March-April 2016

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

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Foreword

I am pleased to enclose the March-April 2016 issue of FICCI's Tax Updates. This contains recent case laws, circulars and notifications pertaining to direct and indirect taxes.

The Union Budget 2016-2017 was presented by the Hon'ble Finance Minister on February 29, 2016. An 'Interactive Session on Union Budget 2016-2017' was conducted at Federation House on March 2, 2016. The objective of the event was to update the participants on the key provisions of the Finance Bill, 2016 and the relevant notifications to help the participants in understanding the implications of the changes in the Income Tax, Customs, Central Excise and Service Tax laws and procedures. The event provided an opportunity to the participants to seek clarifications from the officers of the Ministry of Finance and other tax experts.

FICCI's Post Budget National Executive Committee Meeting was held at Federation House on March 4, 2016. The meeting gave an opportunity to the members to interact with the senior government officials to discuss various proposals announced in the budget. A presentation on the important tax proposals made in the Budget was made by the Mr. Dinesh Kanabar, Chairman, FICCI's Taxation Committee and Mr. Sachin Menon, Co-Chairman, FICCI's GST Task Force.

A meeting of the Taxation Committee chaired by Mr. Dinesh Kanabar was held on March 10, 2016. The meeting finalized the recommendations arising out of the proposals announced in the Finance Bill, 2016 for inclusion in FICCI Post Budget Memorandum 2016-2017. Pursuant to the discussions held in the meeting, FICCI has submitted its Budget Memorandum 2016-2017 to the officials in the Ministry of Finance on March 21, 2016.

On the direct tax front, the Central Board of Direct Taxes (CBDT) has clarified that the provisions of the tax treaty would be applicable to a partnership, estate or trusts that is a resident of either India or the U.K., to the extent that the income derived by such partnerships, estates or trusts is subject to tax in that state as the income of a resident, either in its own hands or in the hands of its partners or beneficiaries.

In an another important decision Supreme Court has observed that the adjudication process for grant of refund of Central Excise duties should be completed within three months from the date of filing refund application. For any delay beyond three months in grant of the refund due, interest would be payable to the taxpayer even if the delay is due to defects in the refund application.

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

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Recent Case laws

I. DIRECT TAXES

High Court Decision

Levy of interest under Section 234B is automatic even if it is not mentioned in the assessment order

During the year under consideration, the AO passed an assessment order under Section 143(3) of the Act. The AO has not charged any interest under Section 234B of the Act. The CIT(A) held that charging of interest under Section 234B of the Act is consequential and therefore, the AO has to recalculate the interest while giving effect to the order. The Tribunal held that since in the assessment order, the AO has not charged any interest under Section 234B of the Act, no such interest is chargeable.

High Court's ruling

Levy of interest under Section 234B of the Act is held to be mandatory and automatic. The AO has no discretion to levy any interest other than the right of interest mentioned in Section 234B of the Act. The AO has no jurisdiction and/or authority to reduce and/or charge interest less than that provided under Section 234B of the Act. On conjoint reading of the provisions of Sections 143, 234B and 156 of the Act it was held that levy of interest under Section 234B of the Act is mandatory and automatic and the AO has no discretion to levy any other interest other than that provided under Section 234B of the Act. Even in the absence of any direction by the AO while passing an assessment order, there can be a demand of levy as well as a demand of interest under Section 156 of the Act. It would have been a different fact if the AO had any discretion with respect to the rate of interest and/or to levy any interest considering the facts and circumstances of the case. In the present case, the AO had no such discretion on the eventuality as mentioned in Section 234B of the Act.

The Supreme Court in the case of Karanvir Singh Gossal vs CIT [2012] 349 ITR 692 (SC) has considered its earlier decisions in the case of Ranchi Club Ltd. [2001] 247 ITR 209 (SC) and CIT vs Anjum M.H. Ghaswala [2001] 252 ITR 1 (SC), and is binding on the High Court and the same is required to be considered. In the case of Anjum M.H. Ghaswala, and Karanvir Singh Gossal it was held that charge and levy of interest under Section 234B is mandatory and compensatory in nature. Therefore, once the levy of interest under Section 234B is mandatory, and recitation by the AO, directing an institution of penalty proceedings is not obligatory and penal proceedings could be initiated for such default without any specific direction from the AO.

On conjoint reading of the provisions of Sections 143, 234B and 156 of the Act, it was held that levy of interest under Section 234B of the Act is mandatory and automatic, and the AO has no discretion to levy any other interest other than that provided under Section 234B of the Act. Thereafter, levy of interest under Section 234 of the Act would be consequential, and arithmetically the amount of interest is required to be calculated. Even in the absence of any direction by the AO while passing an assessment order, there can be a demand of levy and demand of interest under Section 156 of the Act. The AO has no jurisdiction and/or authority to reduce and/or charge interest less than that provided under Section 234B of the Act.

It is to be noted that the subsequent decision of the Supreme Court in the case of Anjum M.H. Ghaswala is a decision of a five judges bench and in the subsequent decision of the Karanvir Singh Gossal, the Supreme Court had taken note of the earlier decision in the case of Anjum M.H. Ghaswala, in which the Supreme Court has categorically laid down the law that levy of interest under Section 234B is mandatory and automatic and that it cannot be reduced. Therefore, a subsequent decision laying down the aforesaid law is binding on this court. Therefore, it is held that there is no necessity to mention interest under Section 234B of the Act in the assessment order before raising a demand of the same in the notice issued under Section 156 of the Act. It is also held that the AO could charge/levy interest as per Section 234B of the Act in the notice issued under Section 156 of the Act directly.

