



India Tax Konnect

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Editorial



As per the latest economic survey of India, Gross Domestic Product (GDP) is expected to expand by 7.6 per cent during Financial Year (FY) 2016. The survey also highlighted India's potential to register more than eight per cent growth in the coming years, on the back of an improving macroeconomic environment and the government's reforms agenda¹.

The Government of India (GOI) has allowed 100 per cent foreign direct investment (FDI) in online retail of goods and services under the 'marketplace model' through the automatic route, seeking to legitimise existing businesses of e-commerce companies operating in India. It also notified new rules which could potentially end the discount wars. The rules now prohibit marketplaces from offering discounts and capping total sales originating from a group company or one vendor at 25 per cent.

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

With a view to avoid tax disputes and to have consistency in approach while handling the issue with respect to taxability of the consortium members in the case of Engineering, Procurement and Construction (EPC) contracts and turnkey project cases, the CBDT has issued a circular laying down the criteria where a consortium of contractors formed for executing EPC/turnkey contracts will not be treated as Association of Persons (AOP) for taxation purposes.

The CBDT also issued a circular to clarify that consideration received on buyback of shares during the period from 1 April 2000 to 31 May 2013 would be taxed as capital gains in the hands of the recipient in accordance with Section 46A of the Act. Further, such an amount shall not be treated as dividend under the provisions of the Act. The CBDT has directed that no fresh notice for assessment/reassessment/non-deduction of tax at source shall be issued wherein buyback of shares has taken place prior to 1 June 2013, and the case is covered under Section 46A read with sub-clause (iv) of Section 2(22) of the Act. In cases where notices have already been issued, and assessment proceedings are pending, tax authorities shall complete the assessment keeping in view the above legal position.

On the international tax front, the Bangalore Tribunal held that the provisions of tax deduction at source have to be read along with the tax treaty for computing the tax liability on the sum in question. Therefore, when the recipient is eligible for the benefit of the tax treaty, then there is no scope for deduction of tax at source at the rate of 20 per cent as provided under the provisions of Section 206AA of the Income-tax Act, 1961 (the Act).

On the transfer pricing front, the Delhi High Court in the case of Denso India Limited, rejected aggregation of an import transaction under the transactional net margin method (TNMM), since the facts of the case demonstrated that the arrangements made in relation to the transaction, when viewed in totality, differed from those which would have been adopted by independent enterprises behaving in a commercially rational manner.

We at KPMG in India would like to keep you informed of the current developments on the tax and regulatory front and its implications on the way you do business in India. We would be delighted to receive your suggestions on ways to make this Konnect more relevant.

01. Economic Survey 2015-16, India Union Budget, 26 February 2016



Decisions

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

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

The Bangalore Tribunal observed that an identical issue was considered and decided by the Pune Tribunal in the case of Serum Institute of India Ltd. [2015] 56 taxmann.com 1 (Pune). Reliance was also placed on the decision of the Karnataka High Court in the case of Bharti Airtel Ltd. [2014] 52 taxmann.com 31 (Kar). The Bangalore Tribunal held that the provisions of Tax Deducted at Source (TDS) had to be read along with the tax treaty for computing the tax liability on the sum in question. Therefore, when the recipient is eligible for the benefit of a tax treaty, then there is no scope for deduction of tax at source at the rate of 20 per cent as provided under the provisions of Section 206AA of the Act. Similarly, on the issue of jurisdiction, it was held that the question of computing the rate of 20 per cent under Section 206AA of the Act is a debatable issue when the recipient is eligible for the benefit of provisions of the tax treaty, and therefore, the AO cannot proceed to make the adjustment while issuing an intimation under Section 200A of the Act.

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

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

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

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

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

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

Notifications/Circulars/Press Releases

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

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

- Where each member is independently responsible for executing its part of the work through its own resources and also bears the risk of its scope of work i.e. there is a clear demarcation in the work and costs between the consortium members and each member incurs expenditure only in its specified area of work
- Each member earns profit or incurs losses based on the performance of the contract, falling strictly within its scope of work. However, consortium members may share contract price at a gross level only to facilitate convenience in billing

- Men and materials used for any area of work are under the risk and control of the respective consortium members
- Control and management of the consortium are not unified, and common management is only for the inter-se coordination between the consortium members for administrative convenience.

