

August 2016

TAX UPDATES

(containing recent case laws, notifications, circulars)



Prepared in association with



Foreword

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

A meeting of FICCI's Task Force on GST was convened on 20th July, 2016 to discuss the draft model law on Goods and Services Tax (GST) and the Integrated Goods and Services Tax Bill. The meeting deliberated on various suggestions received from the industry. Based on the decisions taken in the meeting and other suggestions received, FICCI is in the process of finalization of appropriate feedback for submission to the Government on the model law.

In the taxation regime, the Mumbai Tribunal in the case of Vikas Chimakurty held that the notional interest on security deposit paid by an employer, to a landlord in respect of the rent free accommodation provided to its employees, is not to be considered in the perquisite valuation of the rent free accommodation in the hands of the employees. The Income Tax Act, 1961 ('the Act') recognizes rent-free accommodation (RFA) provided by an employer to its employees as a perquisite taxable in the hands of the employees. The Mumbai Tribunal held that perquisite value of RFA is to be made in accordance with Rule 3 of the Income Tax Rules, which provides that perquisite value of accommodation provided by an employer is to be computed on the actual amount of lease rental paid or payable by an employer and not on notional basis.

The Customs, Excise and Service Tax Appellate Tribunal has in a case held that the payments made by the head office to branch offices located outside India for disbursement of salary and other expenses by the overseas branches will not attract service tax. The Tribunal observed that there is no independent existence of the overseas branch as a business and the transfer of funds is nothing but reimbursement, and taxing of reimbursements is not contemplated under service tax laws. (M/s Tech Mahindra Limited v/s Commissioner of Central Excise).

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 TAXES

High Court Decision

Deduction under 80-IA of the Act cannot be disallowed pending tax department's appeal before the Supreme Court

The taxpayer is a licence holder of a warehousing complex consisting of buildings, godowns, weigh bridge and other equipments for the purpose of maintaining a Container Freight Station (CFS). During the assessment, the AO had denied the claim of deduction under Section 80-IA(4) of the Act holding that the taxpayer's facility could not be defined as an 'infrastructure facility' or fit into the definition of 'port' or 'inland port' as per the provisions of the Act. The AO referring to Circular 717 of 1995, dated 14 August 1995 held that the deductions could be claimed only with respect to public facilities created in line with agreement entered with the government and not to private facilities. The CIT(A) and the Tribunal held the decision in favour of the taxpayer.

Before the High Court, the tax department contended that even though in taxpayer's own case before Madras High Court, the High Court had ruled in taxpayer's favour, the same is under challenge before the Supreme Court. It was also contended that the Delhi High Court's decision in Container Corporation of India Limited which was followed in taxpayer's case was also challenged before the Supreme Court. When both the cases relied by the lower authorities (while ruling in taxpayer's

favour), were in challenge before the Supreme Court, the present appeal should be entertained and kept pending till the Supreme Court passes orders in pending civil appeals. Revenue further submitted that the Supreme Court decision in the case of Kunhayammed and others v. State of Kerala and Another [2000] 6 SCC 359 (SC) which was on doctrine of merger, would be applicable in the given case.

The Delhi High Court held that the principles laid down by the Supreme Court in the case of Kunhayammed were related to exercise of review jurisdiction by the High Court when a civil appeal is pending before the Supreme Court. The said principles cannot be applied in the present case since it is not a case dealing with exercise of review jurisdiction by the High Court.

Even though the Delhi High Court's decision in the case of Container Corporation of India Limited and the taxpayer's earlier case were challenged by the tax department before the Supreme Court, there could not be any impediment in following the said decisions to cases arising out of similar set of facts and law. When a petition is filed before the Supreme Court seeking leave to appeal and the same having been converted into an appeal by the Supreme Court, the High Court should not entertain a review petition. The High Court also cannot reverse and modify the order impugned before the Supreme Court. But the decision rendered by the High Court is not erased.

The High Court allowed deduction under Section 80-IA(4) of the Act following the decision of the coordinate bench in the taxpayer's own case wherein it was held that CFS is a part of inland port and, therefore, it is an infrastructure facility as

defined in Explanation to Section 80-IA(4)(i) of the Act.

CIT vs AL Logistics P Ltd (Tax Case Appeal No.405 of 2016) – Taxsutra.com

Excise duty paid on closing stock before the due date is allowed as deduction under Section 43B of the Income-tax Act

During the AY 2004-05, the taxpayer filed return of income declaring income of INR486 million. During the assessment, the AO allowed the deduction under Section 43B of the Act amounting to INR8.23 million towards excise duty pertaining to closing stock. The matter was taken up by the Commissioner of Income Tax under Section 263 of the Act stating that in view of the deduction of excise duty of INR 8.23 million, the total income was reduced and there was a short levy of tax of INR2.95 million. The Tribunal held that the taxpayer had paid the excise duty before due date and was thus, allowable under Section 43B of the Act. Section 43B of the Act makes provision for deduction of payments only on actual payment irrespective of accounting method being followed by taxpayer.

