place an interpretation consistent with the policy and not contrary to it and that the group company requirement is fulfilled by indirect control as well.

Accordingly, the HC held that TCS and the taxpayer were group companies and the excess exports affected by TCS could be considered for fulfilling the export obligation of the taxpayer under the EPCG scheme.

Tata Teleservices Ltd vs Union of India & Ors [W.P No. 233 and 237/2013, Bombay HC]

Indian companies having foreign shareholding are eligible to obtain

scrips under Served from India Scheme ("SFIS")

The taxpayer was a subsidiary of a foreign company which was incorporated in India as per the provisions of the Companies Act, 1956 ("Company law") and was engaged in the business of exporting certain services from India. The taxpayer made application for availing the benefit of SFIS as provided under the FTP and such applications were accepted by the DGFT.

Subsequently, on Policy Interpretation Committee (PIC)/DGFT denied the SFIS benefit to non-Indian companies on the grounds that the intention of the SFIS is to incentivize 'Indian Service Providers' and to create a powerful and a unique 'served from India' brand.

The HC has set aside the decision of the PIC and observed as follows:

- While DGFT is empowered to interpret the FTP, it would not be open to introduce new conditions and criteria under the guise of interpreting the Policy;
- There is no scope to read into the words "Indian Service Providers" the condition that for service providers to be Indian, its shareholders must also be Indian; and
- The conclusion of DGFT that Indian companies having foreign equity cannot be considered as Indian, militates against well-established canons of company law.

Thus, the term 'Indian Service Providers' was held to include subsidiaries of foreign companies which have been incorporated in India and the benefit of SFIS would be available to them subject to fulfillment of other conditions laid down under the FTP.

Yum Restaurants (I) Private Limited, & others vs Union of India [TS-13-HC-2015(DEL)-FTP, Delhi HC]

V. CENTRAL EXCISE

Tribunal Decisions

Credit of duty paid by job worker on intermediate goods available to manufacturer even where manufacturer had removed inputs originally to the job worker without reversing credit availed on inputs

The taxpayer, a manufacturer of Turbine and Electricity Generating Sets, was receiving duty paid inputs in respect of which they were availing the CENVAT credit. Thereafter, the CENVAT credit availed inputs were sent to job-workers without reversing the CENVAT credit, in terms of provisions of Rule 4(5)(a) of Credit Rules. The job worker cleared the processed inputs to the taxpayer under invoices on payment of excise duty by including the value of the inputs and without availing the exemption under Notification 214/86-CE. The taxpayer took CENVAT credit on the duty paid by the job worker.

The issue before the CESTAT was whether the taxpayer is eligible to claim CENVAT credit of the excise duty paid by the job worker on the intermediate goods when the taxpayer had already claimed the credit on the inputs. The CESTAT observed that the exemption under Notification No 214/86-CE is a conditional exemption and is not required to be compulsorily availed by job workers where the inputs are removed availing the facility of Rule 4(5)(a) of the Credit Rules. The job workers had rightly paid duty on the cost of inputs plus job charges following the ratio laid down by the SC in the case of Ujagar Prints vs Union of India [1989 taxmann.com 661 (SC)]. Moreover, the inputs in question had suffered duty twice, first in the hand of input manufacturers from whom the taxpayer had procured the inputs and second time in the hand of job-workers at the time of clearance of processed goods to the taxpayer. Accordingly, the claim of CENVAT credit was upheld by the CESTAT.

Bharat Heavy Electricals Limited vs Commissioner of Central Excise & Service Tax, Meerut-I [Order Nos. A/58139/2013-Ex(DB),CESTAT New Delhi]

No dispute on undervaluation of intermediate product can arise where duty is paid on final product on Maximum Retail Price ("MRP") basis

The taxpayer was a manufacturer of soap and like products. The taxpayer cleared 'soap noodles' to an independent job worker at a price lower than the price charged from its sister concern. The job worker manufactured soap using the soap noodles and cleared it to the taxpayer on payment of duty under section 4A of the Central Excise Act, 1944 ("CE Act"). The RA raised a differential demand of duty on account of under-valuation of the goods sold to the job worker.

