May 2018

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

KPMG
cutting through complexity

Foreword

I am pleased to enclose the May 2018 issue of FICCI's Tax Updates. This contains recent case laws, circulars and notifications pertaining to direct and indirect taxes.

FICCI has conducted workshops on GST covering aspects such as e-way bill, anticipated simplification under GST regime, anti-profiteering provision under GST regime in Bengaluru, Kochi and Mumbai on April 18, 2018, April 19, 2018 and April 25, 2018 respectively.

A FICCI delegation also attended the Stakeholders Consultation Meeting with the Ministerial Group led by Mr. Sushil Kumar Modi, Deputy Chief Minister, Bihar on Simplification of returns under GST regime on April 17, 2018 at Vigyan Bhawan, Delhi. FICCI had also submitted its comments/suggestions on the proposed models for GST return simplification to the Ministerial Group.

Recently, the Authority for Advance Rulings (AAR) in the case of SeaBird Exploration FZ LLC held that the vessels engaged in seismic surveys on the high seas, in connection with the exploration of mineral oil/natural resources, through which applicant carries on its business, constitutes fixed place Permanent Establishment (PE) in India under Article 5(1) of India-UAE tax treaty. It is immaterial that the period of their operation was only 113 days, as a PE need not be permanent or for all times. Hence, the income arising from such PE shall be subject to tax in India as business income of the applicant.

India's monthly Goods and Services Tax (GST) collections crossed INR1 lakh crore for the first time in April, indicating that the indirect tax regime is stabilizing and that economic revival is picking up pace, the finance ministry said in a statement. Gross GST revenue in April (collections for the month of March) stood at INR1.03 lakh crore, against a monthly average of INR 89,995 crore during the period August 2017 to March 2018.

We 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.

Jyoti Vij

Recent Case laws

I. DIRECT TAX

High Court Decisions

Delay in filing income-tax return due to delay in obtaining tax-audit report is condoned

The taxpayer filed its tax return for AY 2014-15 after 37 days of the due date for filing return of income. During the relevant AY, the taxpayer transferred its business division on a going concern basis as a slump sale to its subsidiary company. The tax auditors of the taxpayer had certain reservations on the valuation of the aforesaid business transfer and wanted to issue a disclaimer in the audit report in Form 3CB. In the last moment, the tax auditors orally communicated their unwillingness to complete the audit and to issue a tax audit report before the due date. Therefore, the taxpayer was left with no other alternative, but to look for an alternative auditor, after getting written communication from the existing auditor. Subsequently, the taxpayer approached a new auditor but the existing auditor issued a No Objection Certificate (NOC) after considerable delay. The new auditor completed the audit work and issued the tax audit report belatedly based on which the taxpayer filed tax return. Inadvertently, the taxpayer in this return did not claim exemption under Section 47(iv) for transfer of business to a wholly owned subsidiary. Hence, the taxpayer made an application to Central Board of Direct Taxes (CBDT) for condonation of delay of 37 days. Since, the application was pending for a long time, the taxpayer filed a writ petition before the Madras High Court to direct CBDT to consider taxpayer's application. The High Court directed CBDT to consider the taxpayer's application on merits. However, CBDT refused to condone the delay of 37 days in filing return of income on the ground that the taxpayer was not able to establish that the work of the tax audit got delayed due to the professional misconduct on the part of the auditor and the taxpayer could have still taken a contrary view to the tax audit report and filed its return. Aggrieved, the taxpayer filed a writ petition before the High Court.

The High Court observed that since there was misunderstanding between the erstwhile auditor and the taxpayer, the taxpayer could not be blamed for the delay in carrying out its audit, as the same was beyond its control and hence, it could not file its return of income. The High Court observed that NOC could not be obtained from the erstwhile auditor immediately, hence, after obtaining NOC, the taxpayer engaged a new auditor and obtained the audit report and filed the return of income. By delaying the return of income, the taxpayer did not stand to benefit in any manner whatsoever. When the taxpayer had satisfactorily explained the reasons for the delay in filing the return of income, the approach of the tax department should be justice-oriented so as to advance the cause of justice. The delay of 37 days in filing the return of income should not defeat the claim of the taxpayer. The High Court observed that when once the tax authority has been conferred with discretion to condone the delay, the application seeking condonation of the delay of 37 days cannot be rejected for such reasons as are assigned by the tax department. The tax department should exercise its discretion in a proper manner. Therefore, the High Court condoned the delay of the taxpayer.

REGEN Powertech Private Ltd v. CBDT (W.P.No.24273 of 2016, dated 28 March 2018) (Mad)

High Court confirms attachment of immovable property transferred after service of recovery notice by tax recovery officer

The taxpayer (defaulter), an individual, defaulted in payment of dues under the Act. The Tax Recovery Officer (TRO) quantified the arrears and served a recovery notice on the defaulter on 5 January 2013. After service of the recovery notice, the defaulter sold his immovable property to the 'petitioner', also an individual. The sale was for adequate consideration, and the petitioner had no knowledge of the taxpayer being a defaulter under the Act. After the petitioner purchased the immovable property from the defaulter, the TRO passed an order for attachment of the immovable property on 21 December 2015. After the petitioner objected to the attachment, the TRO conducted an inquiry and passed an order not only declining to vacate the attachment, but also declaring the purchase of the immovable property from the defaulter as null and void. Aggrieved, the petitioner filed a writ petition before the High Court.

High Court's decision

On the validity of the attachment by the TRO

The High Court upheld the validity of the attachment by the TRO for the following reasons:

- The petitioner had purchased the immovable property from the defaulter after service of the recovery notice. However, the attachment was after the date of purchase

- The Act has a separate and distinct scheme of provisions governing transactions in immovable properties before and after service of the recovery notice. The High Court affirmed the TRO's contentions that the saving clause applied only to transactions in immovable properties before service of the recovery notice. In the present case, because the petitioner had purchased the immovable property after service of the recovery notice, the saving clause did not apply.