ACIT vs Norma Detergent (Pvt) Ltd. (Tax Appeal No. 321 of 2000) (Guj) – Taxsutra.com

Aggregation of a transaction under TNMM is rejected since the facts of the case indicated unusual features which remained unexplained by the taxpayer – Delhi High Court

The taxpayer was engaged in the manufacturing and sale of auto electrical products and was held by Denso Corporation, Japan (Denso) and Sumitomo Corporation, Japan (Sumitomo) with 47.93 per cent and 10.27 per cent shareholding respectively. In AY 2002-03 and 2003-04, the taxpayer had various international transactions with its AEs, such as payment of royalty, technical know-how, testing fees, etc. and benchmarked these transactions along with the import of components on an aggregated basis using the Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM). During AY 2002-03, the taxpayer imported raw material components from Sumitomo. The taxpayer had taken a stand that since shareholding of Sumitomo is less than 26 per cent, it is not its AE and hence did not report this purchase transaction as an international transaction in Form 3CEB. The TPO accepted all the transactions at an arm's length using TNMM as the MAM. However, the TPO noticed that the components imported from Sumitomo were, in fact, manufactured by Denso and it was so routed through an intermediary with the sole objective of camouflaging the actual transaction of purchases being made from an AE. The TPO treated this transaction of purchase of components from Sumitomo as an international transaction under Section 92B(2) of the Act. The TPO applied the Comparable Uncontrolled Price (CUP) method by comparing the price of components imported with that of the price of indigenous components purchased from domestic suppliers. The CIT(A) deleted the said adjustment. The Tribunal restored the TP adjustment pertaining to transactions of import of components with directions on proper application of the CUP method.

High Court's ruling

> The factual discussion in this case clearly reveals that, the taxpayer chose to import components not from the manufacturer (which was its AE) but an intermediary, which normally, would have been accepted by the revenue authorities as a commercial decision. However, in the instant case, the vendor of the components viz. Sumitomo was also connected with both the taxpayer and the manufacturer.

- The above realities compelled the TPO to closely scrutinise the value of such imports and seek further details from the taxpayer. The explanations by the taxpayer that were forthcoming, were apparently unconvincing.

  The taxpayer's approach i.e. a bundled or an aggregated series or a chain of transactions to benchmark international transactions would normally be accepted by the authorities, if they did not show the features that call for his/her interference. However, the AO/TPO should extend his/her inquiry critically evaluating materials, where a detailed scrutiny is required. The unusual features in this case, which remained unexplained by the taxpayer, raised concerns and influenced the revenue authorities to benchmark the transaction separately.

  The High Court, while upholding the approach adopted by the TPO, relied on the decision of Sony Ericsson Mobile Communications India (P) Ltd vs CIT [2015] 374 ITR 118 (Del), which discusses a test as to when the revenue authorities can disregard the actual transaction, and re-characterise the same i.e. when the form and substance of the transaction though were the same but the arrangements made in relation to a transaction, when viewed in totality, differ from those which would have been adopted by an independent enterprise behaving in a commercially rational manner.

- Thus, the High Court upheld the restoration of the adjustment made by the Tribunal.

Denso India Limited vs ACIT (ITA 443/2013 and ITA 451/2013) - Taxsutra.com

Recent Case laws

Tribunal Decisions

When the foreign recipient is eligible for the benefit of the tax treaty, there is no scope for deduction of tax at source at the rate of 20 per cent under Section 206AA of the Income-tax Act

The taxpayer filed its quarterly electronic tax deduction at source returns in Form No.27Q in respect of the payment made to non-residents. The Assessing Officer (AO) issued an intimation providing a summary of the short deduction and interest payable for delayed deposit of tax. The AO along with an intimation under Section 200A the Act also issued a demand notice under Section 156 of the Act. The taxpayer contended before the Commissioner of Income-tax (Appeals) [CIT(A)] that the AO issued the demand without giving effect to the provisions of the tax treaty. The taxpayer had deducted tax in accordance with the provisions of the respective tax treaty and therefore, there was no shortfall in the deduction of tax at source in respect of the payments made to nonresidents. The CIT(A) confirmed the action of the AO.

The Bangalore Tribunal observed that an identical issue was considered and decided by the Pune Tribunal in the case of Serum Institute of India Ltd. [2015] 56 taxmann.com 1 (Pune). Reliance was also placed on the decision of the Karnataka High Court in the case of Bharti Airtel Ltd. [2014] 52 taxmann.com 31 (Kar). The Ban-

galore Tribunal held that the provisions of Tax Deducted at Source (TDS) had to be read along with the tax treaty for computing the tax liability on the sum in question. Therefore, when the recipient is eligible for the benefit of a tax treaty, then there is no scope for deduction of tax at source at the rate of 20 per cent as provided under the provisions of Section 206AA of the Act. Similarly, on the issue of jurisdiction, it was held that the question of computing the rate of 20 per cent under Section 206AA of the Act is a debatable issue when the recipient is eligible for the benefit of provisions of the tax treaty, and therefore, the AO cannot proceed to make the adjustment while issuing an intimation under Section 200A of the Act.

Wipro Ltd. vs ITO [IT(IT) A. Nos.1544 to 1547/Bang/2013, (AY 2011-12)]

Consultancy services in the fields of exploration, mining and extraction are FTS and do not constitute a PE in India under the India-Germany tax treaty

The taxpayer company is registered in Germany and its core business activities include consulting services in the fields of exploration, mining and extraction. The taxpayer filed its return of income declaring income of INR11.39 million. The taxpayer had offered the income received from Indian parties as Fees for Technical Services (FTS) under Article 12 of the India-Germany tax treaty.

The AO observed that the taxpayer entered into agreements with GIPCL, Neveyli Lignite Corporation Ltd. (NLC) and Mcnally Bharat Engg. Co. Ltd. (MNBECL) and received INR11.39 million from Indian parties under the above agreements. The AO held that the taxpayer had rendered various services including supervisory activities to GIPCL. The services were in the nature of installation or assembly projects. The taxpayer rendered supervisory services to NLC as well. The services rendered were connected with mining projects. As per the agreement entered into with MNBECL, the taxpayer had to render services for the finalisation of the design problem at hand. The taxpayer had a Permanent Establishment (PE) in India as per Article 5(2)(i) of the tax treaty. Accordingly, the AO held that the taxpayer should have paid tax at a higher rate.

The Mumbai Tribunal held that consultancy services in the fields of exploration, mining and extraction rendered by a German company did not constitute a PE in India under the tax treaty. A protocol to the tax treaty with respect to Article 7 states that income derived from a resident of a state from planning, project construction or research activities as well as income from technical services exercised in that state in connection with a PE situated in the other state, shall not be attributed to that PE. Accordingly, even if it is assumed that, the taxpayer had a PE in India; it will not be governed by Article 7 of the tax treaty. Such services are taxable as FTS under Article 12 of the tax treaty.