The taxpayer contended that the job worker was purchasing the 'soap noodles' from other third party independent suppliers at a similar price. The whole exercise was revenue neutral as the finished goods viz. soaps were being cleared by the job worker on payment of excise duty under section 4A of the CE Act i.e. on MRP after claiming prescribed abatement.

The Mumbai Bench of the CESTAT agreed with the contentions of the taxpayer and held that when excise duty is paid on finished goods on MRP basis, the question of under-valuation on the intermediate product supplied by the taxpayer to the job-worker does not arise and accordingly, the demand raised on the taxpayer was set aside.

Hindustan Unilever Ltd vs Commissioner of Central Excise, Mumbai-I [Final Order No. A/513/2014-WZB/C-II(EB), CESTAT Mumbai]

Excess freight charges collected from customers not to be included in the assessable value

The taxpayer was engaged in the manufacture of various types of chemicals. The taxpayer had appointed a related entity as a collection agent-cum-consignment agent ("related agent"). In terms of the agreement, the related agent was responsible for procuring orders, transportation and handling of goods from the factory of the taxpayer to the customer premises. The taxpayer paid excise duty on the value of goods at which they were being sold to the customers. The related agent collected the value of goods on behalf of the taxpayer along with freight. The total amount collected by the related agent was remitted back to the taxpayer after deduction of commission from the value of goods. The RA contended that in cases where the freight recovered from the customers exceeded the actual freight expenses, the differential amount should be included in the assessable value for computation of excise duty.

The CESTAT noted that invoices were raised directly by the taxpayer on the customer indicating the assessable value as per the purchase order and that there was no evidence to prove that value of goods was being collected in the guise of freight. Further, it was held that as per the legal position established by many decisions of the higher courts even if excess freight charges were being collected by the manufacturers themselves, such charges would not be included in the assessable value for charging duty unless there is evidence to establish that value of goods is being collected in the guise of freight charges.

Dhampur Sugar Mills Limited vs Commissioner of Central Excise, Meerut – II [Order Nos. A/52911-52912/2014-EX(DB), CESTAT New Delhi]

Notification & Circulars

Re-export of goods imported inadvertently at a customs station, which are destined elsewhere

In respect of re-export of goods inadvertently imported at a particular customs station but which are destined for elsewhere, with a view to expedite decision-making, it has been clarified that permission for re-export may be granted on merit by the officer concerned as per the adjudication powers. In regard to the adjudication powers, a reference may be made to section 122 of the Customs Act and Circular No.24/2011-Customs dated March 31, 2011

Circular No. 04/2015-Customs dated January 20, 2015

Instructions for issuance of summons

CBEC has issued guidelines regarding issue of summons in Central Excise and Service Tax matters. The following broad instructions were laid down in the Circular:

- Summons should be issued by Superintendents only after obtaining prior written permission of an officer not below the rank of an Assistant Commissioner ('AC'), with reasons recorded in writing
- Where it is not possible to obtain prior written permission, oral/ telephonic permission needs to be obtained from such officer and being intimated to the officer at the earliest
- The officer issuing the summons need to submit a report of the proceedings and submit the same to the officer who authorized the issuance of summons

Instructions- F. No. 207/07/2014-CX-6 dated January 20, 2015

Merging of commercial invoice and packing list

Since both commercial invoice and packing list contain almost identical data fields, to promote trade facilitation, it has been clarified that a single commercial invoice cum packing list would be sufficient for import and export. However, this is only optional.

Circular No. 01/15-Customs dated January 12, 2015

Mandatory pre-deposit of duty or penalty for filing appeal

It has been clarified that mandatory pre-deposit under section 129E of the Customs Act, 1962 ("Customs Act") would be payable even in cases of demand of drawback as drawback, like rebate in Central Excise, is refund of duty suffered on the export goods.

Further, the ambit of the section 129E of the Customs Act does not extend to appeals under section 129DD before Joint Secretary (Revision Application) ("JS(RA)"). Therefore, no pre-deposit would be payable while filing appeal before the JS(RA).