After the service of the recovery notice, the Act provides that the defaulter shall not be competent to sell the immovable property, except with the TRO's permission. If the attachment happens at a later date after service of the recovery notice, the Act provides that the attachment takes effect retrospectively from the date of service of the recovery notice.

The High Court referred to the Indian Contract Act, 1872 and observed that once the recovery notice had been served, the Act made the defaulter incompetent from selling the immovable property to the petitioner. If the defaulter had no competency to transfer the immovable property, the petitioner could not have acquired a valid or legal title from the defaulter.

The High Court held that the Act required the petitioner to establish that, on the date of service of the recovery notice, the petitioner had some interest in, or had

possession of, the immovable property. In the present case, this condition was not satisfied because the petitioner had purchased the immovable property only after the date of service of the recovery notice. In the case of immovable property, the person objecting to the attachment has to establish interest in, or possession of, the immovable property as of the date of service of the recovery notice.

The High Court rejected the applicability of the principle of beneficial interpretation because, only one interpretation was possible on a plain reading of the Act. As per the Act, the petitioner can require the TRO to lift the attachment by filing a suit in the civil court to establish their interest in the immovable property as of the date of service of the recovery notice. Till such suit is decided by the civil court, the attachment by the TRO stands conclusive.

On the TRO's powers to declare the purchase transaction as null and void

The High Court quashed the TRO's order to the extent of declaring the purchase as null and void. Based on certain decisions, the High Court affirmed that the TRO had no jurisdiction to declare the transaction of purchase of the immovable property as null and void. The Act itself declares that a transfer is void under specified circumstances, and does not grant powers to the TRO to pronounce upon the validity of the purchase.

D. S. Senthilvel v. Tax Recovery Officer (W.P. (MD) No. 2932 of 2018) (Mad)

Benefit of Section 80-IA/80-IB is not available to the housing project where levelling of earth commenced prior to the specified date

The taxpayer was engaged in building and construction activities. The taxpayer entered into an agreement with Ghaziabad Development Authority (GDA) in December 1996 for construction of flats in its projects. The GDA's approval was received on 28 February 1998 and construction of the projects commenced in October 1998. The taxpayer claimed a deduction under Section 80-IA(4F) read with Section 80-IA(5) and 80IB(10) of the Act. As per the aforesaid sections, an exemption in respect of profits derived from a housing project was admissible subject to the condition that the development and construction of the housing project commenced on or after 1 October 1998 (specified date). While the work orders were issued subsequent to the specified date, the levelling of earth had commenced much before the specified date.

The High Court held that a plain reading of Section 80IA(4) of the Act reveals that the benefit contemplated under the section would be available only if the undertaking commences the development and construction of the housing project on or after the specified date. The intention of the legislature is clear that the development of the project and construction that followed such development must have commenced on or after the specified date. In the course of building a housing project, while development precedes construction, development and construction could not be dissected. Thus, where the taxpayer undertakes levelling work to develop the land to facilitate construction of the housing project over it, the development and construction of the housing project 'commenced' with such levelling of the earth. In this case, as the development of the project, i.e. the filling and levelling of

the earth had commenced prior to the specified date, the benefit of exemption under Section 80-IA(4F) read with Section 80-IA(5) and Section 80-IB(10) of the Act could not be allowed to the taxpayer.

CIT v. Shipra Estate Ltd. (ITA No. 284 of 2010) – Taxsutra.com

Tribunal Decisions

Fees received for domain name registration are taxable as royalty under Section 9(1)(vi) of the Act

The taxpayer is a Limited Liability Company (LLC) located in the U.S. It is an accredited domain name registrar authorised by Internet Corporation for Assigned Names and Numbers (ICANN). ICANN is the central organisation that appoints a registrar like a taxpayer and charges fees as per a fixed predetermined formula. As per the agreement between the taxpayer and ICANN, the taxpayer has the right to register, assign, transfer and manage specific domain names. Clients all over the world apply for services as per proforma given by the taxpayer and pay fees for the same. One part of the fees is allegedly received by the taxpayer for web-hosting which is being offered for tax as royalty and the other part is taken for domain name registration.

A domain name is an identification string that defines a realm of administrative autonomy, authority or control within the internet. A domain name is used in various networking contexts and application-specific naming and addressing purposes. It represents an Internet Protocol (IP) resource, such as a personal computer used to access the internet, a server computer hosting a website, the website itself or any other service communicated via the internet.

The functions performed by ICANN and the taxpayer are as follows:

- The clients desirous of services apply to the taxpayer who in turn enquires from ICANN availability of domain name
- On confirmation, the taxpayer registers the clients for fees and for conditions as imposed by ICANN
- A technical coordinating body, ICANN, performs a variety of functions related to the internet's unique identifiers. These include operational functions, collaboration, coordination and engagement.

During Assessment Year (AY) 2013-14, the taxpayer received income from domain registration fees which was claimed to be not taxable in India.

The Assessing Officer (AO) observed that the customers of the taxpayer are using the server of the taxpayer and paying the fees for the same. The domain name registration is a tool which equips the customer with the right to use the server of the taxpayer. The domain registration charges have been essentially charged for granting the right to use the servers of the taxpayer, domain registration being the precondition to web hosting and so on, and the same being a highly technical process and because of its inherent quality, the same squarely falls under the definition of royalty under the provisions of the Act. Accordingly, the domain registration charges are taxable as royalty under Section 9(1)(vi) of the Income-tax Act (the Act). The DRP upheld the finding of the AO.

