October 2012

TAX UPDATES

(containing recent case laws, notifications, circulars)

Prepared in association with

KPMG cutting through complexity

BMR & Associates

Editorial

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

In a major move , which should assist taxpayers to obtain certainty on their crucial Transfer Pricing (TP) matters, if they so desire, the CBDT vide Notification No.36 of 2012, dated 30 August 2012, has notified the Advance Pricing Agreement (APA) program which is certainly seen as one of the more positive amendments introduced by the Finance Act 2012. Internationally, as is widely known, the APA program is considered to be an excellent controversy management tool and many of the countries which have specific TP regulations, such as the USA, UK, Japan, Australia etc, also provide an APA option.

On the indirect tax front, the Supreme Court in a recent judgment has held that if the price declared by the assessee is lesser than the cost of production, then such price cannot be considered for the purpose of determining assessable value for the levy of excise duty. The Court held that what has to be seen is that if the sale is not made at arm's length or in the usual course of business, then the sale price will not be real value of the goods. The Court further held that sale of goods below the cost price is not in the usual course of business. The judgment also covers the period post 2000 when the concept of 'transaction value' was introduced. The judgment has led to a debate about the appropriateness of the excise duty paid on the transaction / sale value (which was below the cost price due to commercial exigencies).

The Taxation Committee of FICCI has reviewed the working of the new Service Tax regime based on the concept of the Negative List introduced in July, 2012. It has been observed that when the taxation of services has become universal, the credit for input services should also follow the same principle and be made available across the board. Another area of concern that has been identified is the taxability of services rendered under employer-employee relationship. A FICCI delegation met Member (Budget and Service Tax), Central Board of Excise and Customs on 24th September, 2012 in the Ministry of Finance to put forth issues which need to be addressed by the Government.

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

Rajiv Kumar

Recent Case laws

I. DIRECT TAX

Supreme Court Decisions

Goodwill in the form of difference between the amount paid and the cost of the net asset acquired from the amalgamating company is an asset eligible for depreciation under the Act

Pursuant to a Scheme of Amalgamation of an Amalgamating Company with the taxpayer, duly sanctioned by the High Court, the assets and liabilities of the Amalgamating Company were transferred to and vested in the taxpayer. The excess consideration paid by the taxpayer over the value of the net assets acquired from the Amalgamating Company was considered as goodwill arising on amalgamation on account of the reputation which the Amalgamating Company was enjoying in order to retain its existing clientele. The taxpayer claimed depreciation on goodwill under Section 32 of the Income-tax Act, 1961 (the Act) treating it as an intangible asset. The AO disallowing the claim for depreciation contended that as no amount was actually paid on account of goodwill it is not an asset falling under Explanation 3(b) to Section 32(1) of the Act.

The Supreme Court did not dispute the factual finding of the Tribunal and the Commissioner of Income-tax (Appeals) [CIT(A)] that, as a part of the Scheme, assets and liabilities of the Transferor were transferred for a consideration and the difference between the cost of the net assets and the amount paid constituted goodwill. Explanation 3(b) to Section 32(1) of the Act states that the expression 'asset' shall mean an intangible asset, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of a similar nature. The Supreme Court held that the principle of ejusdem generis would strictly apply to the words 'any other business or commercial rights of a similar nature' of Explanation 3(b) to Section 32(1) of the Act. Accordingly, 'goodwill' would be an asset under Explanation 3(b) to Section 32(1) of the Act and depreciation on 'goodwill' would be allowable under Section 32 of the Act.

CIT v. Smifs Securities Ltd. [2012] 24 taxmann.com 222 [SC]

Tax should not be withheld on the vendor's discount since it is not commission or brokerage

The taxpayer, an association of stamp vendors, bought stamps from the State Government at prescribed discounts ranging from 0.5 percent to 4 percent. The tax department claimed that the stamp vendors were 'agents' of the State

Government and that the discount was 'commission or brokerage', liable for tax deduction at source under Section 194H of the Act. The taxpayer urged that the transaction was for sale of stamps in bulk quantity and the discount was nothing but cash discount given to purchasing members.

The Supreme Court ruled in favour of the taxpayer by holding that the discounts in the range of 0.5 percent to 4 percent given to the stamp vendors were for purchasing the stamps in bulk quantity and the discount was in the nature of a cash discount. Accordingly, the transaction was regarded a sale. Consequently, Section 194H of the Act has no application to the transaction and tax is not liable to be deducted from the discount.

CIT v. Ahmedabad Stamp Vendors Association [2012] 25 taxmann.com 201 [SC]

High Court Decisions

Taxability of supply of equipment comprising hardware and software

The taxpayer, a tax resident of Finland, supplied GSM equipment comprising both hardware and software to Indian telecom operators under independent buyer-seller agreements. The installation activities were undertaken by the wholly owned subsidiary of the taxpayer, Nokia India Private Limited (NIPL) under independent contracts with the Indian telecom operators.

The issue for consideration before the Delhi High Court was whether the consideration received by the taxpayer for the supply of hardware and software would be chargeable to tax in India under the Act and the India-Finland tax treaty.

Based on the facts of the case, the Delhi High Court, inter alia, observed and held as follows:

Whether payments for supply of equipments are taxable

- In a transaction relating to the sale of goods, the relevant factor would be as to where the property in the goods passes.

- Even in the case of one composite contract, offshore supply is to be segregated from installation.

- Relying on the decision of the Supreme Court in the case of Ishikawajima-Harima Heavy Industries Ltd v. DIT [2007] 288 ITR 408 (SC), the High Court concluded that where the property in goods passed to the buyer outside India (i.e. on the high seas), the equipment was manufactured outside India, and the sale had taken place outside India, the income from the supply of equipment would not be taxable in the hands of the taxpayer in India.

Whether payments for software constitute royalty

- The language of the tax treaty differs from the language in the amended section 9(1)(vi) of the Act.

- The Bombay High Court in the case of CIT v. Siemens Aktiongesellschaft [2009] 310 ITR 320 (Bom) has held that the amendments in the Act cannot be read into the treaty.

- In its earlier decision in the case of DIT v. Ericsson A.B. [2012] 343 ITR 370 (Delhi), which had a similar fact pattern as that of the taxpayer, it was held that a copyrighted article does not fall within the purview of 'royalty'.

- Accordingly, the payment for software was held to be not taxable as 'royalty' in India.