The High Court observed that the Gujarat High Court's decision in case of Lakhanpal National Ltd. vs ITO [1986] 162 ITR 240 (Guj) was not based merely on the permissible ground under Section 141A of the Act as contended by the tax department but on the analysis under Section 43B of the Act and thereafter the High Court had held that excise duty paid by the taxpayer in a particular accounting year was an allowable deduction in respect of that year irrespective of the amount of excise duty which was included in the valuation of the

taxpayer's closing stock at the end of the accounting year. The High Court relied on the Supreme Court's decision in case of Berger Paints India Ltd. vs CIT (2004) 12 SCC 42 which dealt with the issue on permissibility of deduction under Section 43B of the Act and had ruled in the taxpayer's favour. The present case was covered by the case of Lakhanpal case and Berger Paints Ltd. and it could not be said that the view taken by the AO was erroneous in law. The treatment is to be given in the opening stock of the subsequent accounting year when the deduction is made under Section 43B of the Act, hence it could also not be said as prejudicial to the interest of revenue.

The High Court observed that while Section 43B of the Act is a non-obstante clause having an overriding effect over any other provisions of the Act, the language used under Section 145A of the Act is 'Notwithstanding anything to the contrary contained in Section 145', therefore the High Court held that it cannot be accepted that by virtue of Section 145A, the Parliament has diluted or nullified the effect of provisions of Section 43B providing for certain deductions. The High Court observed that payment was made before the return-filing due-date as per the outer limit prescribed by the proviso to Section 43B of the Act. Accordingly, the High Court dismissed the tax department's appeal.

CIT vs NCR Corporation India Pvt. Ltd. (ITA No. 836/2009) – Taxsutra.com

Taxpayer to be given an opportunity to cross-examine authorised-personnel of companies, who has provided unaudited segmental data to the transfer pricing officer

The TPO utilised purported segmental data of several companies, which did not form part of these companies' audited accounts, to determine the ALP and accordingly passed an order. Aggrieved by the said order, the taxpayer filed a writ before the Delhi High Court.

The taxpayer's grievance was that, despite seeking an opportunity to cross-examine the authorised personnel of the said companies, whose data had been relied upon by the TPO, the opportunity had not been granted to the taxpayer. Thus, the segmental data of those companies could not have been relied upon, as that would be against the principles of natural justice.

The High Court observed that since the reliance is placed on the data provided by different parties, the taxpayer would have had no opportunity of rebutting the data unless the persons, who submitted the data, were subjected to cross-examination. This is all the more so because, the data that was submitted was not part of the audited accounts. Thus, the matter was remitted back to the TPO to pass a fresh order after providing the taxpayer an opportunity of cross-examination of the authorised personnel of the said companies, who submitted the segmental data, which was relied upon by the TPO.

Cashedge India Private Limited vs DCIT [W.P. (C) 3628/2016 & CM No.15535/2016]

Tribunal Decisions

If the satellite communication system monitoring equipment is in India, the taxpayer is rendering services in India

The taxpayer is incorporated in the U.K. and is engaged in providing satellite capacity through a space segment and related services to Indian customers. The taxpayer claims that it has no Permanent Establishment (PE) in India, and it is not providing any service in India. Further, the signal/data downlinked by VSNL and other companies in India namely, telecasting companies/telecom operators are received from the transponder maintained by the taxpayer's satellite in the orbit. The signal/data uplinked to the transponder was processed and transmitted/downlinked to the earth station. The taxpayer's AE, viz. Intelsat Global Service Corporation, USA owned the equipment, whereas the earth stations are owned, operated and maintained by VSNL or the respective companies/operators in India. The taxpayer submitted that the basic function of the equipment is to monitor the signals. Whereas the function of the earth station is to receive the downlinked signal from the transponder provided by the taxpayer.

The taxpayer by referring to Article 5 of the India-U.K. tax treaty contended that it has no PE in India. Merely because the Assessing Officer (AO) held that there was the business connection in India that cannot lead to taxability of the non-resident, which is covered by the beneficial provisions of the tax treaty. Referring to the decision of the Supreme Court in the case of CIT vs Toshoku Ltd. [1980] 125 ITR 525 (SC) and CIT vs Toshoku Ltd. [1980] 125 ITR 525 (SC), the taxpayer contended that at the best, the tax department could tax a portion of the income that may be attributable to the operations carried out in India. Referring to Article 5(6) of the tax treaty, the taxpayer contended that a company, which is a resident in the U.K. and controls a company which is the resident of India or which

carries on business in India should not by itself constitute either a PE or otherwise. Therefore, merely because an Associated Enterprise (AE) existed in India that cannot be a reason to conclude that the taxpayer has a PE in India. The taxpayer contended that the payments did not constitute as royalty.

The Chennai Tribunal held that if the taxpayer is maintaining a satellite in the orbit, and Indian companies are uploading the signal/data, which was received by a satellite and transmitted to India, then the taxpayer may not be rendering any service in India. In this case, the taxpayer is maintaining equipment at Chandigarh and Chennai for testing the quality of the signal. The very objective of the agreement between the taxpayer and VSNL is to uplink and downlink the signal, and the taxpayer has to maintain the proper quality of the signal, which was transmitted to India or the earth station. Before the Tribunal, the taxpayer claimed that the equipment installed in India at Chandigarh and Chennai belongs to its AE. The fact remains that this equipment is for testing the signal, which was uploaded by VSNL and other Indian companies while it was downlinked in India. So long as the taxpayer is maintaining the equipment in India, it has to be construed that the taxpayer is rendering services in India.