The Delhi Tribunal held that the rendering of services for domain registration is rendering of services in connection with the use of an intangible property which is similar to trademark. Therefore, the fees received by the taxpayer for services rendered in respect of domain name is taxable as royalty under Section 9(1)(vi) of the Income-tax Act, 1961 (the Act).

Godaddy.com LLC v. ACIT (ITA No. 1878/Del/2017)

Payment for intellectual property rights is taxable as royalty in India

The taxpayer is a Limited Liability Company incorporated in the U.S., and also a 100 per cent subsidiary of an Indian company. By virtue of the shareholding pattern and management control in India, the taxpayer is also treated as a tax resident of India. Therefore, the taxpayer is assessed to tax as LLC in the U.S. as well as a tax resident in India. The taxpayer engaged in the business of trading of specialty chemicals like fuel, additives and plasticising. The taxpayer was filing its returns in India as a resident company. The taxpayer has acquired certain patents and copyrights in the U.S. By virtue of the patents, trademarks, and technology obtained by IP purchase agreements with certain U.S. entities, the taxpayer gets the products manufactured from the holding company in India. The taxpayer has also got a customer base in U.S. Products manufactured in India by the holding company and supplied to the taxpayer are sold in the U.S. only, and not in India. As per the terms and conditions of the agreement, the taxpayer has to pay a royalty to the U.S. company. The basis of royalty payment is not a lump-sum amount, but it is determined as a fixed percentage of the sales made in U.S. Tax was not deducted under Section 195 of the Act by the taxpayer on the payments of royalty to the U.S. Company.

The AO has disallowed the royalty payments by invoking Section 40(a)(i) read with Section 195 of the Act. The AO held that by virtue of provisions of Section 9(1)(vi) of the Act, the payment of royalty by the taxpayer to the U.S. company constitutes chargeable income, on which, the tax is liable to be deducted under Section 195 of the Act. The AO observed that the patents, trademarks, and technology used for the manufacturing of the products were utilised in India. The holding company was having full and unconditional access to technical know-how and information regarding manufacturing procedure and technology, and it had been used for the purposes of its manufacturing in India.

On appeal, the Commissioner of Income-tax (Appeals) [CIT(A)] observed that the patents/Intellectual Property Rights (IPRs) in the case of the taxpayer were utilised for a manufacturing activity in India, and the rest of the activity had to be viewed as an export of the said products for marketing in the U.S. Consequently, the disallowances of royalty payments in terms of Section 40(a)(i) read with Section 195 were confirmed.

The Mumbai Tribunal held that payment of royalty for IPRs by the taxpayer to the U.S. entity is taxable in India. The Tribunal observed that although the taxpayer is incorporated in the U.S., it is also a tax resident in India and has entered into an agreement with the U.S. entity for purchasing and utilising patent, IPR, etc. The said patent/copyrights were used by the taxpayer's holding company in India for

the manufacture of products which were sold in the U.S.

Dorf Ketal Chemicals LLC v. DCIT (ITA No. 4819/Mum/2013)

Payment to ward off competition for a short period of five years is a revenue expenditure

The taxpayer is engaged in the business of a tour operator and travel agent. During the AY 2002-03, the taxpayer had entered into an agreement with a travel company, and had acquired the right to use the license for a 5.5 years so that the taxpayer could exploit the Middle East market where the strength of the brand lies. The taxpayer had also entered into an agreement with director and employee of the travel company and paid an amount of INR5 million each to them for not doing similar business for five years. The AO disallowed the amount of compensation paid on account of non-compete fees holding that it is a capital expenditure. The AO also disallowed INR1.05 crores on account of license fees holding that the expenditure being capital in nature was not eligible for deduction. On appeal, CIT(A) sustained the addition on account of non-compete fee paid to the director, but payment to employee was not sustained to the extent of 50 per cent. Aggrieved, the taxpayer filed an appeal before the Tribunal.

Tribunal's decision

Payment of non-compete fee

On a perusal of the agreement, the Tribunal observed that the director has agreed not to directly or indirectly own, manage, establish, engage, operate or cause to be operate, consult, or be employed in a competitive business, engaged in marketing and distribution services or carry on the competitive business or solicit any customer or target to the customer. The director agreed not to undertake directly or indirectly any competitive business through relatives. The tribunal relied on the decision of the Delhi High Court in the case of CIT v. Eicher Ltd. [2008] 302 ITR 249 (Del) and CIT v. Career Launcher India Ltd. [2012] 358 ITR 179 (Del). The Tribunal further relied on co-ordinate bench decision in the case of Hidelberg Cement India Ltd. v. ACIT [2015] 55 taxmann.com 336 (Mum) and observed that non-compete fee paid for elimination of competition for short period does not derive any enduring benefit, and no new asset was added. Therefore, the non-compete fee in the nature of restricting the director and employee in exercising their skill and experience in the similar field, cannot be treated as capital expenditure. The Tribunal held that when the payment was not made for elimination of competition but for non-compete for short period, and the taxpayer had not derived any enduring benefit, and no new asset was added, the payment of non-compete fee was in the nature of restricting the director and employee in exercising their skill and experience in the similar field. Therefore, it cannot be treated as capital expenditure.