DIT v. Nokia Networks OY (ITA 512 of 2007, ITA 1137 of 2006, ITA 1138 of 2006, ITA 503 of 2007, ITA 505 of 2007, ITA 506 of 2007, ITA 359 OF 2005, ITA 1324 of 2007 ITA 30 of 2008)

Sale of pledged shares at loss to a group company which set-off capital gain arising from the transfer of other shares is not a 'colourable transaction'

The taxpayer in Assessment Year (AY) 1993-94 sold certain shares of Rustom Spinners Ltd and derived long-term and short-term capital gain. The taxpayer had also sold certain equity shares of Rustom Mills and Industries Ltd and claimed long-term capital loss. The AO was of the view that the transfer of shares would be complete only when the share certificates along with duly executed transfer forms are delivered to the purchaser. However, in the present case, there was no valid transfer since the share certificates were in the possession of IDBI bank who had lien over such shares. Further, the AO noted that the purchaser company and the taxpayer were part of the same group of companies. Consequently, the full transaction was intended to create loss to the taxpayer so that its capital gains resulting from the sale of shares of Rustom Spinners Ltd could be set-off.

The Gujarat High Court observed that since the taxpayer had entered into the agreement, given Power of Attorney and received the full sale consideration from the purchaser company, the transfer of shares was complete by virtue of Section 2(47) of the Act. There is no provision in the Act which would prevent the taxpayer from selling loss making shares. Further, there is no restriction that such a sale cannot be affected with a group company. Simply because such shares were sold during the previous year when the taxpayer had also sold some shares at profit by itself would not mean that this is a case of 'colourable device' or that there is a case of tax avoidance. In the present case, the shares were pledged to IDBI Bank and therefore, it would not be possible for the taxpayer to deliver the original share certificates to its purchaser along with the duly signed transfer forms. This may have impact on the legal relation between the taxpayer and IDBI and the purchaser's right to have shares transferred in its name. However, this would not establish that the sale of shares was only a paper transaction and a device contrived by the taxpayer. Accordingly the High Court held that the transaction could not be treated as a 'colourable device' created for tax avoidance.

CIT v. Biraj Investment Pvt. Ltd. [2012] 24 taxmann.com 273 [Guj]

Section 234D applies even to refunds granted prior to 1 June 2003

The taxpayer filed its return of income for AY 2002-03. Refund was granted to the taxpayer on 25 March 2003 after processing the return under Section 143(1) of the Act. After completion of a regular assessment under Section 143(3) of the Act on 10 March 2005, a demand for interest under Section 234D of the Act was made.

The Bombay High Court, ruling in favour of the Revenue, rejected the reliance placed by the taxpayer on the decision of CIT v. Bajaj Hindustan Limited (IT Appeal No. 198 of 2009) and the Delhi High Court ruling in Jacabs Civil Incorporated [TS-111-HC-2010(DEL)]. The High Court observed that in those cases, the coordinate benches had no occasion to interpret Explanation 2 to Section 234D inserted by the Finance Act, 2012 and its impact on refunds granted prior to June 2003. The High Court held that Explanation 2 to Section 234D of the Act was a clarificatory statement which declared the law on a particular issue so as to overcome doubts, merely clarifying what the law always was, and hence Section 234D applies even to refunds granted prior to 1 June 2003.

CIT v. Indian Oil Corporation Ltd. [ITA No. 2012 of 2011/Bom HC/dated 12 September 2012]

Scheme of Arrangement

The Company Judge of the Gujarat High Court rejected the Scheme of Arrangement (Scheme) on the ground that the sole object of the Scheme was to avoid tax.

On an appeal, the division bench of the Gujarat High Court, while approving the Scheme, held that:

- The Scheme is supported by adequate commercial rationale including recommendations of the working group on the telecom sector.
- Transfer of an undertaking by way of gift for commercial reasons is tantamount to reconstruction of business and, hence, is an 'arrangement' covered under Section 391 of the Companies Act.
- A scheme which is supported by adequate commercial rationale may result in the benefit of saving income tax or other taxes, which itself cannot be a ground for coming to the conclusion that the sole object of framing the Scheme is to defraud the tax authorities.
- While examining the Scheme each and every objection of a third party cannot be considered by carrying out microscopic examination.
- The Court accepted the locus of the tax department to raise objections to the Scheme in its capacity as a creditor of the Company.

Vodafone Essar Gujarat Limited v. Dept. IT. (O.J.APPEAL/81/2010)

Liberal interpretation of mandatory requirement to withhold taxes in

absence of Permanent Account Number for persons whose income is below taxable limit

The Karnataka High Court has held that the provisions that stipulated the mandatory withholding of taxes in the absence of the deductee's Permanent Account Number (PAN) (Registration number issued by the Indian Revenue Authorities) cause undue hardship to small investors who are otherwise not required to obtain a PAN.

An individual is not required to apply for a PAN where his income does not exceed the taxable threshold. The High Court held that if such individuals are forced to obtain a PAN to avoid mandatory withholding of tax at source, such withholding provisions are discriminatory in nature. The mandatory withholding provision in absence of a PAN would therefore need to be made inapplicable when applied to persons whose income is less than the taxable limit.

Smt. A. Khowsalya Bai & Ors v. UOI [2012] TS-416-HC-2010 (Kar HC)

Tribunal Decisions

Payments made for installation services that are inextricably linked to sale of product not taxable

The taxpayer was an Indian company engaged in the business of engineering and general contracting. It entered into two separate contracts with a non-resident for the purchase, installation and commissioning of the SCADA system and application computer programs. The consideration for the installation was paid by the taxpayer to the non-resident without deducting taxes at source on the premise that such payments were excluded from the definition of 'Fees for Technical Services' (FTS) in Explanation 2 to Section 9(1)(vii) of the Act.

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

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

- The installation charges paid to the non-resident cannot be regarded as 'consideration for any construction, assembly, mining or like project undertaken by the non-resident' to fall within the exception to the definition of FTS as provided under Explanation 2 to section 9(1)(vii) of the Act;

- From the terms and conditions of the agreement between the taxpayer and the non-resident, it was evident that the installation and commissioning services were ancillary and subsidiary, as well as inextricably and essentially linked, to the supply/sale of the SCADA system. Accordingly, these services would not qualify as FTS by virtue of the exception provided in Article 12(5)(a) of the India-Canada tax treaty.

- Hence, the payment made to the non-resident was not taxable in

India and could not be disallowed for non-deduction of tax at source.

DCIT v. Dodsal Pvt. Ltd. [2012] 343 ITR 370 (Delhi)

Rule 10 of the Income-tax Rules, 1962 providing for the global formulary apportionment approach can be applied only where income accruing or arising to any non-resident from any business connection cannot be definitely ascertained

The taxpayer, a company incorporated in South Korea established a Project Office (PO)/Permanent Establishment (PE) in India for providing liaisoning, co-ordination and administrative support services to its Head Office. In the Financial Years (FYs) 2001-02, 2002-03 and 2003-04, the taxpayer showed the income of the PE at cost plus 9 percent and prepared and submitted TP documentation. For FY 2001-02 and FY 2002-03 the AO determined the income of the taxpayer by applying Rule 10 of the Rules and adopted a global formulary apportionment approach in order to determine such income attributable to the PE. In FY 2003-04 a reference was made to the Transfer Pricing Officer (TPO) who accepted the international transactions of the taxpayer to be at arm's length based on the TP documentation furnished by the taxpayer.