Now the taxpayer claims that the equipment installed at Chandigarh and Chennai was dismantled from the year 2004. However, this fact of the dismantling of machinery/equipment is not brought on record by the authorities below. The AO proceeded as if the taxpayer is maintaining the equipment at Chandigarh and Chennai for all the assessment years continuously. It needs to be examined when the taxpayer is

not maintaining any equipment at Chandigarh/Chennai or any other place, how the quality of the signal is being tested by the taxpayer. If the quality of the signal/data is very poor, then the recipient company may not accept the service as it was claimed by the taxpayer before this Tribunal. Therefore, there is an obligation on the part of the taxpayer to maintain the good quality of signal/data. The so-called earth station maintained by VSNL and other companies in India may be downlinking the signal/data from the satellite. The question arising for consideration is whether such earth station could receive signal/data without any intervention by the taxpayer-company in India. This fact was not examined by both the authorities below. Further, how the signals were received in India without the intervention of the taxpayer needs to be examined.

The technical experts from VSNL or any other companies, which entered into an agreement with the taxpayer needs to be examined about the mode of receipt of signal/data. The AO shall bring on record the actual services rendered by the taxpayer and after that decide the issue in accordance with law.

Intelsat Global Sales and Marketing Ltd. vs ITO (ITA Nos. 1070 to 1074 & 1621/Mds/2010) – Taxsutra.com

Income from sale of software does not amount to royalty under India-Netherlands tax treaty

The taxpayer is a Netherlands based entity engaged in the business of development and sale of computer software and provides other services in relation to its software product. The taxpayer entered into a 'Distribution Agreement' with an Indian

subsidiary company for the supply of its software to the Indian customer on which it receives a fix percentage sum as per the agreement. The Indian subsidiary is an independent distributor of computer software which sells under the brand name of 'Infor' and is sold as 'off the shelf' software in the market used by the customers in various businesses, like in connection with financial accounting, inventory management, HR management, etc.

The customer in India places an order with the Indian subsidiary which in turn passes on the order to the taxpayer for the purchase of the software. The taxpayer has the exclusive right to accept or reject the order. However, once the order is accepted by the taxpayer, the CD containing the software is sent to India and in turn Indian subsidiary distributes the CD to the customer in India. The taxpayer also delivers the licence-key for the software directly to the customer and the customers pay the consideration for the sale of software to the Indian subsidiary, which in turn after retaining the distributor's margin remits the balance amount to the taxpayer. The taxpayer also carries out through the Indian subsidiary 'other general services' related to software.

During the year, the taxpayer had received payment as sales consideration for the computer software products supplied by it to its Indian subsidiary and payment on account of 'other general services' (OGS fees) from the said Indian subsidiary. The taxpayer claimed that since it does not have a PE in India, only the payment received as 'OGS fee' was offered for tax in India as Fees for Technical Services (FTS). However, income from sale of software products was treated as business profit. Hence, this

amount was not shown chargeable to tax in India in the absence of any PE in India. The AO held that the payment received by the taxpayer for sale of software is royalty under the Act as well as under the tax treaty and accordingly, liable to be taxed at 15 per cent under Article 12 of the tax treaty. The Commissioner of Income-tax (Appeals) [CIT(A)] held that the payment was received by the taxpayer from sale of a copyrighted article and therefore, it does not amount to 'royalty' under Article 12(4) of the tax treaty.

The Tribunal observed that when the taxpayer supplies the software which is incorporated on a CD, it has applied only a tangible property and payment made for acquiring such a property which cannot be regarded as payment by way of royalty. The Tribunal held that the payment received by the taxpayer does not amount to 'royalty' within the meaning of Article 12(4) of the tax treaty and accordingly, the same is not taxable in India. Since, the taxpayer does not have a PE in India, same cannot be taxed as business income under Article 7 of the tax treaty.

The retrospective amendment brought into the Act with effect from 1 June 1976 cannot be read into the tax treaty, because the tax treaty has not been correspondingly amended in line with new enlarged definition of 'royalty'.

ADIT vs Baan Global B V (ITA No. 7048/Mum/2010) – Taxsutra.com

Two enterprises cannot be treated as associated enterprises unless both the parameters laid down in Section 92A of the Income-tax Act are fulfilled

The taxpayer is engaged in the business of manufacture and sale of ready-made garments. It is a licensee of the brand-name 'Jockey' for the exclusive manufacturing and marketing of Jockey's readymade garments under the licence agreement with Jockey International Inc, U.S. (JII), the owner of the brand Jockey. The taxpayer owned the entire manufacturing facility, capital investment, employees and there was no participation of JII in the capital and management of the taxpayer. In consideration for granting the right to use the brand-name, the taxpayer paid consideration in the form of royalty at the rate of 5 per cent of the sales to JII. The Form 3CEB was filed by the taxpayer disclosing the payment of royalty transaction.

During the Assessment Year (AY) 2010-11 the taxpayer incurred expenditure on Advertisement, Marketing and product Promotion (AMP) to increase its sales. The Transfer Pricing Officer (TPO) stated that the AMP expenditure incurred by the taxpayer was done on behalf of JII to promote their brand name and hence, such costs should have been recovered by the taxpayer from JII. The TPO categorised the said expenses as an international transaction in the nature of brand building and determined the Arm's Length Price (ALP) by applying Bright Line Method. The TPO proposed adjustment in relation to both royalty and AMP expenses.

Tribunal's ruling

- The Bangalore Tribunal rejected the TPO's view that the two enterprises (i.e. the taxpayer and JII) should be treated as associated entities u/s 92A, considering the amendment made to Section 92A(2) vide Finance Act, 2002

with effect from 1 April 2002 which provides that 'in order to constitute relationship of an AE, the parameters laid down in both subsections (1) and (2) of Section 92 should be fulfilled'.