Rheinbraun Engineering Und Wasser GmbH vs DIT (ITA No. 2353/Mum/2006) – Taxsutra.com

Merely the market price of some shares being at a higher value as compared to others in a group restructuring exercise, cannot be a ground to treat the transaction as a

deemed gift under the Income-tax Act

The taxpayer is engaged in the business of wholesale trading of pharmaceuticals, medicines, general stores and its related items as well as running of clinics. Its supply of goods is mainly to its group company which is engaged in the retail business of pharmaceuticals and general goods. During the Financial Year (FY) 2010-11, a major restructuring of the group had taken place wherein almost all the shares of the group company were taken over by the taxpayer and in turn the wholesale operations of the taxpayer were taken-over by the group company, resulting in the taxpayer becoming the holding company of the group company. The AO observed that two persons i.e. Mr. C. Srinivasa Raju and Chintalapati Holdings P. Ltd transferred their shares to the taxpayer at INR75.49 per share. However, on the same day one of other major shareholders transferred its shareholding to the taxpayer at INR1 per share. The AO held that the transactions would be treated as a deemed gift/income under the provisions of Section 56(2)(viia) of the Act.

The Hyderabad Tribunal observed that before application of the provisions of Section 56(2)(viia) of the Act, the AO has to compute the Fair Market Value (FMV) and only then can he/she compare the same with the consideration paid by the taxpayer and apply the said provision only if the conditions set therein are satisfied. Though the AO has not computed the FMV in accordance with Rule 11UA of the Income-tax Rules, 1962 (the Rules), he/she should have evidence indicating that the market value of the shares was much higher than the value at which the balance of shares were transferred to the taxpayer. Since the market price of some of the shares at a higher value than INR1 were available, the AO has adopted the same FMV. This stand of the AO could have been sustainable had the section provided that the FMV of an unquoted share shall be the value computed in accordance with the rule or the actual market value, if any, whichever is higher. However, as can be seen from the Act and the Rules, no such provision has been made. In fact, under the Wealth tax Act, Section 7(1) defines the expression 'value of an asset' as 'the price which in the opinion of the Wealth Tax Officer would fetch if sold in the open market on the valuation date' but in the relevant provisions, the definition of FMV is given in the Act and the method has also been prescribed thereunder.

The AO has to compute the FMV in accordance with the prescribed method but cannot adopt the market value as FMV under Section 56(2)(viia) of the Act. The legislature in its wisdom has also given the formulae for computation of FMV, which cannot be ignored by the lower authorities. It has been observed that the taxpayer has furnished the valuation of shares based on the working given under Rule 11UA(c) (b) of the Rules, according to which, the FMV of the shares is a negative figure whereas the taxpayer has paid at INR1 per share. Where the AO was not satisfied with the working given by the taxpayer, he/she ought to have computed the FMV himself/herself in the method prescribed under the Rules but ought not to have adopted higher of the prices paid by the taxpayer for purchase of some of the shares. Further, even when the transactions are between related parties, the provisions of Section 56(2)(viia) of the Act can be applied only in accordance with the prescribed method and the difference between the price at which the taxpayer has purchased the shares and the aggregate of the FMV of the shares as computed can

be brought to tax as deemed income in the hands of the taxpayer. Accordingly, it has been held that the provisions of Section 56(2)(viia) of the Act are not correctly applied in the taxpayer's case.

Medplus Health Services P. Ltd. vs ITO (ITA.No.871/Hyd/2015) – Taxsutra.com

The taxpayer is to be granted a stay of demand till the disposal of appeal

The taxpayer, incorporated in Singapore, is engaged in the business of profit management support services to group entities in the Asia-Pacific Region. During Assessment Year (AY) 2011-12, the taxpayer rendered management support services to its 100 per cent Indian subsidiary, DDIL, and has received a management fee pursuant to the agreement for the provision of management, general support and administrative services entered into between the said parties. The taxpayer claimed that the said receipt is not taxable as FTS under the India-Singapore tax treaty as it had not made available to DDIL, any technical knowledge, experience, etc. Accordingly, the refund was claimed for the taxes withheld on the management fees. While completing the assessment, it was held that the taxpayer has a PE in India and attributed the entire management fees to its PE. Further, the AO allowed only 10 per cent as expenses and held the balance 90 per cent as business income. Accordingly, the AO raised a tax demand. The CIT(A) dismissed the appeal.

Before the Tribunal, the taxpayer claimed that the demand is liable to be stayed in the interest of justice.

The Tribunal observed that the AO assessed the 10 times to the returned income. Therefore, such the demand is liable to be stayed in view of the CBDT Instruction No.96 dated 21 August 1969 and also law settled in various decisions. The question of PE is still required to be decided by the Tribunal in the appeal before it. The Tribunal observed that the fee of the taxpayer is reimbursed on cost plus 10 per cent basis whereas the AO allowed deduction only 10 per cent and taxed 90 per cent of the management fees as business income. As per the agreement, the taxpayer has earned a mark-up of only 10 per cent and the Transfer Pricing Officer (TPO) in the taxpayer's own case has accepted the mark-up of 10 per cent to be at Arm's Length Price. Moreover, TDS is also more than the tax liability if assessed upon the receipt at the rate of 10 per cent. Relying on the decision of DIT vs NGC Network Asia LLC [2009] 313 ITR 187 (Bom), it was held that the tax demand is liable to be stayed in the interest of justice till the pendency of the appeal.

Dimension Data Asia Pacific Pte. Ltd vs DCIT (S.A. No.72/Mum/2016) – Taxsutra.com

Notifications/Circulars/ Press Releases

CBDT clarification on taxability of consortium members in the case of EPC contracts and turnkey projects

Recently, the CBDT issued a circular clarifying that a consortium arrangement for executing EPC/turnkey contracts which have the following attributes, may not be treated as an Association of Persons (AOP):

> Where each member is independently responsible for executing its part of the work through its own resources and also bears the risk of its scope of work i.e. there is a clear demarcation in the work and costs between the consorti-

um members and each member incurs expenditure only in its specified area of work

Each member earns profit or incurs losses based on the performance of the contract, falling strictly within its scope of work. However, consortium members may share contract price at a gross level only to facilitate convenience in billing.