Payment of license fees

The Tribunal observed that license fees were paid by the taxpayer to leverage its strength and to expand business activities in Middle East market for incoming customer to India. The taxpayer paid the license fee for expanding its existing business in regions outside India. The taxpayer made the payment for use of brand for a period of five and a half years and therefore should be considered as an intangible asset. On perusal of the books of account, the Tribunal observed that the taxpayer has

capitalised the aforesaid license fee expenditure under the head 'intangible asset' but claimed the entire expenditure under Section 37 of the Act and no depreciation is claimed. The Tribunal relied on Supreme Court decision in the case of CIT vs. IAEC (Pumps) Ltd. [1998] 232 ITR 316 (SC). The Tribunal also relied on the Supreme Court decision in the case of Devidas Vithaldas & Co. v. CIT [1972] 84 ITR 277 (SC) wherein it was held that, where expenditure is for acquisition of goodwill, it should be considered as capital in nature, but when it is not for acquisition of goodwill, it should be allowable as revenue expenditure. Thus, the expenditure incurred by the taxpayer on license fee is revenue expenditure.

DCIT v. SOTC Travel Services Pvt. Ltd. (ITA No. 1924/Mum/2007) –Taxsutra.com

Acceptance of arm's length price in case of one party cannot prevent the revenue to determine the arm's length price of the same transaction in the hands of the other party

The taxpayer entered into international transactions related to payment of royalty and payment of administrative, financial and marketing services (herein after referred as 'management cross charge') with its Associated Enterprises (AEs), Filtrex Holdings Pte. Ltd. (FHPL) and Filtrex International Pte. Ltd. (FIPL) respectively. The Transfer Pricing Officer (TPO) examined the arm's length nature of the said international transactions. Due to lack of evidences submitted by the taxpayer to substantiate the need and benefit received for the payments made towards royalty and management cross charges, the TPO determined the arm's length price (ALP) of both the transactions as nil. The DRP upheld the TPO's action. Further, post DRP proceedings, the income tax return filed by the AEs i.e. FHPL and FIPL, were selected for income tax scrutiny and the returned income of the these entities was accepted by the AO.

Tribunal's ruling

- The Tribunal observed that AO accepted the income earned by the AEs to be at arm's length, however, they have not accepted expenditure claimed by the taxpayer, from the same transactions, to be at arm's length.

- Relying on the second proviso to section 92C(4) of the Act and circular no. 14/ 2001 dated 9 November 2001, the Tribunal held that the income of one AE from which tax has been deducted (or to be deducted) shall not be recomputed merely by reason of an adjustment made in the case of the other AE on determination of ALP by the AO.

- The Tribunal also held that in case of any transaction which could lead to tax base erosion, the AO is free to refer the case to the TPO for ALP determination, whereas, corresponding adjustment in the assessment of the other enterprise to the transaction need not be made where there is no tax base erosion.

- The tribunal affirmed its aforesaid view in light of section 92(3) of the Act.

- Relying on section 92CA(4) of the Act, the tribunal held that the AO is mandated to pass the order based on the adjustment made by the TPO and does not have a right to deny such adjustment. Therefore, in the instant

case, the AO has to accept the adjustment made by the TPO in case of the taxpayer without making an corresponding adjustment in the hands of FIPL and FHPL in light of Sections 92C(4) and 92(3) of the Act.

- The tribunal observed that there appears to a conflict between the provisions of Sections 92CA(4) and 92(3) of the Act. However, it held that a harmonious construction of these sections would mean that in respect of a same transaction, the revenue can opt to determine the total income on the basis of ALP determined in accordance with section 92(1) of the Act, in the hands of one party to the said transaction, wherever there is a tax base erosion.

- With respect to the ALP determination of the transactions of royalty and management cross charge, the tribunal opined that the TPO is required to examine the transaction in detail and the evidences in respect of the payments made and benefit received, prior to determining the ALP. Accordingly, the tribunal remanded back to the TPO for further examination and ALP computation.

Filtrex Technologies Pvt. Ltd vs ACIT [IT(TP)A Nos.469/Bang /2017]

AAR Ruling

Vessels engaged in seismic surveys on the high seas, in connection with the exploration of mineral oil/natural resources, constitute fixed place PE under the India-UAE tax treaty

The applicant is a UAE company engaged in the business of rendering geophysical services to the oil and gas exploration industry. Its core business activity involves 4C-3D seismic data acquisition and processing, which is aimed at increasing the exploration success of its oil and gas clients and maximising their production. In India, the applicant has rendered these services to Oil and Natural Gas Corporation Ltd (ONGC) and other oil companies operating in India. It had entered into a contract with ONGC for 4C-3D seismic data acquisition, processing and interpretation in the Mumbai high field. Its activities are therefore intrinsically connected with oil and mineral exploration, and which ultimately aid oil and mineral extraction, and the same are carried out through its survey and seismic vessels.

The applicant filed an application before the AAR seeking a ruling for the determination of tax liability in respect of revenue received from ONGC under the said contract.

The AAR held that the vessels engaged in seismic surveys on the high seas, in connection with the exploration of mineral oil/natural resources, through which applicant carries on its business, constitutes fixed place PE in India under Article 5(1) of India-UAE tax treaty (tax treaty). It is immaterial that the period of their operation was only 113 days, as a PE need not be permanent or for all times. Hence, the income arising from the PE shall be subject to tax in India as business income of the applicant.

SeaBird Exploration FZ LLC (AAR No. 1295 of 2012)

Notification/Circulars/ Press Releases

The Union Cabinet approves revision of India-Qatar tax treaty

The Union Cabinet has given its approval for revision of the India-Qatar tax treaty. The existing tax treaty was signed on 7 April 1999 and came into force on 15 January 2000. The revised tax treaty updates the provisions for exchange of information to latest standard, includes limitation of benefits provisions to prevent treaty shopping and aligns other provisions with India's recent treaties. The revised tax treaty meets the minimum standards on treaty abuse under Action 6 and mutual agreement procedure under Action 14 of OECD Base Erosion and Profit Shifting (BEPS) project, in which India participated on an equal footing.