The Tribunal ruled that the income of the taxpayer had to be determined either on the basis of a tax treaty or on the basis of the Income Tax Act, 1961, whichever is more favourable to the taxpayer. Relying on the Supreme Court ruling in the case of CIT v. Hyundai Heavy Industries [2007] 291 ITR 482 (SC), the Tribunal observed that the only way to ascertain the profit arising in India is by treating the Indian PE as a separate profit centre in relation to the foreign enterprises. The AO applied Rule 10 of the Rules without providing any cogent reasons for rejecting the TP documentation prepared by the taxpayer. Rule 10 of the Rules can be applied in cases where income accruing or arising to any non-resident from any business connection cannot be definitely ascertained. The AO has nowhere pointed out that income cannot be definitely ascertained on the basis of the material placed on record by the taxpayer. The tax treaty provides that profits attributable to PE shall be determined by the same method year by year unless there is good and sufficient reason to the contrary. Tribunal accepted the income computed at cost plus 9 percent as declared by the taxpayer.

Hyundai Rotem Company [ITA Nos. 3300 to 3302/Del/2009]

Claim for exemption of capital gains by investing in specific bonds not barred by simultaneous claim for exemption by investment in a residential house, and more than one residential unit built as a composite residential house can be treated as one property

Recently, the Mumbai Tribunal has upheld the simultaneous claim by the taxpayer for exemption of capital gains in respect of investment of the net sale consideration / capital gains both in the acquisition of a house, as well as specified bonds. The tax laws permit an exemption in respect of the investment of the net sale consideration arising from the transfer of a long-term capital asset, in the acquisition of a residence, within the time stipulated. An exemption is also prescribed in the case of investment of the gain from such a transfer in the purchase of specified bonds.

ACIT v. Shri Deepak S Bheda (ITAT No.5011/Mum 2010)(Mum)

Reimbursement of employee related costs to overseas companies is not liable to tax withholding if no element of income is embedded in the payment

The Bangalore Tribunal has held that the reimbursement of expenditure in relation to employee relocation, employee awards, etc. incurred on behalf of the taxpayer by overseas companies does not contain any 'income' element. Accordingly the taxpayer was not required to withhold tax while making such payments.

Global E-Business Operations Pvt Ltd vs. DCIT [ITA No 643 & 957 (B)/2010]

Decisions of Authority for Advance Rulings

Payments made towards acquisition of cable capacity taxable as 'royalty'

The Applicant is an Indian company engaged in the business of providing telecommunication services in India. The Applicant entered into an agreement with a Saudi Arabian Company (STC) for transfer, to the Applicant, the right to use the capacity in the EIG cable system (Europe India Gateway submarine cable linking Indian subcontinent and the United Kingdom) for a consideration of USD 20 million.

The applicant contended, inter-alia, that, as the amounts payable to STC represented payment made for acquiring a 'capital asset' which was entirely situated outside India, such payment could not be taxed in India both under the Act and under the India-Saudi Arabia tax treaty.

The issue for consideration before the Authority for Advance Ruling (AAR) was whether the payment made by the Applicant to STC for acquisition of the cable capacity would be chargeable to tax in India.

In connection with the above, based on the facts and arguments of the case, the AAR observed and held as follows:

- No right of ownership, property in or title to the capacity, facilities or network infrastructure, equipment or software was conveyed to or vested in the Applicant;

- The transfer of capacity by STC to the Applicant amounted to 'making available' the right to use the capacity in the EIG cable system;

- In view of the clarificatory amendment in Section 9(1)(vi) of the Act, the payments made by the Applicant to STC for the acquisition of cable capacity were for a right to use a process and a right to use commercial or scientific equipment and would therefore be taxable in India as 'royalty'.

Dishnet Wireless Limited [AAR No. 863 of 2010]

Legal fee received by Swiss law firm for adjudication proceedings outside India is taxable in India

The Applicant was a Switzerland based partnership firm (the firm) and its partners are tax residents of Switzerland. The firm is engaged in the practice of law in Switzerland and it does not carry out its activities in any other country. The Applicant was appointed by an Indian company for representation in an adjudication proceeding in Switzerland.

The question posed for consideration before the AAR was whether the firm could be treated as a resident of Switzerland under the India-Switzerland tax treaty and whether the legal fee received by the partnership firm from the Indian company would be taxable in India.

The AAR, based on the facts and arguments of the case, observed and held as follows:

- The definition of the term 'person' provided in the tax treaty includes, inter alia, a company, body of persons, or any other entity 'which is taxable under the laws in force in either contracting state'. The firm is not a 'person' under the tax treaty for the following reasons:
    - There is no definition of the term 'person' in Swiss Law corresponding to section 2(31) of the Act which confers the status of a 'person' on a partnership firm;
    - The partnership firm is not a taxable entity in Switzerland.
- Although the partners of the firm are residents of Switzerland, they cannot invoke the tax treaty to determine the taxability of the legal fees received by the firm since they have not received the legal fees from the Indian company;
- The source of income for rendering professional services to the Indian company is in India. The fact that the major part of the services are rendered outside India in respect of a dispute arising in India cannot alter the source of income;
- Accordingly, the firm will not be treated as a resident under the tax treaty and will not be entitled to treaty benefits. Therefore, the legal fees received by the firm will be taxable in India.

Schellenberg Wittmer along with its partners (AAR No. 1029 of 2010 dated 27 August 2012)

No capital gains on transfer of Indian shares if foreign companies are merged without consideration

The Applicant, a company incorporated in Switzerland, was a wholly owned subsidiary of another company incorporated in

Switzerland (Company C). Pursuant to the proposed merger of the Applicant with Company C, all the assets and liabilities of the Applicant would be assumed by Company C, including its holding in a subsidiary in India (Indian company). On merger, no consideration would pass to the Applicant.

The question for consideration before the AAR, inter alia, was whether on merger, any capital gains under Section 45 of the Act would arise to the Applicant and whether such capital gains would be exempt under Section 47(via) of the Act.