- Men and materials used for any area of work are under the risk and control of the respective consortium members

- Control and management of the consortium are not unified, and common management is only for the interse coordination between the consortium members for administrative convenience.

The CBDT also clarifies that there may be other additional factors which may justify that a consortium is not an AOP, and that the same shall depend upon the facts and circumstances of a particular case, which needs to be taken into consideration while taking a view in the matter.

Further, this Circular shall not apply where all or some of the members of a consortium are Associated Enterprises (AEs) under Section 92A of the Act. In such cases, the AO shall decide whether an AOP is formed or not, keeping in view the relevant provisions of the Act and judicial precedents on the issue.

Circular No. 07/2016, dated 7 March 2016

CBDT clarifies the India-U.K. tax treaty benefits available to U.K. partnership firms

In February 2014, the protocol to the India-U.K. tax treaty (the tax treaty) amended the definition of the term 'person' to delete the exclusion of U.K. partnership firms. Further, the term 'resident' was amended to include partnership firms, estates or trusts as a resident of a contracting state to the extent the income of such partnership firms, estates or trusts is subject to the tax in that state as the income of a resident, either in its hands or in the hands of its partners or beneficiaries. Certain apprehensions that the term 'person' in the tax treaty does not specifically include partnerships, have been brought to the notice of the CBDT. Accordingly, clarity was sought from the CBDT on whether the provisions of the tax treaty were applicable to a partnership firm.

Recently, the CBDT has clarified that the provisions of the tax treaty would be applicable to a partnership that is a resident of either India or the U.K., to the extent that the income derived by such partnerships, estates or trusts is subject to tax in that state as the income of a resident, either in its hands or in the hands of its partners or beneficiaries.

Circular No. 2/2016, dated 25 February 2016

CBDT issues an instruction on the issue of taxability of surplus on the sale of shares and securities

The CBDT issued a Circular whereby it instructs the AOs that in holding whether the surplus generated from the sale of listed shares or other securities would be treated

as capital gain or business income, it shall take into account the following:

- Where the taxpayer itself, irrespective of the period of holding the listed shares and securities, opts to treat them as stock-in-trade, the income arising from transfer of such shares/securities would be treated as its business income,

- In respect of listed shares and securities held for more than 12 months immediately preceding the date of its transfer, if the taxpayer desires to treat the income arising from the transfer thereof as capital gains, the same shall not be put to dispute by the AO. However, this stand, once taken by the taxpayer in a particular year, shall remain applicable in subsequent years as well, and the taxpayers shall not be allowed to adopt a different/contrary stand in this regard in the subsequent years;

- In all other cases, the nature of the transaction (i.e. whether the same is in the nature of capital gains or business income) shall continue to be decided keeping in view the aforesaid circulars issued by the CBDT.

Circular No. 6/2016, dated 29 February 2016

CBDT clarification on taxability of transactions of buyback of shares undertaken prior to 1 June 2013

The CBDT has issued a Circular to clarify that consideration received on buyback of shares during the period from 1 April 2000 to 31 May 2013 would be taxed as capital gains in the hands of the recipient, in accordance with Section 46A of the Act. Further, no such amount shall be treated as dividend in view of the provisions of sub-clause (iv) of Section 2(22) of the Act.

The CBDT has directed that no fresh notice for assessment/reassessment/non-deduction of tax at source shall be issued wherein buyback of shares has taken place prior to 1 June 2013 and the case is covered under Section 46A read with sub-clause (iv) of Section 2(22) of the Act. In cases where notices have already been issued and assessment proceedings are pending, tax authorities shall complete the assessment keeping in view the above legal position.

CBDT Circular No. 3/2016, dated 26 February 2016

The Government of India issues a notification for changing the provisions of provident fund withdrawals under the Employees' Provident Funds Scheme, 1952

In accordance with the regulations of the Employees' Provident Funds Scheme, 1952 (EPFS), it was possible for employees to withdraw their full Provident Fund (PF) accumulations on the cessation of employment, provided they were not re-employed with an establishment which is covered under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act).

However, recently the Ministry of Labour and Employment, Government of India issued a notification dated 10 February 2016 to amend the EPFS with regards to the provisions relating to early withdrawal of PF accumulations on the cessation of employ-

ment. The notification came into effect from 10 February 2016.

Key amendments in the notification

- Amendment in the age limits for PF withdrawal
  - The age limit of PF withdrawal has been increased from 55 to 58 years. As per the revised provisions under the revised Para 69 of EPFS for non-IW's, members may withdraw the full amount standing to their credit in the PF account at the time of retirement from service after attaining the age of 58 years.

    Now the members of the EPFS are eligible to withdraw up to 90 per cent of their PF accumulations on attaining the age of 57 years or within one year before their actual retirement, whichever is later.

- Removal of the provision for early withdrawal

  As per the earlier provisions3, members could withdraw their full PF accumulations on the cessation of employment and on not being re-employed with an establishment which is covered under the EPF Act for a continuous period of not less than two months before making the PF withdrawal application.

  - The above facility for an early withdrawal4 has been removed by this notification.

- Inserting a provision enabling partial withdrawal
  - A new provision has been inserted for enabling partial PF withdrawals. Members can now apply for withdrawal (after two months of the waiting period) of their own share of PF contributions along with interest earned on their own contribution on the cessation of employment on the condition that they are not re-employed with an establishment which is covered under the EPF Act.

  - The payment of partial withdrawal of the amount can be made directly into the member's bank account or through the employer as well.

- Removal of the provision relating to fresh membership

  As per the earlier provisions, employees could be treated as fresh members after taking their early PF withdrawals on the cessation of employment in a covered establishment.

  - With the omission of these provisions, individuals shall remain the members of EPFS till they withdraw their full PF accumulations.

    The new amendments in the EPFS, that have limited pre-retirement withdrawals, could have a significant impact on employees who were eligible for early withdrawals under the previous regulations. Since individuals can now avail a full refund of their PF accumulations only on retirement after reaching the age of 58 years, it appears that the members will con-

tinue to earn interest on their PF accumulations till 36 months after they become eligible for a full refund. Clarification on this aspect from the PF department would be helpful for the industry.