Circular No 993/17/2014-CX dated January 5, 2015

Validity of Rule 5A (2) of the ST Rules upheld; Delhi HC ruling quashing the said Rule distinguished

In light of the ruling of the Delhi HC ruling in the case of Travelite (India) vs UOI and others (2014 (35) S.T.R. 653) wherein Rule 5A(2) of the ST Rules had been quashed on the ground that the said rule was ultra-vires the governing statutes, the CBEC has issued the present Circular stating that the new clause (k) under section 94(2) of the Finance Act inserted vide Notification 23/2014 of December 5, 2014 shall be considered as the legal backing for rule 5A(2) of the ST Rules. The said rule empowers cost accountants and chartered accountants to conduct service tax audits on behalf of the service tax department.

Circular No 181/7/2014–Service Tax dated December 10, 2014

Execution of 100 percent Bank Guarantee ("BG") in respect of Advance License/EPCG Schemes not justified on account of absence of risk to revenue

Paragraph 2.27.1 of the FTP provides that all exporters having an export turnover of at least Rs 5 crores in the current or preceding financial year and having a good track record of three years of exports will be exempted from furnishing a BG for any of the Schemes under the FTP and may furnish a legal undertaking ("LUT") in lieu of BG.

Vide paragraph 3.2(c) of the Circular No. 58/2004-Customs dated October 10, 2004, CBEC had clarified that exemption from execution of BG shall be available subject to the condition that the license holder should not have been penalized during the previous three financial years in certain types of cases booked against him under statutes specified therein. It was brought to notice of CBEC that in case the aforesaid condition specified in Circular No. 58/2004-Customs dated October 10, 2004 was not met with, the exemption from BG became inapplicable (i.e. trade facilitation gets affected) even if there is absence of risk to revenue.

To redress the above position, CBEC has added another condition 3.2(d) in the Circular No. 58/2004-Customs dated October 10, 2004 clarifying that where condition specified in paragraph 3.2 (c) is not fulfilled, the jurisdictional Commissioner of Customs for the reasons recorded in writing may waive the condition of 100 percent BG on account of absence of risk to revenue.

Circular No 15/2014–Customs dated December 18, 2014

Restoration of Accredited Clients Programme ("ACP") status of ACP clients which has either been withdrawn or not extended

Vide the Circular, CBEC has clarified on the ACP status, basis representations received from ACP clients whose ACP status has either been withdrawn or not extended on account of them having been served a show cause notice ("SCN") in terms of the amended para 7(iii) of the Circular No.42/2005-Cus dated November 24, 2005 ("Circular dated November 24, 2005"). As a trade facilitation mechanism, CBEC has decided that ACP status may be restored in such cases as follows:

- Restored after 3 months if the entity pays the duty demanded with interest and penalty of 25 percent within 30 days of the SCN or if the entity's application is allowed to be proceeded with by the Settlement Commission
- Restored after 6 months if the entity pays the duty demanded with interest.

Further, the restoration of the ACP status in terms of the above is subject to the condition that if another case is booked within the 3 months or 6 months period, as the case may be, against the said entity; the period of exclusion would be 1 year. If another (or more) case(s) is booked during the 1 year period, the exclusion period would be 3 years.

CBEC has further clarified that the ACP status would not ordinarily be denied to an entity if, in the category of cases specified above, the Customs/Central Excise duty or Service Tax involved is up to Rs 50 lakhs and Rs 25 lakhs, respectively.

Circular No 18/2014–Customs dated December 22, 2014

Facility of 24x7 Customs clearance extended to specified additional sea ports and air cargo complexes

Vide Circular 22/2012 dated August 7, 2012, CBEC had announced that 24x7 customs clearance would be made available at specified sea ports and air cargo complexes for identified categories of import and export goods. In continuation of the same, the CBEC has specified additional 18 sea ports and 17 air cargo complexes where the facility of 24x7 customs clearance would be made available effective December 31, 2014. CBEC has instructed the Chief Commissioners of Customs to publicize trade facilitation measure and to ensure that adequate number of officers is deployed on a 24X7 basis at the specified locations.

Circular No. 19/2014–Customs date December 31, 2014