- The Tribunal observed that while interpreting a provision in a taxing statute, the construction should preserve the purpose of the provision. If more than one construction is possible, that which preserves its workability and efficacy is to be preferred to the one which would render it otiose or sterile. Thus, the Tribunal held that even if the taxpayer and JII may be related as per Section 92A(2)(g) but till the time their relationship will not satisfy the conditions laid down in 92A(1) they cannot be construed as AEs and therefore the provisions of chapter X of the Act have no application.

Page Industries Ltd. vs DCIT [IT (TP) A No. 163/Bang/2015] - AY 2010-11

Future projections alone should be adopted in respect of valuation of intangibles, and such valuation cannot be reviewed with actuals at a later date

The taxpayer is engaged in producing animation visual effects, game art and entertainment content for Indian as well as global media and entertainment industry. The taxpayer entered into various international transactions with its AE. The taxpayer determined the ALP of the international transactions relating to sale of Intellectual Property (IP) rights of the 'Jungle Book' animation series to DQE (Ireland) Ltd (DQE Ireland) based on an

average of the value's arrived at by two independent valuation reports. The valuation was conducted using the relief from royalty method and Discounted Cash Flow (DCF) analysis. The TPO accepted the valuation method adopted for determining the sale consideration in case of sale of IP by the taxpayer to its AE. However, the TPO replaced the projections considered in DCF analysis for the purpose of valuation with actual total revenue of DQE Ireland for the FY2009-10 and 2010-11 and arrived at a higher value. Further, since the IP right was sold under the development phase, the TPO alleged that the taxpayer has deliberately shifted the potential revenue earning IP to Ireland being a low tax regime jurisdiction. Therefore, the TPO adopted Profit Split Method (PSM) and attributed 80 per cent of the total profits earned by DQE Ireland to the taxpayer. TPO made adjustment to all the international transactions which was upheld by Dispute Resolution Panel.

Tribunal's ruling

Sale of intangible assets (IP rights)

Transfer of IP rights to the AE - Based on the rulings¹ relied upon by the taxpayer, the Hyderabad Tribunal stipulated that in case where a valuation method is adopted, the projections cannot be replaced with actuals at a later date, as the valuation may go either way. The method adopted should be consistent and should be documented to review in the future. The review does not mean replacing projections with actuals. It is reviewing the rationale of adopting the values for decision making at a point in time of making the decision. Further, the Tribunal also observed that the revenue

¹ Tally Solutions (P.) Ltd vs DCIT [2011] 14 taxmann.com 19 (Bang) and Social Media India Ltd. vs ACIT (ITA No. 1711/Hyd/2012)

adopted for valuing the IP should be in relation to the transferred IP (Jungle Book) and that the TPO cannot adopt such values without proper verification.

Profit attribution and application of PSM -

The Tribunal held that there is no international transaction after an outright sale as per Section 92B of the Act. Upon the sale of IP and determination of ALP, the intangible asset is the property of the AE and neither the taxpayer has any right to claim benefit nor the revenue. In respect of planning amongst the group companies, the Tribunal observed that tax planning may be done within the four corners of taxation laws. The Tribunal stated that there is enough mechanism in the existing Act and Double Taxation Avoidance Agreement with Ireland to manage situations of tax avoidance and in absence of any cogent evidence to prove existence of tax avoidance, the Tribunal allowed the taxpayer's grounds.

Payment of management consultancy service fees

The Tribunal, following the taxpayer's own case in the earlier year, adjudicated that services have been rendered by the taxpayer's holding company and hence the TPO cannot consider the ALP of management consultancy fees as 'nil'.

Recovery of travel expenses

The Tribunal, following the Chennai Tribunal decision in the case of Cognizant Technology Solutions India Pvt. Ltd vs ACIT [ITA Nos.114 & 2100(Mds)/2011], held that since the taxpayer had incurred travel and other expenses on behalf of its AE, there is no element of service involved and

therefore adding a markup is not justified and deleted the adjustment.

DQ (International) Ltd vs ACIT (ITA No. 151/Hyd/2015)

Notional interest on security deposit paid to a landlord not to be considered in perquisite valuation of rent-free accommodation provided by employer

The Act recognises rent-free accommodation (RFA) provided by an employer to its employees as a perquisite taxable² in the hands of the employees. The Mumbai Tribunal held that, notional interest on security deposit paid by an employer, to a landlord in respect of the RFA provided to its employees, is not to be considered in the perquisite valuation of the RFA in the hands of the employees.

Vikas Chimakurty vs DCIT [ITA No. 6591/Mum/2014]

Salary received by a non-resident in India is taxable in India on receipt basis

The Act brings different classes of income within the ambit of taxation³ based on the residential status of each taxpayer. The Kolkata Tribunal held that the income received in India by a non-resident taxpayer is taxable in India by virtue of such income received in India.

Tapas Kr. Bandopadhyay vs DDIT [ITA No. 70/Kol/2016]

² Section 17(2)(i) of the Act read with Rule 3(1) of the Rules

³ Section 5 of the Act

Salary income earned outside India is exempt from tax in India under DTAA based on split residency position

Section 90(2) of the Act provides for adopting the provisions of the Act or of the double taxation avoidance agreements (DTAA or tax treaty) whichever is beneficial to the taxpayer. The Delhi Tribunal held that, salary income outside India earned by an individual who qualified as a resident of the other country is eligible for tax exemption in India under the relevant tax treaty based on a split residency position.