Source – http://taxindiainternational.com/

DIPP notification on the procedure for 'startups' to avail tax benefits

The Department of Industrial Policy and Promotion (DIPP) has issued a notification to outline the procedure of application and criteria for a startup to be eligible to apply for tax relief. Further, a broad-based Inter-Ministerial Board will be constituted to consider applications of startups for claiming following incentives under the Act:

- One hundred per cent deduction of the profits and gains from income of startups for three out of seven consecutive AYs under Section 80-IAC of the Act.
- Exemption from levy of income tax on share premium received by eligible startups under Section 56(2)(viib) of the Act.

Source – Notification No. 364(E), dated 11 April 2018, suppressing its earlier Notification No. 501(E), 23 May 2017

CBDT notification — withdrawal of transport allowance exemption

The CBDT has issued a notification no. 17/2018 withdrawing tax exemption of transport allowance of INR1,600 per month, granted to an employee to meet his expenditure for the purpose of commuting between the place of his residence and the place of his duty. The withdrawal of exemption was announced during Budget 2018 pursuant to the introduction of standard deduction.

The notification shall come into force on 1 April 2019, and shall apply to the AY 2019-2020 and subsequent AYs.

Notification no. 17/2018, dated 6 April 2018

CBDT press release — PAN and TAN mentioned in certificate of incorporation shall also be treated as sufficient proof

In case of a company, an application for incorporation, allotment of Permanent Account Number (PAN) and allotment of Tax Deduction and Collection Account Number (TAN) may be made through a common application form submitted to the Ministry of Corporate Affairs (MCA). In these cases, the Certificate of Incorporation

(COI) issued by MCA contains a mention of both PAN and TAN.

The Finance Act, 2018 amended Section 139A of the Act and removed the requirement of issuing PAN in the form of a laminated card.

The CBDT has issued a press release clarifying that PAN and TAN mentioned in the COI issued by MCA shall also be treated as sufficient proof of PAN and TAN for the said company taxpayers.

CBDT press release, dated 14 April 2018

II. GOODS AND SERVICE TAX

Decisions

Advance Ruling of taxability of goods traded internationally without importing into India

Applicant a registered persons under GST and in the business of trading spices and spice products.

Applicant sought clarification from AAR on whether IGST is payable on high sea sales of goods purchased from a supplier in China and shipped directly from China to his customer in the USA. Applicant also sought clarification on applicability of IGST in respect of goods purchased from China and shipped directly to Netherlands for storage and subsequent delivery to their customers in and around Netherlands.

ARR after examining the provisions of IGST Act, Customs Act and Circular issued by CBEC has ruled that the applicant is neither liable to GST on the sale of goods procured from China and directly supplied to the USA nor on the sale of goods stored in the warehouse in Netherlands, after being procured from China, to customers, in and around Netherlands, as the goods are not imported into India at any point.

M/s Synthite Industries Ltd. [2018-VIL-02-AAR (Kerala)]

Advance Ruling on taxability of food expenses recovered from employees under the GST Act

Applicant preferred an Advance Ruling on whether recovery of food expenses from employees for the canteen service provided by the applicant/company comes under the definition of outward supplies and are taxable under Goods and Services Tax Act
Applicant submitted that they were providing canteen services exclusively for their employees. They were incurring the canteen running expenses and were recovering the same from its employees without any profit margin.

The applicant further submitted that the service provided to the employee is not being carried out as a business activity, as they were in the business of manufacture of footwear.

The applicant was of the opinion that this activity did not fall within the scope of 'supply', as the same was not in the course or furtherance of its business.

After going through the definition of business, supply and consideration under CGST Act, AAR ruled that recovery of food expenses from the employees for the canteen services provided by the company would come under the definition of 'outward supply' as defined in Section 2(83) of the Act, 2017, and therefore, taxable as a supply of service under GST.

M/s Caltech Polymers Pvt. Ltd. [2018-VIL-04-AAR- Kerala]

Advance Ruling on supply of two products under one contract not naturally bundled

Applicant, a supplier of power solutions, including UPS, servo stabilizer, batteries etc. approached AAR on the classification of the supply when it supplies UPS along with the

battery. The applicant stated that as the battery, being supplied as part of an integral contract, remains naturally bundled with UPS i.e. the principal supply.

However, applicant also confirmed that UPS and battery are two different and independent products, but are billed together and single price is quoted for sale.

Therefore, AAR ruled that supply of UPS and battery is to be considered as mixed supply which is supplied under a single contract at a combined price.

Switching Avo Electro Power Ltd. [2018-VIL-01- West Bengal]

CGST Notifications

Central Government notified that the E-way Bill Rules notified vide Notification No. 12/2018 dated 7 March 2018, shall come into force with effect from 1 April 2018.

Notification No. 15/2018, dated 23 March 2018

Central Government notified that registered persons having aggregate turnover of upto INR1.5 crore shall furnish GSTR-1 return for the quarter April to June 2018 by 15 July 2018.

Notification No. 17/2018 dated 28 March 2018

Central Government notified that registered persons having aggregate turnover exceeding INR1.5 crore shall furnish GSTR-1 return for the month April 2018, May 2018 and June 2018 by 31 May 2018, 10 June 2018 and 10 July 2018 respectively.

Notification No. 18/2018, dated 28 March 2018

CGST Circulars

Clarifications on issues related to job work

Commissioner-GST has issued clarifications on procedures and compliance requirement for sending goods for job work (i) by the principal to the job worker, (ii) from one job worker to another job worker; and (iii) from the job worker back to the principal.

Circular No .38/12/2018, dated 26 March 2018

Clarification on issues related to furnishing of Bond/Letter of Undertaking for exports

Commissioner-GST has issued clarification regarding acceptance of LUTs to be submitted online in FORM GST RFD-11. LUT shall be deemed to be accepted as soon as an acknowledgement bearing Application Reference Number (ARN) is generated online and no documents need to be physically submitted thereafter to the jurisdictional office for acceptance of LUT.