The regulations on the refund of PF accumulations in case of IWs who are covered under an effective SSA with India have not been changed in the latest amendment and they would continue to enjoy the special facility of a full refund of PF accumulations at the time of cessation of their employment in Indian establishments covered under the EPF Act. Employers would need to engage with their employees and communicate these new changes to help them to take informed decisions about their retirement planning.

Notification No. G.S.R. 158(E), dated 10 February 2016 [F.No. S-35012/5/2015-SS-II]

The Government of India issues a notification for changing the provisions of provident fund withdrawals under the Employees' Provident Funds Scheme, 1952

The Ministry of Labour and Employment, Government of India has issued a Notification no. S. O. 440(E), dated 10 February 2016 [F. No .S-35018/10/2013-SS.II] with regard to the applicability of the EPF Act on banks.

The government notified that the EPF Act shall apply to all banks, employing 20 or more number of persons as a class of establishment, for those employees who are not entitled to the benefit of contributory provident fund or old age pension under any

scheme or rules framed by the:

- Central government or
- State government or
- Respective banks established under the Banking
- Regulations Act, 1949.

This is an important change for banks which were previously not covered under the EPF Act. The government's intent seems to be to widen social security coverage in India. In view of this notification, those banks, which are not currently covered under the EPF Act, should review their schemes or rules regarding contributory provident fund and old age pension benefits to their employees to ascertain the applicability of the EPF Act.

Notification No. S. O. 440(E), dated 10 February 2016 [F. No.S-35018/10/2013-SS.II]

II. SERVICE TAX

Advance Ruling

Grant of non-exclusive and non-transferable right to use equipment is outside the ambit of service tax

The applicant was engaged in the business of supply of labelling, aggregation and dispatch systems to its customers in accordance with the Excise Supply Chain Information Management System (ESCIMS), an IT initiative of the Excise Department, Government of NCT of Delhi for automating and regulating liquor sales in Delhi. This system was used in labelling of beer cans, bottles, etc with the desired bar code under ESCIMS. As per the contract of supply, the applicant was responsible for the installation of the system at the premises of customer (ie breweries), imparting training to the customer personnel, supplying consumables to the customers and carrying out preventive and restorative maintenance of the system. The customer was responsible for carrying out operational maintenance of the system. As per the contract of supply, the customer was granted a revocable, non-exclusive and non-transferable right to use the system. The applicant treated the arrangement as a "transfer of right to use", being out of the ambit of service tax.

The Revenue Authorities ("RA") relying on the Supreme Court ("SC") ruling in the case of BSNL vs UOI [2006 (145) STC 91] stated that for a transaction to be considered as a "transfer of right to use", there should be a grant of an exclusive right to the customer. The RA also stated that the use of the word "licensing" in the contract of supply implied that possession and control was not transferred to the customer, and therefore service tax was applicable on the transaction.

The Authority for Advance Rulings ("AAR") observed that the use of word "non-exclusive" in the contract of supply was only with respect to the intellectual property related to the system. The AAR further observed that the system was operated by the customer and operational maintenance was the responsibility of customer, which reflected that the possession and control of the system was transferred to the customer. The AAR relying on the Karnataka High Court ruling in case of Indus Towers Ltd. [2012 (285) ELT 3 (Kar.)] held that the contract of supply had to be examined in totality, and the scope of the contract could not be derived on the basis of a phrase used in contract. Thus, the AAR held that the proposed activity of applicant was not liable to service tax.

M/s SICPA India Pvt Ltd New Delhi vs Commissioner of Service Tax, Commissioner of Trade and Taxes, Govt of NCT of Delhi (Ruling No AAR/ST/02/2016) (AAR)

Tribunal Decisions

Service tax paid by the transferee company to the transferor company after the appointed amalgamation/ transfer date would constitute as 'service to self'

The taxpayer, being the 'transferee' in a merger approved by the High Court ("HC"), filed for a refund claim of service tax paid on royalty payments made to the transferor

company between the period April 1, 2007 and May 26, 2008. The appointed date for the merger was fixed by the HC as April 01, 2007 vide its order dated May 26, 2008. The taxpayer filed the refund claim on the ground that during this period, as a consequence of the merger, the same amounted to a 'service to self' on which service tax was not payable. Separately the Registrar of Companies, Ministry of Corporate Affairs ("ROC"), approved the name change of the merged entity with effect from June 20, 2008.

The RA denied the refund to the taxpayer on the ground that the merger of transferor and transferee was not concluded till the name of the business changed. The RA contended that since the ROC approved the change in name only on June 20, 2008, there could not be any 'service to self'.

The CESTAT observed that under a merger scheme all assets and liabilities of the transferor are transferred to the transferee company on the appointed date fixed by the HC. It was also observed that such appointed date may be retrospective, ie the date from which the transferee company ceases to carry on business in its own capacity. Thus the CESTAT upheld the eligibility of refund of the service tax paid on the royalty as the same amounted to a 'service to self', and further held that merely on grounds of procedural delays, the refund claim could not be rejected by the RA. The Tribunal also held that unjust enrichment would not be applicable in this case, as in the case of a 'service to self' the incidence of tax is not passed on to any other person.

M/s Usha International vs CST, New Delhi (Order No 50858-50859/2016) (CESTAT, Delhi)

Service tax reverse charge not to apply on withholding tax paid under the net of tax arrangement

The taxpayer engaged a foreign architect for designing and planning various commercial buildings, and paid consultancy charges on the same. The taxpayer discharged its service tax liability under the reverse charge mechanism on the invoice amount of such services. The taxpayer also paid withholding tax, as per the applicable laws in India, on such foreign architect's income on his own account ie the taxpayer did not recover the same from the foreign architect. The RA contended that the withholding tax paid by the taxpayer, on behalf of the foreign architect, was includible in the value of service and hence liable to service tax on reverse charge basis.

The CESTAT observed that service tax was payable on the gross amount charged by the service provider as per section 67 of the Finance Act, 1994 and Rule 7 of the Service Tax (Determination of Value) Rules, 2006. In this regard, the CESTAT held that the taxpayer had duly discharged service tax on the invoice amount and that service tax was not applicable on withholding tax paid by the taxpayer on behalf of the foreign architect, as there was no evidence which showed that such income tax amount was recovered from the foreign architect, or was in the nature of consideration paid for the services received.