In connection with the above, based on the facts and arguments of the case, the AAR, inter alia, observed and held as follows:

- The change of ownership of the shares of the Indian company from the Applicant to Company C would involve the transfer of shares and be within the inclusive definition of 'transfer' given under Section 2(47) of the Act;

- The transaction does not fulfill the condition specified under section 47(via) of the Act i.e. at least 25 percent of the shareholders of the amalgamating foreign company continue to remain shareholders of the amalgamated foreign company. This is because the shareholders of the Applicant merging with Company C will not or cannot become shareholders of Company C, as Company C is the only shareholder of the Applicant;

- As the gain, if any, in the instant case is not determinable within the scope of Section 45 and Section 48 of the Act, no capital gains arises to the applicant as a result of the merger.

Credit Suisse (International) Holding AG (AAR No.956 of 2010)

Reimbursement of salary of seconded employees to foreign company is income in the hands of the foreign company

The AAR has held that the salary reimbursed by the applicant to the foreign parent company under the secondment agreement is income in the hands of the foreign parent company, in view of the fact that:

- The applicant does not become the employer of the seconded employee;

- What is paid by the applicant to the foreign parent company could not be construed as reimbursement of salary.

The AAR relied on its earlier ruling in the case of Centrica India Offshore Private Ltd [AAR No. 856 of 2010] in reaching this conclusion.

Target Corporation India Pvt. Ltd. [AAR No. 851 of 2009]

Buy-back of shares

The AAR held that the proposed buy-back of shares by an Indian company from its shareholder, a Mauritian company, is not a tax avoidance scheme and it is not liable to capital gains tax in India under the India-Mauritius tax treaty in view of Article 13(4) of the tax treaty. Furthermore, the AAR held that the capital gain transaction is not exempt under Section 47(iv) of the Act since the entire share capital is not held by the applicant or its nominees. The proposed buy-back is an international transaction between related parties and income arises out of it, therefore the TP provisions under Sections 92 to 92F of the Act are attracted to the present case.

Armstrong World Industries Mauritius Multiconsult Limited (A.A.R. No. 1044 of 2011)

Transfer of shares in Indian company by a Mauritius holding company to a Singapore company as a part of internal re-structuring is not liable to capital gains tax under the India-Mauritius tax treaty. Further, TP provisions are applicable to the facts of the present case even though share transfers are not taxable under the tax treaty

The Applicant, a company based in Mauritius, had invested in the equity share capital of GlaxoSmithKline Pharmaceuticals Limited (GSKPL). GSKPL is a company incorporated and registered in India and is a part of the international GlaxoSmithKline Group (GSK), which is headquartered in the UK. The Applicant sought to transfer the equity shares of GSKPL held by it to another GSK group company in Singapore as a part of internal re-structuring. The transfer of shares was proposed off the market, and not through a recognised stock exchange, without attracting securities transaction tax. Accordingly, the Applicant had sought a ruling from the AAR on whether the transfer of such shares was taxable in India as capital gains, and also sought clarity on the applicability of the TP provisions to the transfer of shares.

The AAR held that the transfer of shares would not be taxable in India in view of Article 13(4) of the India- Mauritius tax treaty. Section 92 of the Act is a machinery provision and does not indicate that the expression ‘income’ has to be given a restricted meaning. The AAR held that as per Section 92, TP provisions are applicable to ‘any income arising from an international transaction” and that the word “income” has wide connotations. The definition under the Act does not restrict its meaning. The tax treaty also does not define the expression ‘income’. The Applicability of Section 92 of the Act does not depend on the chargeability under the Act. The AAR held that in the present case, the capital gains are taxable under the Act. However, in view of the benefit of Article 13(4) of the tax treaty and the decision in Azadi Bachao Andolan [2003] 263 ITR 706 (SC), it was not taxable even if there was no double taxation. Therefore, the provisions of Sections 92 to 92F of the Act are applicable.

Castleton Investment Limited (AAR No. 999 of 2010, dated 14 August 2012)

Notifications/Circulars/ Press releases

India and Liberia sign an agreement for exchange of information with

respect to taxes

India and Liberia signed an agreement for the exchange of information with respect to taxes on 3 October 2011. The Agreement will be effective in India from 30 March 2012. The Agreement, inter alia, provides for exchange of information relevant to the determination, assessment and collection of taxes covered, recovery and enforcement of tax claims, and investigation or prosecution of tax matters. The Agreement also provides that the competent authorities of both the States shall lend assistance to each other in the collection of tax claims.

Notification No. 32/2012-FT&TR-II [F.No.503/02/2012-FT & TR-ii]/SO 1877(E), dated 17 August 2012

CBDT sets up committee to form Departmental View on Contentious Legal Issues

On observing that over the years due to lack of desired clarity on a contentious legal issue, amongst the officers of the department, inconsistent approach on the same issue was being taken giving rise to litigation. In an attempt to provide clarity, promote a consistent approach, and thereby reduce litigation, the CBDT has decided to set up an institutional mechanism to form a 'Departmental View' on contentious legal issues.

This mechanism shall consist of a 'Central Technical Committee (CTC) on Departmental View' in the CBDT and 'Regional Technical Committee (RTC)' under each Chief Commissioner of Income-tax. The CTC shall form the departmental view on the issues referred to it by the RTC and after approval by the CBDT, the 'Departmental View' will be issued as a circular under Section 119 of the Act.

Office memorandum dated 28 August 2012 bearing F. No. 279/M-6112012-ITJ

APA Rules notified in India

The Finance Act 2012 introduced the APA Program to be effective from 1 July 2012. The APA provisions contained in the Act authorised the CBDT to prescribe a scheme specifying the manner, form, procedure and any other general matters in respect to APA. The detailed rules have now been introduced vide Notification No. 36 of 2012 dated 30 August 2012. Some of the salient features of the APA Rules are:

- Any person who has undertaken or is contemplating to undertake an international transaction shall be eligible to enter into an APA.

- Unilateral, bilateral and multilateral APAs may be entered into. For Unilateral APAs, applications to be filed with the Director General of Income Tax (International Tax) (DGIT), and for bilateral and multilateral APAs, applications to be filed before the Competent Authority.

- The most appropriate method would be any of the six methods provided in the Act.

- APA team to include experts in economics, statistics, law or any other field.

- APA shall not be binding on the Board or the taxpayer if there is a change in any of the critical assumptions - “Critical assumptions” means the factors and assumptions that are so critical and significant that neither party entering into an agreement will continue to be bound by the agreement, if any of the factors or assumptions is changed.

- Pre-filing Consultation (also anonymous) is available.