Raman Chopra vs DCIT [2016] 69 taxmann.com 452 (Del)

The Government of India enhances benefits under the Employees' Deposit-Linked Insurance Scheme, 1976

The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act) is an employee welfare legislation aimed at, *inter alia*, securing welfare of the employees upon termination of their employment. The following schemes have been established under the EPF Act:

- The Employees' Provident Funds Scheme, 1952 (EPFS)
- The Employees' Pension Scheme, 1995 (EPS)
- The Employees' Deposit-Linked Insurance Scheme, 1976 (EDLIS).

The EDLIS facilitates the grant of assurance benefit in the event of death of

an employee who was a member of the EDLIS. Under the EDLIS, the assurance benefits were limited to a maximum of three-lakh sixty thousand rupees (INR360,000).

Recently, the Ministry of Labour and Employment, Government of India issued a notification⁴ dated 24 May, 2016 to increase the quantum of benefits to a maximum ceiling of six lakh rupees (INR 600,000) by amending the provisions in the EDLIS.

The Employees' Provident Fund Organisation (EPFO) has also issued a circular⁵ in this regard directing its officials to make necessary arrangements to grant the increased benefits. The assurance benefits will be calculated at thirty times the monthly wages (subject to the wage ceiling of INR15,000) plus 50 per cent of the average balance in the provident fund account of the deceased during the preceding twelve months or during the period of membership whichever is less (subject to a cap of INR150,000).

The overall cap on assurance benefit, therefore, will be INR 600,000 under the revised EDLIS provisions. In the circular, EPFO has also mentioned that all the establishments that have taken out insurance policies in lieu of EDLIS and are exempted from EDLIS should modify their present schemes accordingly and grant the enhanced benefits to the beneficiaries.

⁴ Notification no. G.S.R. 543(E), dated 24 May, 2016, published in the Gazette of India

⁵ http://www.epfindia.com/site_docs/PDFs/Circulars/Y2016-2017/EDLI_AmendmentEDLI_5662.pdf accessed as on 9 June 2016

Notifications/Circulars/ Press Releases

CBDT notifies Foreign Tax Credit rules

The CBDT recently issued a notification introducing a new rule in the Income-tax Rules, 1962 (the Rules) with respect to the Foreign Tax Credit (FTC) that shall come into effect from 1 April 2017. The new FTC rules are as follows:

- The resident taxpayer shall be allowed FTC of any foreign tax paid in a country or specified territory outside India, by way of deduction or otherwise, in the year in which the income corresponding to such tax has been offered to tax or assessed to tax in India.
- In a case where income on which foreign tax has been paid or deducted, is offered to tax in more than one year, credit of foreign tax shall be allowed across those years in the same proportion in which the income is offered to tax or assessed to tax in India.
- The FTC shall be available against the amount of tax, surcharge and cess payable under the Act but not in respect of any sum payable by way of interest, fee or penalty.
- FTC shall not be available in respect of any amount of foreign tax or part thereof which is disputed by the taxpayer.
- The credit of disputed tax shall be allowed for the year in which such

income is offered to tax or assessed to tax in India if the taxpayer within six months from the end of the month in which the dispute is finally settled, furnishes evidence of settlement of dispute and an evidence to the effect that the liability for payment of such foreign tax has been discharged by him/her and furnishes an undertaking that no refund in respect of such amount has directly or indirectly been claimed or shall be claimed.

- The FTC shall be the aggregate of the amounts of credit computed separately for each source of income arising from a particular country or specified territory and given effect to in the following manner:
 - The FTC shall be the lower of the tax payable under the Act on such income and the foreign tax paid on such income. However, in case the foreign tax paid exceeds the amount of tax payable in accordance with the tax treaty, such excess shall be ignored
 - The FTC shall be determined by conversion of the currency of payment of foreign tax at the telegraphic transfer buying rate on the last day of the month immediately preceding the month in which such tax has been paid or deducted.
- In the case where any tax is payable under the provisions of Minimum Alternate Tax (MAT) under the Act, the credit of foreign tax shall be allowed against such tax in the same manner as is allowable against any tax payable

under the provisions of the Act other than the provisions of the said sections.

- Where the amount of FTC available against the tax payable under the provisions of MAT, exceeds the amount of tax credit available against the normal provisions, then while computing the amount of MAT credit in respect of the taxes paid under MAT provisions, as the case may be, such excess shall be ignored.
- The FTC shall not be allowed unless the specified documents are furnished by the taxpayer.

Notification No. 54/2016, dated 27 June 2016

CBDT notifies rules with respect to non-furnishing of PAN by non-residents and furnishing of alternative documents

The CBDT has issued a notification and introduced Rule 37BC in the Rules in relation to relaxation from deduction of tax at source at a higher rate under Section 206AA of the Act. Rule 37BC of the Rules provides that a non-resident deductee without a Permanent Account Number (PAN), shall not be subject to higher withholding tax under Section 206AA, in respect of payments in the nature of interest, royalty, FTS and payments on transfer of any capital asset, if the deductee

furnishes the specified details and the documents to the deductor. The Rules are summarised as follows:

- As per Rule 37BC(1), in the case of a non-resident, not being a company, or

a foreign company (the deductee) and not having PAN, the provisions of Section 206AA shall not apply in respect of payments in the nature of interest, royalty, FTS and payments on transfer of any capital asset, if the deductee furnishes the details and the documents specified in sub-rule (2) to the deductor.