M/s Magarpatta Township Development And Consideration Co Ltd vs CCE, Pune – III (Appeal No ST/322/12-Mum) (CESTAT, Mumbai)

III. CENTRAL EXCISE

Supreme Court Decisions

Grant of refund under section 11B of the Central Excise Act, 1944 ("Excise Act") should not be delayed beyond three months of filing the refund application. For any delay beyond three months, interest should be paid to the assessee, even if the same is due to defects in the refund application

The taxpayer was engaged in the manufacture of excisable goods. Pursuant to a court order, the taxpayer made an application for refund under section 11B of the Excise Act. The RA delayed the grant of refund on the ground of defects in the refund application. Further interest prescribed under section 11BB of the Excise Act (payable on delay in processing refunds) was not paid by the RA to the taxpayer on account of such delay. On the demand of payment of interest by the taxpayer, the RA responded that the period of three months for grant of interest was to be computed from the date when all the defects in the refund application are cleared by the taxpayer.

The SC observed that as per the circular issued by the CBEC on May 30, 1995, where a refund application is filed under section 11B of the Excise Act, any deficiency in the application shall be intimated to the taxpayer within two days by the RA. In the event the deficiency persists, the RA may proceed with adjudication and reject the application for refund. Further, by placing reliance on the ruling passed in case of Ranbaxy Laboratories Limited [2011 (10) SCC 292], the SC held that the adjudication process for grant of refund shall be completed within three months from the date of filing refund application, and interest would be payable by the RA to the taxpayer in case there was any delay in grant of refund beyond such time.

UOI and Ors vs M/s Hamdard (WAQF) Laboratories (Civil Appeal No 1666 of 2006) (SC)

Post clearance value addition towards bullet-proofing of vehicles not includible in the assessable value of vehicles for purposes of payment of excise duty

The SC affirmed the view of the CESTAT that value addition, by way of bullet proofing a motor vehicle, would not be includible in the assessable value for the purposes of payment of excise duty, where bullet proofing was done by job workers after clearance of the vehicle from the factory premises of the taxpayer. In this case, the bullet proofing was done on vehicles upon special request of government customers, and was done outside the factory premises of taxpayer, by job workers. The RA contended that this value addition had to be added to the assessable value of the vehicles for the purpose of payment of excise duty.

The SC observed that in normal course, the vehicles were cleared from the factory without any bullet proofing. Basis the same, the SC affirmed the CESTAT view that in this case the value addition by way of bullet proofing was not includible in the transaction value of the vehicles.

CCE vs M/s Mahindra & Mahindra Ltd (Appeal No 5856 of 2010) (SC)

Excise duty exemption under notification no 108/95-CE dated August 28, 1995 would be available where goods are supplied to sub-contractors for executing the project

The taxpayer was engaged in supply of earth moving equipment to sub-contractors that were appointed for execution of the "Golden Quadrilateral Road Project", financed by the United Nations. The taxpayer claimed an excise duty exemption on the same under the aforesaid notification no 108/95. The RA challenged the exemption on the ground that the benefit of the exemption was available only when the goods were supplied to the Project Implementing Authority (PIA) for execution of the project. Further, the RA also contended that since the sub-contractors retained ownership of the goods even after completion of the project, the same could be misused for activities other than the project.

The HC observed that notification no 108/95 was issued in public interest and was beneficial in nature, therefore the exemption could not be denied on the grounds mentioned by the RA. Further the HC also observed that there was no evidence presented by the RA which implied presence of any kind of misuse of goods by the sub-contractors for any activity other than the project at hand. The language used in the exemption notification required 'supply to projects financed by the said United Nations or an International Organization and approved by the government of India', and therefore did not require fulfillment of any other condition. The Madras HC also observed that as per the language of exemption notification no 108/95 the term 'supply' is not restricted to mean direct sale to the PIA but also includes supply through multiple chains ultimately becoming beneficial to the project. Basis the above observations the benefit of the excise duty exemption was upheld by both, the Madras HC and subsequently the SC.

CCE vs M/s Caterpillar India Pvt Ltd (Special Leave to Appeal No 4504 of 2014) (SC)

SC orders CESTAT to re-determine whether dealer's advertising expenses are to be excluded from the transaction value for the purpose of payment of excise duty

The larger bench of SC quashed an order of CESTAT, Chennai which held that advertisement expenditure incurred by dealers are liable to be excluded from the transaction value of motor vehicles cleared by the taxpayer ('manufacturer'). The CESTAT while passing its order had observed that dealers are not bound by the taxpayer to promote sale of motor vehicles. More importantly, the CESTAT had observed that even reimbursement by the taxpayer, of a part of advertisement expenditure incurred by the dealers, does not imply that the taxpayer had an enforceable right to require dealers to incur advertisement expenses.

The SC while hearing the matter, observed that several issues and aspects considered by the adjudicating authority were not touched upon by the CESTAT while passing its order. On this ground, the SC set aside the CESTAT order and remanded the matter back to the CESTAT for fresh consideration.

CCE, Chennai vs M/s Ford India Pvt Ltd (Civil Appeal No 1646 of 2008) (SC)

Tribunal Decisions

Placement of various food items on the meal tray served on board an aircraft would not amount to 'manufacture'

The taxpayer was engaged in the business of providing catering to airlines and entered into agreements with various airlines for supply of food items. Once the food items were supplied to the airline staff, the airline staff added other food/ meal items and cutlery, and placed all items on a meal tray before serving the same to passengers on board the aircraft. The brand name of the taxpayer was affixed on a note accompanying the cutlery pack supplied along with the meal. The RA contended that the entire meal tray along with the cutlery supplied to the passengers on board was liable to excise duty at the hands of the taxpayer, as the same was covered under the ambit of excisable goods ie food preparations bearing a brand name.