- Application for an APA shall be made in Form No. 3CED to the DGIT (or the Competent Authority in the case of bilateral or multilateral APAs), along with the requisite fees. The applicants need to furnish exhaustive and detailed information. The fees payable at the time of making the application is as under:
  - Transaction value not exceeding INR 1000 million – Fee amount is INR 1 million
  - Transaction value not exceeding INR 2000 million – Fee amount is INR 1.5 million
  - Transaction value exceeding INR 2000 million – Fee amount is INR 2 million

- Taxpayer, who has entered into an APA would be required to file an annual compliance report to the DGIT for each year covered in the APA. The TPO shall carry out a compliance audit for each year covered in the agreement.

- Provisions have also been introduced for revision, cancellation and renewal.

Source: www.pib.nic.in

EPFO issues circular on readjustment of excess payment in Pension Fund for Indian outbound employees

- In October 2008, GOI made fundamental changes in the Employees’ Provident Funds Scheme, 1952 and Employees’ Pension Scheme, 1995 by bringing International Workers (IWs) under the purview of the Indian social security regime. Indian outbound employees posted to countries with which India has signed a Social Security Agreement (SSA) were also treated as IWs with effect from the date of commencement of the Certificate of Coverage (COC). Therefore, every Indian employee who obtained a COC was treated as an IW and the contribution in respect of such IWs became payable on full salary.

- Recently, the Employees’ Provident Fund Organisation (EPFO) has issued a circular to its officers regarding pension fund contribution made in the past for Indian outbound employees.

- EPFO has reiterated the clarification issued on 25 May 2012 that persons going on postings with a COC are not to be treated as IWs. Therefore, the pension contribution for such IWs should be limited to the wage ceiling of INR 6500.

- Consequently, the excess contribution mistakenly made to the pension fund in the past will be readjusted by the local Regional Provident Fund Commissioner by diverting it to a provident fund account if a request is made by the company in this regard.

Source: www.epfindia.com

II. SERVICE TAX

High Court Decisions

The Electricity supplied free of cost by the customers to the taxpayer does not in any way amount to additional consideration received by the taxpayer in kind

In the present case, the appellant - taxpayer is *inter alia* engaged in setting up air-separation plants (equipments for short) at the customer premises. The said equipments are used for manufacturing the oxygen which is ultimately used by the customers in manufacturing their final products. Further, the appellant had entered into a lease agreement with their customers wherein the said equipments were leased to the customers and the appellants provided services of operation and maintenance of equipments to the customers for which they charged service fee.

The taxpayer was called upon to show-cause as to why the value of taxable service should not be enhanced by including the cost of electricity supplied free of cost to the appellant by the customers in the course of rendering the services. The appellant contended that the electricity supplied free of cost was not a consideration received by the taxpayer for rendering the services and, hence, the same was not includible in the taxable service. The Adjudicating Authority rejected the contention of the appellant and confirmed the tax demand with interest and penalty. Challenging the aforesaid order, the appellant filed an appeal and the CESTAT directed the taxpayer to pre-deposit Rs.1 crore for entertaining the appeal. The appellant approached the High Court challenging the above pre deposit.

The Hon'ble High Court was of a prima facie view that the argument of the Revenue that the electricity supplied free of cost is a consideration in kind received by the taxpayer from its customers was difficult to accept. Further, the High Court stated that the electricity supplied free of cost is meant to be consumed in the manufacture of oxygen and admittedly the oxygen so manufactured is used by the customers in the manufacture of their final product. It is the customers of the taxpayer who clear the final product on payment of duty and no benefit accrues to the taxpayer on such clearances. Thus, the electricity supplied free of cost by the customers to the taxpayer does not in any way amount to additional consideration received by the taxpayer in kind. The High Court directed the CESTAT to hear the appeal on merits without insisting on pre deposit.

Inox Air Products Ltd vs. CCE, Nagpur [2012-TIOL-510-HC-MUM-ST]

Tribunal Decisions

Delivery of ready-mix-concrete under a sale transaction through pumping the same at requisite spots would not lead to a separate taxable service transaction

The taxpayer was engaged in the business of manufacturing ready mix concrete (RMC) and supplied the said goods at the recipients premises by pumping the RMC to spot where it was required. The revenue was of the view that the aforesaid activity would qualify under the taxable category of 'Commercial and Industrial Construction Services'. After going through the facts of the case and relying on the judgment delivered by Hon'ble Karnataka High Court in case of ACC Ltd. vs. State of Karnataka, the CESTAT allowed the appeal by the taxpayer and held that aforesaid activity is part of the sales transaction entered by the appellant (pumping RMC at the requisite spots merely being the agreed mode of delivery of goods under the sale transaction) and thus does not qualify as taxable service. *Ultratech Concrete vs. Commissioner of Service Tax, Delhi [2012 36 STT 366]*

Records such as discharged cheques, vouchers, deeds, agreements, books of accounts of banks and corporate houses wouldn't qualify as 'goods' as per the provision of Section 2(7) of the Sale of Goods Act, 1930 and hence services in relation to storage and retrieval of these records are not taxable under the category of 'Storage and Warehousing' Services

The taxpayer was registered with the service tax department for service tax purposes under the category of Business Auxiliary Service ("BAS"). During the financial year 2004, the Anti Evasion Wing at Bangalore initiated an investigation against the branch office of the Appellant at Bangalore for evasion of service tax. During the course of investigation it was noticed that the Appellant was raising bills on their clients for (a) segregation and packing charges, (b) storage charges and (c) retrieval charges, on which they were not discharging any service tax liability. It was submitted by them that the said activity was undertaken by them for storage and retrieval of records of banks and corporate houses and the records consisted of discharged cheques, vouchers, agreements, books of accounts, etc., which were not intended for sale and were not having any commercial value. For rendering these services Appellant raised bills on their clients towards (1) segregation, labelling and marking of records ; (2) transportation of records ; (3) storage of records at the premises ; and (4) retrieval/recall services.

The Department was of the view that the activities undertaken by the appellant comes under the category of taxable service of "storage and warehousing" as defined in section 65(102) of the Finance Act, 1994 as such services cover any service provided to any person by a storage or warehouse keeper in relation to storage and warehousing of goods. Therefore, taxpayer was liable to pay service tax on the said activity under section 65(105)(zza) of the said Finance Act. Accordingly, various show cause notices ("SCN") were issued to the taxpayer demanding service tax on above activities.

The above SCN's were adjudicated by the Commissioner of Central Excise (Adjudication), Mumbai wherein the Commissioner came to the conclusion that the storage and warehousing services rendered under section 65(105)(zza) relates to storage and warehousing of "goods" . In the instant case, the storage and warehousing has been rendered in respect of old files and records which are not goods and therefore he dropped the proceedings initiated against the appellant. Aggrieved by the said order, the Revenue preferred an appeal.