Circular No .40/14/2018, dated 6 April 2018

Procedure for interception of conveyances for inspection of goods in movement, and detention, release and confiscation of such goods and conveyances

In order to ensure uniformity in the implementation of the provisions of the CGST Act across all the field formations, the CBEC has issued detailed instructions in respect of interception of conveyances for

inspection of goods in movement and detention, seizure and release and confiscation of such goods and conveyances.

Circular No .41/15/2018, dated 13 April 2018

Clarification regarding procedure for recovery of arrears under the existing law and reversal of inadmissible input tax credit

In order to ensure uniformity in the implementation of the provisions of the CGST Act across all the field formations, the CBEC has prescribed a detailed procedure for recovery of arears of central Excise Duty, Service Tax or wrongly availed CENVAT credit under existing law and inadmissible transitional credits.

Circular No .42/16/2018, dated 13 April 2018

Extension of date for submitting the statement in FORM GST TRAN-2

The period for furnishing the statement in FORM GST TRAN-2 under sub-clause (iii) of clause (b) of sub-rule (4) of rule 117 of the CGST Rules, 2017 has been extended till the 30 June 2018

Order No. 1 /2018 – Central Tax dated 28 March 2018

III. EXCISE - Decisions

CENVAT credit can be availed if the first stage dealer is registered, whether or not the importer from whom the first stage dealer has purchased is registered

The facts of the case were that the taxpayer was the manufacturer of excisable goods, and availed the CENVAT credit on inputs received from the first stage/second stage dealers, who are duly registered with the service tax department. However, Revenue had a view that since the first stage dealer received the imported goods from the importer who was not registered as an importer under Rule 9 of Central Excise Rules, 2002, the invoices issued by the first stage/second stage dealers were not eligible documents for the purposes of CENVAT credit.

On appeal, Commissioner (Appeals) observed that the invoices issued by the first stage/second stage dealers clearly mentioned the name, address and Central Excise Registration numbers of the original supplier and also of manufacturer/importer. Inasmuch as the dealers were duly registered with the department, the invoices issued by them are required to be held as eligible cenvatable invoices. Commissioner (Appeals) also took note of subsequent Notification No. 30/2016-CE (NT) dated 28 June 2016 specifying that if a person is registered as a first stage dealer and also as an importer, he is not required to take separate registration for both. Accordingly, he set aside the order of the original appellate (sic) authority on the ground that inasmuch as the dealers or the importers were registered with the Revenue, the denial of credit is not justified. CESTAT, confirmed the stand taken by Commissioner (Appeals) that the denial of credit was not justified on the sole ground that the importer, who had supplied the goods to the first stage dealer was not registered with the Central Excise department. The taxpayer had availed the credit on the basis of invoice issued by the

dealer who was admittedly registered with the Revenue and their registration number along with all other particulars were duly reflected in the invoice and hence the revenue's appeal is rejected.

Western Refrigeration Pvt Ltd [2018-VIL-41-CESTAT-MUM]

Mere mention of certain products in the tariff classification will not make them liable to Central Excise Duty

The facts of the case were that the taxpayer was engaged in supply of various bought-out electrical items and accessories to various nodal agencies to provide electricity connection to below poverty line (BPL) households. They procured these items from various parties and supplied them to these nodal agencies in various combinations (BPL Kit).

The Revenue were of the view that the taxpayer was liable to Central Excise Duty on such BPL kits cleared by them to their clients.

The taxpayer submitted that there was no new manufactured item arising out of the process undertaken by the appellant which would amount to manufacture in terms of Section 2(f) of the Central Excise Act, 1944. Mere mention of certain products in the tariff classification would not make them liable to Central Excise Duty.

There was no change in the name, character and use of the goods now subjected to excise levy when compared to items used in making such goods. In other words, there was no item as 'BPL Kit' known or available in the market for sale and purchase. The product was not commercially known. Without prejudice to the above submissions, it was stated that the product, even after mounting of two items, was not classifiable under CETH 85371000.

In view of the above analysis, it was held that the appellants had not manufactured any dutiable item attracting central excise levy during the material time. Therefore, the original authority's order was upheld with reference to the finding for dropping the demand raised against the taxpayer.

M/s TGL Enterprises Pvt Ltd [[2018-VIL-05-CESTAT-DEL-CE]

Claim for CENVAT credit of service tax paid on reverse charge basis, cannot be denied if tax payer opts for not claiming exemption as per Notification No 8/2005, which it is optional

The facts of the case were that the taxpayer had removed moulds to the job worker under Rule 4(5)(a) of CENVAT Credit Rules, 2004 for carrying out certain processes on such moulds. Subsequently some foreign technician carried out the process on behalf of the job worker and raised invoices. The taxpayer paid service tax on reverse charge basis on the invoices raised by foreign technician and availed CENVAT credit of such service tax paid.

The revenue held that since moulds were sent to job workers, service tax was not payable in terms of notification no 8/2005 and therefore the service tax paid by the taxpayer is not available as CENVAT credit.

The Tribunal held that the service was not provided by the job worker instead it was provided by a foreign technical person. Therefore the taxpayer being recipient of service has rightly discharged service tax and availed CENVAT credit. However, even

if it was assumed that the service provided by job worker was exempt by notification no 8/2005 there was no compulsion for availing such exemption as the same was optional.

Therefore, the Tribunal held that availing the benefit of notification was optional and the service tax paid by the taxpayer was available as CENVAT credit.