- Rule 37BC(2) specifies that in respect of payments specified therein the deductee shall furnish the following details and documents to the deductor:
 - name, e-mail id, contact number;
 - address in the country or specified territory outside India of which the deductee is a resident;
 - a certificate of his being resident in any country or specified territory outside India from the government of that country or specified territory, if its law provides for the issuance of such certificate;
 - Tax Identification Number of the deductee in the country or specified territory of his residence. In case no such number is available, then a unique number on the basis of which the deductee is identified by the government of that country or the specified territory of which he claims to be a resident.
- Consequential changes have been introduced in Form No. 27Q, which is a quarterly statement of deduction of tax under Section 200(3) of the Act, in respect of specified payments. Accordingly, the information mentioned in the Rule 37BC needs to be furnished in the Form No. 27Q.

No. 53 /2016, F.No.370 142/16/2016-TPL, dated 24 June 2016

CBDT issued direction to tax officers to issue scrutiny notice in the revised formats

The Central Board of Direct Taxes (CBDT) has issued a direction to tax officers that all scrutiny notices under Section 143(2) of the Act, shall henceforth, be issued in the revised format. CBDT has modified format of notice under Section 143(2) of the Act. Henceforth, there shall be three formats of the said notice i.e. limited scrutiny, complete scrutiny and manual scrutiny.

F. No. 225/162/2016/ITA.II

CBDT issues notification with respect to TDS/TCS related online procedure

The CBDT vide Notification No. 6/2016, dated 4 May 2016, has laid down procedure of registration in the e-filing portal, the manner of preparation of statements and submission of the statements relating to tax deducted at source (TDS) and tax collected at source (TCS). Accordingly, the TDS/TCS statement is required to be uploaded as a zip file and submitted using only by way of Digital Signature Certificate (DSC). Recently, the CBDT has issued a Notification No. 11/2016, dated 22 June 2016 inter alia clarifying that TDS/TCS statement may be submitted either using DSC or Electronic Verification Code (EVC). For DSC mode, the signature for the zip file can be generated using the DSC management utility. Alternatively, deductor/collector can e-verify TDS return using EVC.

Notification No. 11/2016, dated 22 June 2016

II. SERVICE TAX

Service Tax - Decisions

Principle of mutuality is applicable when overseas branch has no independent existence from head office

The issue in the instant case was whether payments made by head offices to branch offices located outside India for disbursement of salary and other expenses by the overseas branches (in relation to the personnel of head office deputed to the overseas customer sites) would be subject to service tax under a reverse charge mechanism on the premise that a branch beyond the jurisdiction of the statute is deemed to be a distinct establishment for the purpose of service tax.

The CESTAT held that such payments will not attract service tax basis the following observations:

- The activity of head office and branch office are inextricably related.
- There is no independent existence of the overseas branch as a business, and the economic survival of the branch is entirely dependent on the finances provided by the head office.
- The transfer of funds is nothing but the reimbursements and taxing of reimbursements would amount to taxing of transfer of funds which is not contemplated under the services tax laws.

M/s Tech Mahindra Ltd. vs Commissioner of Central Excise [TS-140-CESTAT-2016-ST]

Services provided by a corporate entity on behalf of the government is liable to service tax

The issue in the instant case was whether maintenance and repair services provided by the taxpayer (which is a corporate entity) would be liable to service tax on the basis that such services are performed under statutory duty/function on behalf of the state government. The Delhi High Court upheld the levy of service tax on such services on the basis of the following:–

- The service tax law does not provide for any exemption for services rendered as part of statutory duties or merely on the ground that service provider/service receiver is 'Government'/'Governmental agency'; and
- Erstwhile Circular No. 89/7/2006 – ST, exempting activities performed by sovereign or public authority would not be applicable in the instant case since the taxpayer was a corporate entity.

Chhattisgarh State Industrial Development Corporation Ltd vs C.C.E. & S.T., Raipur [2016-VIT -385-CESTAT -DELST]

Payment processing services to foreign customers qualifies as export as they are not 'intermediary services'

The issue in the instant case was whether the payment processing services proposed to be provided by the taxpayer to a service

recipient located outside India would be liable to service tax. The AAR held that since the services are to be provided on a principal to principal basis and the taxpayer would be providing services on its own account, it would not qualify as 'intermediary services'. Therefore, the AAR held that the place of provision of the said services would be outside India in terms of the service tax law and accordingly, the said services would qualify as 'export' of service.

M/s Universal Services India Pvt Ltd vs Commissioner of Service tax, Ruling No. AAR/ST/07/2016

Rule empowering departmental and other officers to demand documents is ultra vires to that extent

The issue in the instant case was whether the Service tax Rule which empowers departmental officers/ officers of Comptroller and Auditor General to demand documents from assessees, was in conflict with the provisions of the Chapter V of the Finance Act, 1994 (Service tax Act) itself. The Delhi High Court held that the impugned Rule of Service tax law is ultra vires the provisions of the Act on the basis of the following observations –

- Certain aspects mentioned in the impugned Rule such as cost audit reports goes beyond the requirements mentioned in the Service tax Act and the Central Government cannot exceed its powers by using the rulemaking powers;
- Since the concerned officers can demand production of documents from

assesseees without recording any reasons and there is no requirement that the officers should be duly authorized, the powers under the impugned rule could lead to harassment of assesseees; and

- The rule-making powers provided under the Service tax Act, do not include power to conduct audit.

Mega Cabs Pvt Ltd vs Union of India and Ors. [2016-TIOL-1061-HC-DEL-ST]

Notification/Circulars/ Press Releases

Krishi Kalyan Cess is not applicable in cases wherein provision of service has been completed and invoice issued on or before 31 May 2016

Taxable services have been exempted from levy of Krishi Kalyan Cess (KKC) in case provision of such services has been completed and the corresponding invoice has been issued on or before 31 May 2016.