The CESTAT observed that the activity of supplying the meal tray to passengers on board an aircraft by placing different food and cutlery items was performed by the airline staff and not by the taxpayer. The CESTAT also observed that the cutlery and meals (like curry, dal, rice, etc) were packed under different packs/ containers and there was nothing mentioned on the meal pack which suggested that the food preparations were supplied under the brand name of the taxpayer. As all the items supplied on the meal tray were not provided by the taxpayer, it was held that the excise duty liability for the entire meal tray could not be shifted to the taxpayer. Thus the CESTAT held that the RA's order was unsustainable.

M/s Taj Sats Air Catering Ltd vs CCE, Delhi-II (Excise Appeal No E/1214/2011-EX[DB]) (CESTAT, New Delhi)

IV. VAT/CST

High Court Decisions

Reimbursement of CST available on inter-state sales between Export Oriented Units ("EOU")

The taxpayer, a 100 percent EOU, procured goods from domestic tariff area ("DTA") as well as imported the same from outside India. The taxpayer purchased goods from another 100 percent EOU located in another state, and paid CST on such procurements. In terms of the Para 6.11 of the Foreign Trade Policy 2009-2014 ("FTP"), the taxpayer claimed reimbursement of the CST paid on such inter-state procurements. The RA denied the reimbursement on the ground that Appendix 14.I-I of the FTP did not provide for reimbursement of CST paid on procurement of goods from another EOU.

The HC observed that Para 6.11 of FTP provides that EOU's can procure goods without paying CST from DTA or can claim refund of CST, if paid at the time of procuring goods from DTA. The HC observed that Para 6.11 of the FTP does not provide that the same excludes 'EOU'. The HC also observed that appendices and handbooks of the FTP were mere procedural instruments, which operationalized substantive rights granted in the FTP. The HC observed that where there was a conflict in the procedures and the policy, it was always the policy which prevailed. The HC held that merely on the ground of ambiguity in the appendix 14.I-I of the FTP,

substantive benefit could not be denied to the taxpayer, thereby allowing reimbursement of CST paid by the taxpayer.

M/s Hospira Health Care India Pvt Ltd vs Development Commissioner, MEPZ SEZ & HEOUs, Chennai & Ors (WP No 15646 & 26004 of 2014) (HC, Madras)

'Form-F' mandatory in case inter-state movement of goods is made pursuant to a job-work transaction

The taxpayer, a job worker, was manufacturing goods in Maharashtra on behalf of its customers, located within and outside Maharashtra. Post manufacturing, the goods were dispatched to the customers located outside the state of Maharashtra by the taxpayer without obtaining 'Form-F'. The RA contended that such inter-state movement of finished goods without 'Form-F' was in the nature of "movement in the course of inter-state sale" and demanded CST on the same. The RA placed reliance on trade circular no 2T of 2010 issued on October 11, 2010 (Maharashtra), which mandated the requirement of 'Form-F' in the course of inter-state movement of goods, other than by way of sale.

The taxpayer filed a writ petition before the HC challenging the applicability of section 6A of CST Act, 1956 in its transaction and the validity of the aforesaid trade circular in case of inter-state movement of goods by placing reliance on the SC ruling in case of Ambica Steels Limited [2009 (24) VST 356 (SC)]. The taxpayer also submitted that trade circular no 16T of 2007 dated February 20, 2007 (Maharashtra) which clarified that there was no requirement of 'Form-F' in relation to job work transaction executed on principal to principal basis, was subsequently withdrawn by issuing trade circular no 2T of 2010 without any justifiable ground.

The HC observed that section 6A of the CST Act places the burden of proof on the assessee who claims the transfer of goods inter-state, is otherwise than by way of sale. The HC also observed that such burden of proof could only be discharged by the job worker in the present case by furnishing 'Form-F'. The HC held that the taxpayer misinterpreted the SC ruling in case of Ambica Steels Limited which clarified that if in case 'Form-F' is not issued by the authorities, then this fact can be placed before the assessing officer for consideration before passing the assessment order. Basis the same, the HC held that there is no infirmity in respect of section 6A of the CST Act or the trade circular and hence the writ petition was dismissed.

M/s Johnson Matthey Chemicals India Pvt Ltd vs The State of Maharashtra and Ors (WP No 7400 of 2015 and WP No 7934 of 2015) (HC, Bombay)

Non issuance of 'Form-C' due to non-disclosure of relevant purchases in sales tax return unjustified

The taxpayer, engaged in the inter-state sale and purchase of goods, applied for issuance of 'Form-C' against inter-state purchase of goods. The application was rejected by the RA on the ground that relevant inter-state purchase transactions were not disclosed by the taxpayer in the sales tax return. The RA also contended that the details of inter-state purchases were not recorded in the statutory registers and no documents in this regard were produced by the

taxpayer during the special audit conducted on the records of the taxpayer.

The taxpayer in its submission before the HC, conceded that non-disclosure of inter-state purchase in sales tax return was a result of its own genuine mistake. In the support of its claim, the taxpayer submitted relevant invoices, letters from vendors seeking 'Form-C' and also proof of payment to the vendors. The HC observed that as the taxpayer was successful in establishing its claim of mistake in recording the purchases, there was no question regarding the genuineness of the transactions. In view of the provisions of the CST Rules, 1957, the HC observed that there would be no revenue loss or adverse impact caused to the RA if 'Form-C' is issued to the taxpayer. In fact if the same was not issued to the taxpayer, the selling dealer would not be able to take benefit of the reduced rate of CST and would recover the differential rate of CST from the taxpayer, causing it prejudice. Thus the HC directed the RA to issue the 'Form-C' to the taxpayer, against an indemnity bond if required.

Ingram Micro India Private Limited vs Commissioner, Department of Trade & Taxes & Anr [WP (C) 8272/2015 & CM No 17432/2015 (for stay)] (HC, Delhi)

Inter-state movement of goods occasioned by lease would amount to an 'inter-state sale' and the taxpayer would be eligible to claim benefit of 'Form-C'

The taxpayer leased certain equipment from a lessor. The said equipment was transported by the lessor from Maharashtra to Delhi, and the lease agreement was executed in Delhi. The taxpayer treated this transaction as an inter-state sale, and applied for issuance of 'Form-C' from the RA.