The short question for consideration before Tribunal was whether the records such as discharged cheques, vouchers, deeds, agreements, books of accounts of banks and corporate houses would come under the category of "goods" as per the provisions of section 2(7) of the Sale of Goods Act, 1930 and hence whether the services provided by the taxpayer are liable to service tax under the taxable category of "storage and warehousing".

Section 2(7) of the Sale of Goods Act, 1930 defines "goods" as every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

Tribunal observed that to constitute goods, salability is an essential criterion. If salability was not a relevant criterion, there was no necessity to refer to the definition of goods, under the Sale of Goods Act, 1930. Therefore the very reference to the definition of 'goods' under the Sale of Goods Act implies that salability is a necessary condition to consider something as 'goods'. Tribunal relied upon the decision of Hon'ble apex court in R. D. Saxena v. Balram Prasad Sharma [AIR (2000) SC 912] wherein it was held that case files maintained by a bank pertaining to their clients cannot be equated with goods as they are not saleable goods and they do not have any marketability.

In view of above, Tribunal held that the taxpayers' are not liable to pay any service tax in respect of the activity undertaken by them relating to the storage and warehousing of old records of their clients.
Commissioner of Service Tax, Mumbai vs. P.N. Writer & Co. Ltd [2012 (52) VST 479]

Where the parties are neither taking risk jointly or doing any common activity, it cannot be contended that their relationship was a relationship of a joint venture for profit and hence not of a service provider-recipient

The taxpayer was engaged in the construction of the residential complexes. For this purpose, it used to enter into Joint Development Agreements ("JDA") with landowners, in terms of which it undertakes construction of residential flats/ houses in the lands owned by such landowners. As per the JDA, a portion of the constructed area, in the form of flats/ houses, would be assigned in favour of the landowners and the remaining constructed area, in the forms of flats/ houses, would be sold by the taxpayer to various buyers. After conducting a verification of the taxpayer's liability to service tax, show cause notice was issued demanding short levy of service tax.
The taxpayer argued before the Tribunal that there is no service provider and service recipient relationship as it was a relationship of a joint venture for profit. The Tribunal held that the Joint Development agreement did not indicate any terms on the above lines as the parties were neither tak-

ing risk jointly or doing any common activity. In fact, the undivided share of land ("UDS") was sold first and an agreement for construction was entered into with individual buyers. Hence, in these cases there was a service provided to the UDS holders including the original landowners.

The taxpayer argued that the contracts were in nature of works contracts involving supply of material and service, since such service became taxable only from 1-6-2007, there would not be any tax on such works carried out prior to that date. The Tribunal held that the entry of works contract services cannot be taken as an altogether a new entry. Further, construction of flat is in nature of a composite contract specified in Article 366 (29a). So the value of the material supplied and the service provided can be separated and subjected to service tax. Hence, the argument of the taxpayer was rejected.

Taxpayer argued that the definition of 'residential complex' excludes the construction of such flats intended for personal use. It was submitted that the fact that landowners were given more than one residential unit, should not be a reason to disregard their claim that the flats given to the landowners were for their personal use. Tribunal noted that the residential complexes in question were not constructed for personal use of the owners of the land. It was predominantly for sale to individual buyers. The exclusion in the definition of the service is for a residential complex intended for personal use. The clause cannot be applied to individual flats in a complex.
LCS City Makers (P.) Ltd. vs. Commissioner of Service Tax, Chennai [2012] 36 STT 22

Notification & Circulars

Service provided by Directors and security services covered under reverse charge mechanism

The services provided by directors (non-whole time) of the company and security services falls in the list of services taxed under reverse charge mechanism. Further the liability to pay service tax in the said services is 100 percent on the service recipient.

The notification provides for the definition of security services to mean services relating to the security of any property, whether movable or immovable, or of any person, in any manner and includes the services of investigation, detection or verification, of any fact or activity.
Notification No 45 and 46/2012, dated August 07, 2012.

No service tax leviable on vocational education courses offered by government institutions

CBEC has issued circular clarifying leviability of service tax on vocational education and training course. The circular has clarified that any vocational education courses offered by government institutions will not be liable to service tax. Further it has been clarified that 'qualification recognized as per law' implies a Certificate, Diploma, Degree or any other similar Certificate as are approved or recognized by any entity established under a central or state law including delegated legislation, for the purpose of granting recognition to any education course including a vocation education course.

Circular No. 164/15/2012, dated August 28, 2012

III. VAT/ CST

High Court Decisions

"During the course of business" postulates a continuous exercise of an activity. The expression "carrying on business" requires something more than selling or buying. The object of the person who carries on the activity is important to attract the levy of sales tax

The taxpayer-dealer was engaged in the manufacture and sale of biscuits, confectionery etc. It entered into an agreement with Britannia for transfer of business wherein the entire assets and liabilities were transferred to Britannia including the movables, immovables, goodwill, IPR etc. The Deputy Commissioner proposed to levy sales tax under the Karnataka Sales Tax Act, 1957 on the sale of IPR owned by the taxpayer. The assessing authority confirmed the levy of sales tax on the transfer of IPR. The taxpayer filed an appeal before the Joint Commissioner (Appeals) and subsequently, Karnataka Appellate Tribunal wherein the order of the assessing authority was confirmed. Consequently, writ petition was filed before the Karnataka High Court wherein the Court set aside the order of the Tribunal.

The High Court held that the sale of IPR was not 'in the course of business' of the taxpayer. It relied on various case laws including the case of State of Gujarat vs. Raipur Manufacturing Co. Ltd. [1967] 19 STC 1 (SC) wherein it was held that the turnover of sale of a commodity could not be added to the total turnover of the taxpayer if he is not engaged in the business of trading of those goods.

Kwality Biscuits (P) Ltd vs. State of Karnataka – [2012] 53 VST 66 (Kar HC)

'Transfer of right to use' must involve transfer of effective control and possession of the goods for it to qualify as a 'deemed sale' and be subject to the levy of sales tax / VAT

The taxpayer entered into an agreement with ONGC for conducting drilling operations in the oil blocks of ONGC. The drilling rigs were operated in the designated area which belonged to ONGC. The assessing authority held that since the drilling area had to be specified by ONGC, the drilling rigs were under the control of ONGC and there was a transfer of right to use the goods which is subject to levy of sales tax. The first appellate authority allowed the appeal of the taxpayer on the basis that the effective control and possession of the drilling units was with the taxpayer at all times. The revenue appealed before the Tribunal wherein the assessment order was upheld but dropped the penalty. Against the said order, the taxpayer approached the High Court of Madras through a revision petition.