Notification No. 35/2016 - Service tax, dated 23 June 2016

Service tax exemption on services by way of transportation of goods by a vessel from outside India up to the customs stations

Services by way of transportation of goods by a vessel from outside India up to the customs stations has been exempted from levy of service tax in cases, wherein invoices for such services have been

issued and import manifest has been delivered on or before 31 May 2016 and the customs certified copy of the same has been produced by the service provider or recipient.

Notification No. 36/2016 – Service tax, dated 23 June 2016

III. CUSTOMS

Notifications/Circulars/ Press Release

Sale of goods at Duty Free Shops in Indian currency

In view of the Notification No. FEMA 6 (R)/RB-2015, dated 29 December 2015 issued by the RBI, CBEC has revised the limit for purchase of goods at duty free shops. Now, passengers are permitted to purchase goods at duty free shops for an amount not exceeding INR25,000.

Circular No. 31/2016-Customs, dated 6 July 2016

IV. CENTRAL EXCISE

Decisions

Eligibility to avail CENVAT credit by a job-worker

The issue involved in the instant case is whether the taxpayer, being a job-worker, is eligible to avail CENVAT Credit on the procurement of inputs by him/her which are used in the manufacture of intermediate goods, which are further

used/cleared on payment of excise duty by the principal manufacturer.

The taxpayer submitted that the CENVAT credit is eligible as duty is being paid by the principal manufacturer on final product. He further contended that the matter is squarely covered by the Larger Bench decision in the case of Sterlite Industries (I) Ltd. [2005 (183) ELT 353 (Tri.-LB)]. The said case has also been upheld by the Bombay High Court.

On the other hand, Revenue submits that the benefit of CENVAT credit can be availed only by the manufacturer, who discharges duty liability. In the present case, the taxpayer acting as a job-worker has not discharged any duty liability and accordingly not eligible to avail CENVAT credit benefit.

The Kolkata Tribunal considering the arguments of both the parties observed that CENVAT credit benefit would be available to the job-worker, on the inputs directly purchased by him/her and used in the manufacture of finished/intermediate goods, considering that excise duty is discharged by the principal manufacturer on final product.

Alom Extrusion Ltd vs CCE (2016-TIOL-1539-CESTAT-KOL)

CENVAT credit cannot be disallowed on the ground that invoices pertain to a period prior to obtaining CE registration

In the present case, the issue was whether CENVAT credit is allowed for services received before obtaining excise registration. The taxpayer obtained

registration with the Central Excise department on 14 November 2008. The taxpayer availed CENVAT credit of service tax on 1 March 2009 on the strength of invoice dated 31 October 2008. Availment of such credit was disputed by the Central Excise department on the ground that the invoices on which credit has been taken pertains to the period prior to obtaining the excise registration.

The taxpayer submitted that service tax paid relates to construction of the new factory building for commencement of the manufacturing activities. He further submitted that since Central Excise registration was taken on 14 November 2008, CENVAT credit of the service tax indicated in the invoices dated 31 October 2008 was taken on 1 March 2009, which is after the commencement of the production activities. Accordingly, CENVAT credit availment is in conformity with Rule 3(1) of the CENVAT Credit Rules, 2004 and denial of such benefit by referring to sub-rule (2) of the said Rule is not proper. He, further, relied on the judicial precedents in the case of Imagination Technologies India (P) Ltd. [2011 (23) STR 661 (Tri.-Mum)] and Well Known Polyesters Ltd. [2011 (267) ELT 221 (Tri. Ahmd)].

On the other hand, the departmental representative reiterated the findings recorded and submitted that at the time of undertaking the construction activities of the factory building, the taxpayer was engaged in the activities of manufacturing goods on job work basis, which was exempted from payment of Central Excise duty under Notification 241/86 dated 14 March 1986. Thus, availment of CENVAT credit prior to the commencement of manufacturing activity and obtaining

registration under the Central Excise law is contrary to the CENVAT Credit Rules, 2004.

Considering the above, the Delhi Tribunal held that denial of CENVAT credit benefit on the disputed services is not in conformity with the CENVAT Credit Rules, 2004. Therefore, the appeal is allowed.

Pithampur Tools Pvt Ltd vs CCE (2016-TIOL-1682-CESTAT-DEL)]

Notification/Circulars/ Press Releases

Relief for first stage dealer and importer

The Central Government has notified that:

- A person who is registered as a first stage dealer shall not be required to take registration as an importer; or
- A person who is registered as an importer shall not be required to take registration as a first stage dealer.

Notification No. 30/2016 - Central Excise (N.T), dated 28 June 2016

Common Registration and Return for the 'First Stage Dealer' and 'Importer'

An assessee being engaged in business both as an 'Importer' and 'First Stage Dealer', may take only one excise registration, as such an assessee has been exempted from the requirement of taking a second registration. It may be noted that

such exemption facility is optional and an assessee may seek to register depending upon the requirement to obtain separate registration for his own business purposes.

The assessee, who conducts business both as a First Stage Dealer and an Importer, henceforth shall also have the option of filing a 'Single Quarterly Return' giving details of transactions as a first stage dealer and an importer.