M/s Sridevi Tool Engineers Pvt Ltd [2018-TIOL-874-CESTAT-MUM]

Interest is chargeable only if CENVAT credit was availed and utilised wrongly from the date of notification

The facts of the case were that the taxpayer had inadvertently taken CENVAT credit for the period April 2011 to March 2012. During an audit the revenue pointed out that the CENVAT credit was inadmissible and the taxpayer on the basis of the findings of revenue reversed the CENVAT credit on 30 August 2013 and paid interest on such CENVAT credit availed. However, as per amendment to Rule 14 of CENVAT credit rules 2004 through notification no 18/2012-CE dated 17 March 2012, interest became payable only if CENVAT credit is inadvertently taken and utilised. Prior to notification no 18/2012-CE, interest was payable if CENVAT credit is inadvertently taken or utilised. On the basis of the notification, the taxpayer applied for refund of interest paid for the disputed period.

However, the revenue rejected the application filed by the taxpayer for refund of interest on the grounds that at the time of taking credit un-amended provision of Rule 14 was in force and according to which even though the credit was not utilised, interest was chargeable.

The Tribunal carefully considered the submissions made by both the sides and held that when the Rule 14 was amended, the effect of amended rule has to be given for the period on or after 17 March 2012. According to the amended provision for the period after 17 March 2012 interest was chargeable only when the assessee has taken and utilised the CENVAT credit in the present case the taxpayer had availed the CENVAT credit but had not utilised the same up to 30 August 2013. Therefore for the period from 17 March 2012 onwards as per the amended provisions, interest was not chargeable on unutilised CENVAT credit.

Therefore the taxpayer was entitled for refund of interest paid for the period 17 March 2012 to 30 August 2013.

Pharmaceutical Product of India Ltd [2018-TIOL-871-CESTAT-MUM]

Freight charges correctly shown in commercial invoice but not shown in central excise invoice , does not lead to adding the same in the assessable value as per Rule 5 of Central Excise Valuation Rules, 2000

The facts of the case were that the taxpayer had raised commercial invoice in respect of freight and insurance charges whereas the freight was not shown in the central excise invoice. It was contended by Revenue that since freight charges were not shown separately in the central excise invoice, such freight charges were to be included in the assessable value. The adjudicating authority held that only due to not showing the freight on the invoice, the substantial provisions of exclusion of freight under Rule 5 cannot be denied. Being aggrieved by the Order in-Original, revenue filed appeal

before the Commissioner (Appeals), who upheld the revenues appeal. Therefore, the taxpayer filed an appeal before Tribunal.

The Tribunal held that even though freight charges were not shown in the excise invoice but by raising the commercial invoice the freight amount was separated from the total sale value. Therefore, irrespective of the fact that whether it was shown separately in the excise invoice or it was charged separately in the commercial invoice, it was one and the same thing. At the most by not showing in the excise invoice, it could be a procedural lapse but only for minor procedural lapse the substantial valuation could not be altered. Therefore, the Tribunal set aside the order passed by the Commissioner (appeals) and passed order in favour of the taxpayer.

International Transmission Product Pvt Ltd [2018-VIL-42-CESTAT-MUMBAI-CE]

Notifications/Circulars/Press Release

Exemption from paying IGST and compensation cess to EOU on imports extended till 1 October 2018.

Notification No. 33/2018- Customs

Exemption from paying IGST and compensation cess for goods imported under advance authorization/EPCG extended till 1 October 2018.

Notification No. 35/2018- Customs

IV. VAT – Decisions

Repeal of KVAT would not affect proceedings initiated by Revenue authorities before enactment of Karnataka GST Act, 2017.

In the present case, the assesse engaged in manufacturing of refined rice bran oil and also obtained de-oiled rice bran oil as a by-product. Rice bran oil is taxable, whereas, de-oiled rice bran oil is an exempt commodity under the Karnataka Value Added Tax Act, 2003 (KVAT Act). The assesse restricted its input tax credit to the extent of the inputs utilised towards taxable output commodity i.e. refined rice bran oil, applying provisions of partial rebate as per Section 17 of the KVAT Act.

Thereafter, the High Court in case of M/S M.K. Agro Tech Private Limited vs State of Karnataka held that, the principle of partial rebate is not applicable in case where there is an exempted by-product as opposed to an exempted final or end product.

Basis the above decision, the assessee filed a writ petition before the High Court seeking direction for obtaining refund of ITC paid in excess. The Court allowed the writ petition of the assessee by issuing direction to process the application filed by the assesse for refund of ITC paid in excess, subject to result of the Special Leave Petition filed by the state against such order and obtaining an indemnity bond from the assesse to the extent of amount refunded.

Subsequently, the above decision of the High Court in case of M/S M.K. Agro Tech Private Limited vs State of Karnataka was set aside by the Supreme Court and it was held that, `the provisions of partial rebate were applicable in case of exempted by-products.

Based on the aforesaid decision, orders were issued directing the assesse to pay the refund amount with the interest.

Aggrieved by the said order, the assesse filed a writ petition before the High Court, for setting aside the orders passed, on the grounds that, KVAT Act was repealed with effect from 1 July 2017, on enactment of Karnataka Goods and Services Tax Act, 2017 (KGST Act). In view of the same, the taxpayer contended that, the judgement of SC passed in September 2017 shall not revive anything not in force or existing at the time of such repeal and therefore, the said judgement of SC cannot be made applicable to invoke the provisions of KVAT Act.

In this regard, the High Court held that, repeal of KVAT Act shall not affect proceedings initiated by Revenue authorities before 1 July 2017, under the said repealed Act. Further, it was observed by the HC that, the refund of ITC was being granted to the assessee subject to result of Special Leave Petition before the SC in the case of M/S M.K. Agro Tech Private Limited vs State of Karnataka and since the judgement of HC was reversed by the SC in the said case, orders were issued directing the assesse to pay the refund amount with the interest.