The RA rejected the claim for issuance of 'Form-C' on the ground that the transaction was not in the nature of inter-state sales, as the agreement transferring the right to use the equipment was executed in Delhi, implying the situs of sale to be Delhi, disregarding the fact that the goods moved from Maharashtra to Delhi. The RA cited the SC ruling in case of 20th Century Finance Corporation Limited vs State of Maharashtra [2000 (6) SCC (12)] to support its ground that situs of sale would be the location where lease agreement is executed, the same being in Delhi led to the conclusion that it could not be an inter-state sale.

On careful examination of the case of 20th Century Finance Corporation Limited (supra), the HC observed that the SC ruling had actually clarified that mere location or delivery of goods would not determine the situs of sale alone. In fact it had held that only when goods were already available in a particular state and the agreement to transfer the property was also executed in the same state, the situs of sale would be considered where the agreement is executed. This case law also clearly held that when goods moved from one state to another, it would fall under the bracket of an inter-state sale. The HC observed that in the present case since there was movement of goods from Maharashtra to Delhi, occasioned by the lease agreement executed in Delhi, the same would amount to an inter-state sale. Basis the above, the HC held the lease transaction to be in the nature of inter-state sale, and consequently directed the RA to issue 'Form-C' to the taxpayer.

Tata Power Delhi Distribution Ltd vs Commissioner of Sales Tax, Delhi & Ors (Service Tax Appeal No 16 of 2008) (HC, Delhi)

Tribunal Decisions

Tax invoice or payment of tax to the selling dealer would be insufficient proof to claim input tax credit when the selling dealer's existence is debatable

The taxpayer, registered under the Karnataka VAT Act, 2003 ("KVAT") purchased goods from a dealer ("Selling Dealer") and claimed input tax credit of such purchases on the basis of the tax invoices issued by the Selling Dealer and proof of payment made by the taxpayer to such Selling Dealer. The RA rejected such claim of input tax credit on the ground that details related to transportation of goods were not presented by the taxpayer in support of its input tax credit claim. The RA also contended that the existence of Selling Dealer was debatable in the present case and the taxpayer had not appropriately discharged the burden of proof regarding its eligibility to claim input tax credit. The same was because the Selling Dealer was not found present at its address and had also not filed its periodic VAT returns. Further the material purchased by the taxpayer was transported through luxury taxis and auto rickshaws, and the payment made by the taxpayers to the Selling Dealers was withdrawn the very next day by a self-cheque by the taxpayer.

The CESTAT observed that as per the investigation conducted by the RA, the existence of selling dealer was doubtful. The CESTAT also observed that the taxpayer had the sole responsibility of discharging the burden of proving that it was eligible to input tax credit, where the validity of tax invoice, proof of payment and transportation details were in dispute. The CESTAT held that arguments and judicial precedents relied by the taxpayer would hold good only in the scenario where the existence of the Selling Dealer was not questionable, which was not the case in the present scenario. Hence the claim of input tax credit was held to be not justified by the CESTAT.

M/s Accurate Steels and Engg Co vs State of Karnataka (STA No 1922 to 1926/2009 and cross appeal no 466 to 470/2015) (CESTAT, Bangalore)

V. CUSTOMS

High Court Decisions

Importer eligible for refund of countervailing duty ("CVD") as disclosed in self-assessed Bills of Entry, regardless of whether such Bills of Entry are reviewed or modified in an appeal

The taxpayer imported goods on payment of CVD at the rate of 6 percent and did not avail credit on such payment of CVD. Subsequently the taxpayer claimed that CVD was payable at the rate of 1 percent as per an amendment notification, and filed an application for refund of excess CVD paid. The RA based on section 27 of the Customs Act, rejected the refund claim on the ground that CVD was paid as per self-assessed Bills of Entry filed by the taxpayer itself, and no refund could be granted unless the assessment order (ie Bills of Entry

in this case) was reviewed or modified in an appeal.

The HC observed that pursuant to an amendment in section 27 of the Customs Act wef April 08, 2011, if any duty has been paid by the importer, then a claim of refund is required to be entertained by the RA irrespective of the fact that order of assessment (ie Bills of Entry in this case) may or may not have been reviewed or modified in an appeal. Setting aside the order of rejecting the refund claim, the HC remanded back the refund application to RA for fresh evaluation.

M/s Micromax Informatics Limited vs Union of India & Others [WP (C) 523/2016) (HC, Delhi)

Notification & Circulars

Single Excise registration for premises of same factory falling under same jurisdictional excise range

The CBEC has issued a notification which provides for a single excise registration of two or more premises of the same factory, falling under same jurisdictional excise range and having inter-linked manufacturing processes. However units operating under an area based exemption notification are not eligible for such single registration facility.

Notification No 19/2016 dated March 01, 2016

Service tax return amended to incorporate details of Swachh Bharat Cess ('SBC')

CBEC has issued a notification to amend the service tax return form ie Form ST – 3 in order to incorporate payment of SBC by both service providers and service recipients. Appropriate amendments have also been made to disclose payment of SBC by cash or by way of adjustments.

Notification No 20/2016-Service Tax dated March 08, 2016

VAT rates under Bihar Value Added Tax Act, 2005 Maharashtra Value Added Tax Act, 2002 enhanced

- The Government of Bihar has issued a notification to enhance the VAT rates from 13.5 percent to 14.5 percent with effect from April 04, 2016.

- The Government of Maharashtra has issued a notification to enhance VAT rates on specified goods under Schedule A and Schedule C from 5 percent to 5.5 percent with effect from April 01, 2016.

Notification No VAT 1516/CR 31/Taxation-1 Dated March 30, 2016

Restriction on credit reversal under Rule 6(3) of Credit Rules

CBEC has issued a notification to restrict the limit of credit reversal under rule 6(3) of the Credit Rules. As per Rule 6(3) of the Credit Rules, the taxpayer is required to pay an amount equal to 6 percent of the value of exempted goods and 7 percent of the value of exempted services. Recently under the budget proposal, notification no 13/2016 – central excise (NT) dated March 01, 2016 was issued, which restricted the amount of reversal to the total credit available at the

end of the period to which payment relates. The same has been amended by this notification to restrict the amount of reversal to the aggregate amount of credit brought forward from previous period and credit availed in the period to which such payment is related.

Notification No 23/2016-Central Excise (NT) dated April 01, 2016