Circular No. 1032/20/2016-CX, dated 28 June 2016

V. VAT

Decisions

MRP declared on the invoices with the purpose of following uniform sales pricing does not imply collection of sales tax in respect of exempt sales

The assessee, in the present case, is engaged in the manufacture of blended packet tea and has established its factory at Dharwad in the State of Karnataka, which was eligible for sales tax exemption based on Package Scheme of Incentives. The Assistant Commissioner of Commercial Taxes (ACCT) visited the premises of the assessee and noticed that the price of tea packets sold by the Dharwad unit (enjoying sales tax exemption) and other units (non-exempted units) was the same. The ACCT held that, the assessee had added the tax component to the sale price of tea packets of Dharwad unit and hence was not eligible for exemption. Based on the above

findings, the ACCT rejected the claim of exemption and finalized the assessment orders. The appellate authority, on an appeal filed by the assessee, upheld the findings of the ACCT that tax component was included in the sale price.

The Tribunal, held that though the company had considered the tax element in the sale price fixed but it had not collected the local taxes from the consumers, since in the invoices the columns against tax amounts were specifically left blank, in respect of sales made from the Dharwad unit. Accordingly, the Tribunal ruled in favour of the assessee. Aggrieved by the Tribunal order, the revenue filed a revision petition before the Karnataka High Court.

The HC observed that the assessee was governed by the Standards of Weights and Measures Act, 1976 (SWM) and Rules which requires printing of sale price of the package commodity on the packages strictly as 'MRP INR INCL. OF ALL TAXES'. He further stated that mere mentioning of MRP does not by itself be a proof of any collection of tax and upheld the Tribunal order.

The tax department filed an appeal before the Supreme Court (SC). The SC contended that the declaration made by the assessee about MRP is a statutory requirement under SWM and the same does not mean that the assessee had collected any amount by way of tax. Further, SC observed that, the assessee would have had to face severe consequences had it deviated from the statutory requirement by making a declaration contrary to the rules. The SC also held that the assessee had a uniform market retail price at an all

India level to ensure that the goods from one state do not flow to the other state, thereby distorting sales.

Further, in the present case, the assessee was not liable to pay tax and had not passed on the tax liability to the customers and hence, sale consideration received should not be bifurcated and divided on the basis of any assumption that the sale price received must have included the tax. There is neither such principle nor any precept in law.

In view of the above, the SC dismissed the appeal of revenue and ruled in favour of the assessee.

Deputy Commissioner of Commercial Taxes (Vigilance) vs Hindustan Lever Limited- [TS-258-SC-2016-VAT]

Notifications/Circulars/Press Releases

Assam

With effect from 1 July 2016, in order to check the transportation of goods through illegal means, all check- post authorities, will ask for production and submission of a copy of the transit passes of all the en route states. They will verify whether the details of consignments declared to the tax authorities of other states match/reconcile with the details of consignments declared at the concerned check-posts and will keep the copies of transit passes and their manifests and will simultaneously record such transit pass numbers with the name of the corresponding states. In case of discrepancies, the check-post authorities have been instructed to take action for

realisation of tax and penalty as per provisions of law.

Circular No. 3/2016 No. CV-2/97/Pt-II/60 dated 1 July 2016

Bihar

- The Governor of Bihar has extended the operation of the Bihar Settlement of Taxation Disputes Act, 2016 for settlement of disputes arising from proceedings under the various laws till FY 2011-12 from 7 July 2016 to 6 October 2016.

Notification No S.O 159 dated 5 July 2016

- Filing of quarterly VAT return in Form RT-I and annual VAT return in Form RT-III is now mandatory for dealers engaged in the business of goods (other than motor spirit, high speed diesel oil and light diesel oil, natural gas and aviation turbine fuel) specified in Schedule IV, who were earlier not required to file such returns.

Notification No. S.O.155 dated 17 June 2016

- With effect from 17 June 2016 , the turnover limit for the purpose of VAT audit in Bihar, has been increased from INR 40lakh to INR1 crore

Notification No. S.O.155 dated 17 June 2016

Chhattisgarh

The government has extended the date for filing of Form 18 (annual statement) for the financial year 2014-15 to 30 November 2016.

Notification No. F-10-33 /2016/CT/V (65) dated 11 July 2016

Delhi

Dealers whose gross turnover during the financial year 2015-16 exceeded INR1 crore are required to furnish VAT returns with a digital signature for the tax period 1 April 2016 to 30 June 2016 and subsequent tax periods. Further, the dealers who have obtained VAT registration on or after 1 April 2016 shall furnish their returns with digital signatures for the tax periods following the year during which their gross turnover exceeds INR1 crore.

Notification No. F.3(643)/Policy/VAT/2016/419-31 dated 1 July 2016

Rajasthan

A unified single user ID has been provided to dealers for all e-services i.e. VAT, CST, Entry Tax (Goods), Entertainment Tax and Luxury Tax. With the help of the said facility a VAT registered dealer shall use his VAT TIN to avail e-Services under different acts administered by the

Commercial tax department. Further, a unified return form template for VAT, CST, Entry Tax (Goods) and Luxury Tax has been provided for return period 2015-16 onwards. A dealer registered under VAT and other taxes, may file return using his TIN as single user ID.

Circular No. 06/2016-17 F.16 (95)/Tax/CCT/14-15/655 Dated 22 June 2016

Uttarakhand

A cess at 2 per cent shall be levied on the value of ready to eat food (fast food) sold by pizza outlets or fried chicken outlets, pre-packed frozen food, pre-packed soft drinks, fruit drinks, flavored drinks and beverages but not including pre-packed lassi, buttermilk and milk, at the point of the manufacturer or at the point of first sale of goods in the state, after their import from outside the state.

Notification No. 431/2016/17(120)/XXVII(8)/2014 dated 27 June 2016

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