Thus, the High Court in the present case, upheld recovery of refunded ITC under KVAT Act, despite repeal of said enactment from July 2017 vide KGST Act. Further, it was held that, levy of penalty and interest shall be subject to providing reasonable opportunity of hearing to the assesse.

M/S Abhay Solvents Private Limited [TS-87-HC-2018-Karnataka]

Notifications/Circulars/Press Release

Maharashtra

The Commissioner Vide below mentioned circular, the Commissioner of Maharashtra has mentioned that with effect from 13 March 2018, dealers registered under Maharashtra Value Added Tax Act, 2002 (MVAT Act) and Central Sales Tax Act, 1956 (CST Act), can also apply for e-CST declarations for the period ending on or before 31 March 2016 at a new portal i.e. www.mahagst.gov by following the procedures prescribed by the department in this regard.

Trade Circular No. 11T of 2018 dated 13 March 2018

- Vide below mentioned circular, Commissioner of Maharashtra has simplified the procedures to file revised return under section 20(4)(b) and 20(4)(c) of MVAT Act for the FY 2016-17 and onwards. In this connection, Maharashtra department has come up with a new template in order to furnish single annual revised return (maximum file size of data upto 100MB). Further, such circular has also prescribed the procedures to be followed by the dealers at new automation site for the purpose of revised return.

Trade Circular No. 12.T of 2018, NO. VAT/MMB-2018/2/ADM-08, dated 28 March 2018

- Maharashtra Government has introduced Maharashtra Tax Laws (Levy and Amendment) Bill, 2018 for the purpose of making amendments in

MVAT Act. According to such bill, following amendments are made in respective sections of MVAT which shall be effective from 1 April 2018:

- Under section 31(1)(b)(i) of MVAT Act, time limit upto 31 December 2018 has been added with effect from 1 April 2018, to deduct tax from amount payable by employer to a dealer to whom a works contract has been awarded as may be notified by Commissioner. However, tax shall be deducted once notification is issued by the Maharashtra department in this regard.

- Further, under section 31(4) of MVAT Act, proviso has been added to mention that in case contractee has deducted tax and paid the same to the credit of the government for the period starting from 1 July 2017 to 31 December 2018, the works contractor may claim such credit for the same in the prescribed manner subject to conditions specified under the said section.

- As per section 16(6A) of MVAT Act, the registration of a dealer, who has not effected sale of any goods, specified in schedule A or schedule B during the FY 2016-17 shall be deemed to be cancelled with effect from the appointed date of Maharashtra Goods and Services Tax Act. In this regard, section 61 of MVAT Act has been amended to include proviso that such dealers shall be required to get his accounts audited by an accountant as per the prescribed provisions for the FY 2017-18 if aggregate of turnover of sales and the value of goods transferred to any other place of business or place of agent or principal, situated outside the state, not by reason of sale or turnover of purchases exceeds INR25 lakh.

Bihar

- Vide the below mentioned notification, the Commissioner of Bihar has specified the criteria for selection of dealers for the purpose of conduct of detailed audit for the FY 2016-17. Accordingly, they have issued the list of dealers selected for the purpose of audit basis the respective criteria mentioned under below notification.

Notification No. 15/VAT Audit/Vividh-09/2017 – 856 dated 26 March 2018

Rajasthan

- Vide below notification, the Commissioner of Rajasthan has extended the date of submission of Form ITCV-D (application for verification input tax credit) from 31 March 2018 to 30 June 2018 and also extended the cut-off date from 1 April 2017 to 1 April 2018, for pending demands due to mismatch of input tax credit amounting to more than INR25, 000 in a financial year, for the FY 2011-12 onwards.

Notification No. F.16 (100)Tax/CCT/14-15/13 dated: 2nd April 2018

- Vide below notification, the Commissioner of Rajasthan has extended the date of submission of Form ITCV-C (application for verification input tax credit) from 31 March 2018 to 30 June 2018 and also extended the cut-off date from 1 April 2017 to 1 April

2018, for pending demands due to mismatch of input tax credit amounting to more than INR2, 00,000 in a financial year, for the FY 2006-07 to FY 2010-11.

Notification No. F.16 (100)/Tax/CCT/14-15/20 dated: 2 April 2018

- Vide below notification, the Commissioner of Rajasthan has extended the date of submission of Form ITCV-B (application for verification input tax credit) from 31 March 2018 to 30 June 2018 and also extended the cut-off date from 1 April 2017 to 1 April 2018, for pending demands due to mismatch of input tax credit amounting to more than INR25000 but upto INR2, 00,000 in a financial year, for the FY 2006-07 to 2010-11.

Notification No. F.16 (100)/Tax/CCT/14-15/27 dated: 2nd April 2018

- Vide the below mentioned notification, Commissioner of Rajasthan has extended the due date for submission of annual return in Form VAT 10A and VAT 11 for the year 2017-18 i.e. for the period ending 30 June 2017, from 31 March 2018 to 30 June 2018.

Notification No. F.26 (315)CCT/MEA/2014/212 dated: 27nd March 2018

Karnataka

- Vide the below mentioned circular, the Commissioner of Karnataka has clarified that with effect from 1 July 2017, the declaration in Form-C shall be issued only in case of inter state purchases of 'goods' defined under section 2(d) of the CST Act (i.e. petroleum crude, high-speed diesel, motor spirit (petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption). Further, such declaration shall be issued only for purposes such as resale of such goods, used in manufacture or processing of such goods and used in telecommunication network or mining on in generation or distribution of electricity or any other form of power.

Trade Circular No.16/2017-18 dated 2nd March 2018