The High Court held that there was no transfer of right to use the drilling units and that the effective control and possession remained with the taxpayer. The court relied on the decision of State of Andhra Pra-

desh vs Rashtriya Ispat Nigam Ltd, [2002] 126 STC 114 (SC) where the apex court held that passing of an effective control of the machinery was a *sine qua non* for the purpose of attracting the levy under the concept of deemed sale relating to transfer of right to use goods.
Aban Loyd Chiles Offshore Limited vs. State of Tamil Nadu – [2012] 53 VST 89 (Mad HC)

Bill of Entry is not a document of title and therefore, an exemption from sales tax cannot be denied in case of sale in the course of import merely on the basis that the name of the seller is appearing in the bill of entry

The taxpayer-dealer claimed exemption under section 5(2) of the Central Sales Tax Act ("CST Act") on the execution of high seas sales. The goods were cleared from customs by the purchaser on payment of customs duty. The sales tax officer rejected the claim of exemption on the basis that the name of the dealer was written on the bill of entry filed with the customs. The Assistant Commissioner (appeals) allowed the exemption to the dealer on the basis that high seas sale was affected and the purchaser had paid the customs duty on clearance. Against this order, the department filed an appeal with the Tribunal wherein the Department's appeal was rejected.

The revision petition filed by the department before the Madras High Court was also dismissed on the ground that there was no dispute with respect to the transfer of document of title (bill of lading) before crossing the customs station. Merely, on the ground that the bill of entry (which is not a document of title) had the name of the dealer, the exemption under the CST Act cannot be denied.
State of Tamil Nadu vs. Kawarlal & Co. – [2012] 52 VST 221 (Mad HC)

In case of execution of a works contract through a sub-contractor, merely because a sub-contractor deduction is allowed, it cannot be said that the profit margin of the main contractor cannot be subjected to tax. It matters little as to whether execution of the work is by the main contractor or through sub-contractor

The taxpayer-dealer was engaged in execution of works contracts, where certain contracts were entirely executed by the taxpayer and some were executed through its subcontractors. In some cases, the taxpayer claimed that it had undertaken certain exclusive labour contracts (referred to as 'back to back basis contracts') and in execution of such contracts, it had not either utilized or passed on any taxable goods and therefore the turnover relating to such labour contracts were not taxable. However, the Revenue authorities did not recognize the distinction between the two kinds of contracts as claimed by the taxpayer and sought to tax the entire value as turnover.

The High Court decided against the taxpayer. In respect of the Supreme Court's decision in Larsen & Toubro's case reported in (2008) 17 VST 1 (SC), the High Court held that making of a dichotomy as 'contractor' and 'sub-contractor' is not permissible since a sub-contractor acts as an agent of the main contractor and therefore, the primary responsibility and liability for payment of tax in respect of the execution of the works contract is only on the contractor. The taxpayer's turnover being the value of the contract it had entered into with the principal, the taxable turnover of the value of this contract is the value of the goods that are utilized for the over-all execution of the contract in favour of the principal. The High Court further held that when taxpayer claims deduction under the relevant valuation rules (under the VAT statute) in respect of such payments actually paid to the sub-contractor, he cannot turn around and put forth further claim that on the basis of the value of the sub-contractor, certain amount is to be taken as taxpayer's profit margin and therefore not covered within the scope of VAT.

The High Court was of the view that the argument that taxpayer's profit margin shouldn't be taxable is another way of submitting that it is not any part of value of the goods supplied to the principal. As per the High Court, an argument of this nature, might have succeeded if the taxpayer was able to demonstrate that the actual value of the goods that passed from the contractor or through his sub-contractor to the principal during the execution of the work, is precisely the value of goods and that amount has been subjected to tax, which has already been paid and therefore no further liability in terms of the VAT statute exists – but taxpayer hasn't been able to demonstrate that.

In light of the above observations, the High Court has allowed the revision petition and directed the assessing authority to re-do the exercise of ascertaining the tax liability of the relating to execution of the works contract to arrive at the tax liability.

Larsen & Tourbo v. State of Karnataka 2012-VIL-55-BANG (Kar HC)

A dealer in the business of building, owning, operating, maintaining passive telecom infrastructure for provision of services to several telecom service providers is entitled to purchase goods at concessional CST rates vide issuance of Form C

The taxpayer-dealer was engaged in the business of providing access to passive telecom infrastructure (i.e. towers and allied assets like shelter, air-conditioning equipments, DG sets etc) to telecom service providers like Airtel, Vodafone, Reliance, BSNL etc) who would put up their antennas on such towers, and share the usage of the other assets against a monthly payment described as the infrastructure payment fee. The key ground of objection by the VAT authorities against usage of Form C by the taxpayer-dealer was that the taxpayer-dealer was merely in the business of constructing passive infrastructure for providing to the actual telecom service providers and has thus wrongly represented themselves as being eligible to issue Form C (Under the CST Act, a "registered dealer purchasing the goods as being intended for use by him in the telecommunication network" is inter alia eligible for issuance of Form C and consequent concessional CST rate).

The Andhra Pradesh High Court dealt at length with the evolution of telecom regulatory aspects in India specific to passive telecom infrastructure and concluded that the phrase "telecommunication network" in the CST Act is a generic phrase and the fact that

passive telecom infrastructure providers have to obtain registration with the Department of Telecommunications is enough to uphold the claim towards Form C of the -dealer in the given factual context. In this regard, the court relied upon earlier decisions on Form C like CTO v. Rajasthan State Electricity Board [(1997) 104 STC 89 (SC)]. While not directly relevant to the issue at hand, the court also took note of the decision of the Andhra Pradesh High Court in the BSNL case [(2012) 49 VST 98 (AP)] wherein the nexus between passive infrastructure and the telecom service was taken note of (to conclude that telecom towers are immoveable property and no 'transfer of right to use' in the passive infrastructure occurs between a passive infrastructure provider and telecom service provider).
Indus Towers Limited v. CTO, Begumpet, Hyderabad [2012] 052 VST 0447 (Andhra Pradesh High Court)

IV. CUSTOMS

Notification & Circulars

CVD of 1 percent on import of goods falling under chapter 31

The Government has amended Notification No 12/2012 – Customs (the mega exemption notification under customs) thereby extending the benefit of concessional rate of CVD of 1 percent to all the goods falling under chapter 31 when imported into India.

Further, vide Circular No 23/2012 dated August 30, 2012, the government has clarified the background and ambit of the aforesaid exemption.
Notification No. 46/2012(T) dated August 17, 2012

Exemption on import of specified sports goods, equipments and requisites, clarification

Clarification has been provided on the scope of exemption Notification No.146/94-Customs dated July 13, 1994 dealing with import of specified sports goods, equipments and requisites.
Circular No.21/2012 dated August 1, 2012

Import of Night Vision Binoculars/Passive Night Vision Devices

DGFT has amended the ITC(HS) Classifications of Export and Import Items, 2009-14, Chapter-90 and thus amends the import policy vis a vis night vision binoculars and similar device.
Notification No.15 (RE-2012)/2009-2014 dated August 29, 2012

Registration of contracts of sugar with DGFT, variation of (-5) in weight allowed

DGFT has in relation to conditions and modalities for registration of contracts of sugar has clarified that a variation of (-) 5% in weight against Registration Certificates issued for export of sugar shall be allowed. Thus, a variation of (-)5% in weight in exports of sugar against registered contracts shall not be treated as default for the purpose of imposition of penalty or debarment from future registrations.
Circular No 3(RE-2012)/2009-14 dated August 23, 2012

V. CENTRAL EXCISE

Supreme Court Decisions

Cars sold to customers at 'loss making price' as a business strategy in order to penetrate the market cannot be considered as transaction value or as a normal price of goods ordinarily sold to a buyer for the purpose of Section 4(1)(a) of the Central Excise Act, 1944 for levy of excise duty

The respondent, taxpayers were manufacturer of motor cars, which was excisable under Central Excise Tariff Act, 1985. The assesses have filed several price declarations in terms of Rule 173C of the Central Excise Rules, 1944 declaring the wholesale price of the cars for sale through wholesale depots for five years, during the period commencing from May 27, 1996 to March 04, 2001.

The authorities under Central Excise Act, 1944 had made enquiries and found that the wholesale price declared by the assesses is much less than the cost of production plus normal profit and, therefore the price so declared by them could not be treated as a normal price for the purpose of quantification of assessable value under Section 4(1)(a) of the Act. It was further alleged that the taxpayer had not taken into account the cost of raw materials, direct wages, overheads, and profits for declarations for the purpose of Rule 4 of the Act. The taxpayer defended their case on the premise that the taxpayer had to sell their cards at a price lower than the manufacturing cost and profit just to penetrate the market. The revenue on the other hand argued that this will constitute an extra commercial consideration for the purpose of valuation under Excise Act and not a sole consideration.

The taxpayer lost the case before the adjudicating authority, and went on appeal before the Tribunal. The Tribunal allowed taxpayer's appeal against which the revenue went to Supreme Court.

The matter finally came up before the division bench of Supreme Court. The principal issues in this case was whether the price declared by taxpayer for their cars which is admittedly below the cost of manufacture can be regarded as "normal price" for the purpose of excise duty in terms of Section 4(1) (a) of the Central Excise Act, 1944 (as it existed during the relevant period). Secondly, Whether the sale of cars by taxpayer at a price, lower than the cost of manufacture in order to compete and penetrate the market, can be regarded as the "extra commercial consideration" for the sale to their buyers as same could be considered as one of the vitiating factors to doubt the normal price of the wholesale trade of the taxpayers.

With respect to valuation of excisable goods, the apex court held that for the purpose of Section 4(1) (a) all that has to be seen is, does the sale price at the factory gate represent the wholesale cash price. If the price charged to the purchaser at the factory gate is fair and reasonable and has been arrived at only on purely commercial basis, then that should represent the wholesale cash price (This is the price which has been charged by the manufacturer from the wholesale purchaser or sole distributor) under Section 4(1)(a) of the Central Excise Act, 1944.

What has to be seen is that the sale is made at arm's length and in the usual course of business, if it is not made at arm's length or in the usual course of business, then that will not be real value of the goods. The value to be adopted for the purpose of assessment to duty is not the price at which the manufacturer actually sells the goods at his sale depots or the price at which goods are sold by the dealers to the customers, but a fictional price contemplated by the section.

With respect to interpretation of the term "sole consideration" the court held that consideration means something which is of value in the eyes of law, moving from the plaintiff, either of benefit to the plaintiff or of detriment to the defendant. It may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other; when the price is not the sole consideration and there are some additional considerations either in the form of cash, kind, services or in any other way, then the equivalent value of that additional consideration should be added to the price shown by the taxpayer. The important requirement under Section 4(1)(a) is that the price must be the sole and only consideration for the sale. If the sale is influenced by considerations other than the price, then, Section 4(1)(a) will not apply. In the instant case, the main reason for the taxpayers to sell their cars at a lower price than the manufacturing cost and profit is to penetrate the market and this will constitute extra commercial consideration and not the sole consideration. As per the Supreme Court, in this case, a 'loss making price' continuously for a period of more than five years, and while selling more than 29000 cars cannot be the normal price for sale of cars.

Basis the above reasons the court held that the appeal by the Commissioner deserves to be allowed. The Court held that aforesaid reasoning will also apply to the present transaction value regime since the condition of price being sole consideration for sale is not satisfied in the instant case. *Commissioner of Central Excise Mumbai, vs. M/s Fiat India Pvt Ltd & Anr 2012-TIOL-58-SC-CX*

High Court Decisions

If details of Cenvat credit availed were mentioned in the periodic returns and same has been filed by the taxpayer promptly, no objections were raised about the same by the revenue officers during the first audit but during the second audit, objections were raised upon availment of credit during the prior period, and thereafter proceedings were initiated against the taxpayer, then extended period under Section 11A of the Central Excise Act, 1944 cannot be invoked

The taxpayer was a manufacturer of Ice Cream and were availing the benefit of Cenvat credit of duty paid on capital goods. They availed Cenvat credit of duty paid on prefabricated (construction) building, (cold room) consisting of wall, roof, door, flashing window, on the assumption that they are required to manufacture final products.

The cold room was to be used for freezing the Ice Cream under below -20 to -40 degree Celsius in order to make the Ice Cream marketable. It was not in dispute that the taxpayer had filed the return as required under Rule 7 of the Cenvat Credit Rules, 2002. The Revenue Authorities after receipt of the returns did not raise any queries when the first audit was carried out during the period between May 2003 to August 2004. The audit officers did not find anything wrong in availment of Cenvat credit. It was only when the second audit took place during September & October, 2004 that they noticed this availment of credit and issued a show cause notice on September 25, 2007. Thereafter duty penalty and interest was levied. Aggrieved by the same, the taxpayer preferred an appeal to the Tribunal.

Revenue submitted that the defect was noticed in September 2004, and the proceedings initiated on September 25, 2007 was well within the period of 5 years by invoking extended period of limitation under proviso to Section 11A of the Central Excise Act, 1944.

It was held that returns were filed by the taxpayer promptly, and the returns clearly mentioned that they availed credit under the aforesaid rules and the audit party also accepted the same, therefore extended period of limitation cannot be invoked in this case.

Commissioner of Central Excise, Bangalore-I v. MTR Foods Limited 2012 (282) ELT 196 (Kar HC)