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

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

Circular No. 07/2016, dated 7 March 2016

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

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

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

Circular No. 2/2016, dated 25 February 2016





Decisions

Merely the market price of some shares being at a higher value as compared to others in a group restructuring exercise, cannot be a ground to treat the transaction as a deemed gift under the Income-tax Act

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

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

The AO has to compute the FMV in accordance with the prescribed method but cannot adopt the market value as FMV under Section 56(2)(viiia) of the Act. The legislature in its wisdom has also given the formulae for computation of FMV, which cannot be ignored by the lower authorities. It has been observed that the taxpayer has furnished the valuation

of shares based on the working given under Rule 11UA(c) (b) of the Rules, according to which, the FMV of the shares is a negative figure whereas the taxpayer has paid at INR1 per share. Where the AO was not satisfied with the working given by the taxpayer, he/she ought to have computed the FMV himself/herself in the method prescribed under the Rules but ought not to have adopted higher of the prices paid by the taxpayer for purchase of some of the shares. Further, even when the transactions are between related parties, the provisions of Section 56(2)(viiia) of the Act can be applied only in accordance with the prescribed method and the difference between the price at which the taxpayer has purchased the shares and the aggregate of the FMV of the shares as computed can be brought to tax as deemed income in the hands of the taxpayer. Accordingly, it has been held that the provisions of Section 56(2)(viiia) of the Act are not correctly applied in the taxpayer's case.

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

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

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

High Court's ruling

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

discretion with respect to the rate of interest and/or to levy any interest considering the facts and circumstances of the case. In the present case, the AO had no such discretion on the eventuality as mentioned in Section 234B of the Act.

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

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

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

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

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

The taxpayer, incorporated in Singapore, is engaged in the business of profit management support services to group entities in the Asia-Pacific Region. During Assessment Year (AY) 2011-12, the taxpayer rendered management support services to its 100 per cent Indian subsidiary, DDIL, and has received a management fee pursuant to the agreement for the provision of management, general support and administrative services entered into between the said parties. The taxpayer claimed that the said

receipt is not taxable as FTS under the India-Singapore tax treaty as it had not made available to DDIL, any technical knowledge, experience, etc. Accordingly, the refund was claimed for the taxes withheld on the management fees. While completing the assessment, it was held that the taxpayer has a PE in India and attributed the entire management fees to its PE. Further, the AO allowed only 10 per cent as expenses and held the balance 90 per cent as business income. Accordingly, the AO raised a tax demand. The CIT(A) dismissed the appeal.

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

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

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

Notifications/Circulars/Instructions

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

The CBDT issued a Circular whereby it instructs the AOs that in holding whether the surplus generated from the sale of listed shares or other securities would be treated as capital gain or business income, it shall take into account the following:

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

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

Circular No. 6/2016, dated 29 February 2016

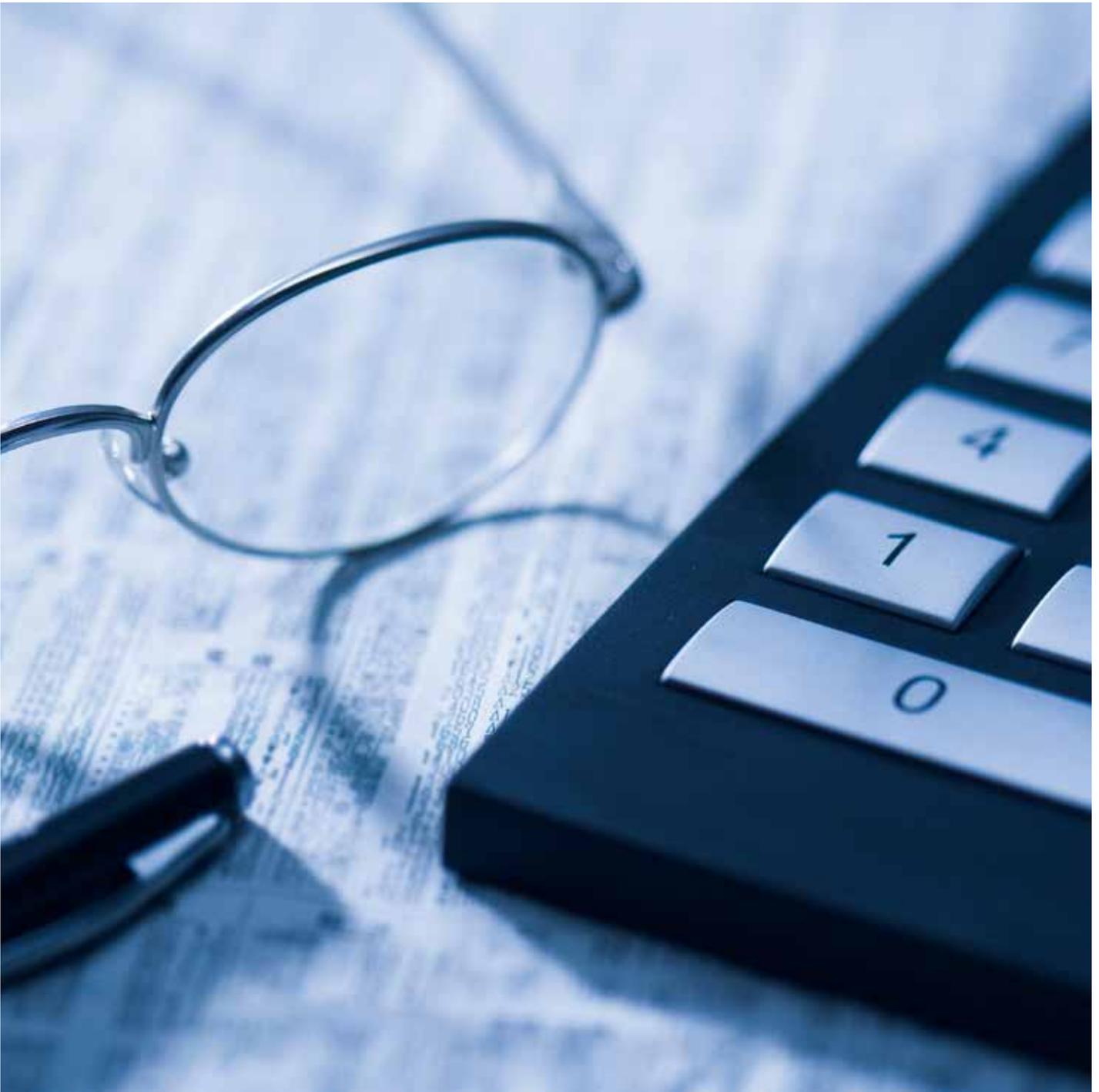
CBDT clarification on taxability of transactions of buyback of shares undertaken prior to 1 June 2013

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

in view of the provisions of sub-clause (iv) of Section 2(22) of the Act.

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

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



Transfer pricing



Union Budget 2016: Transfer pricing amendments

One of the most important developments from a Transfer Pricing (TP) regulations perspective was introduction of the three-tier TP documentation norms with effect from AY 2017-18.

Master file and local file

The Memorandum to the Finance Bill (Memorandum) states that a master file will have to be maintained and the detailed rules regarding the same will be notified at a later date. However, no threshold for preparation of the master file has been prescribed. Local file related regulations that already exist in the law may continue or may be aligned to the OECD's BEPS Action 13 recommendations; however the same will be clear only once the detailed rules in this regard are issued.

Country-by-Country (CbyC) reporting

A new section [proposed Section 286 of the Act] on CbyC reporting has been introduced. These provisions require the Indian parent entity of an international multinational group or any other designated group entity in India (referred to as an alternate reporting entity) to file a CbyC report for FY 2016-17 before the due date of filing of the return of income i.e. 30 November 2017. The threshold for filing the CbyC report has been maintained at EUR750 million (as per the Memorandum). The detailed format shall be notified in the rules at a later date. However, it is proposed in the memorandum that the OECD prescribed template will be adopted.

The CbyC report will be required to furnish the following details:

- Aggregate information in respect of the amount of revenue, profit or loss before income-tax, income-tax paid and accrued, stated capital, accumulated earnings, number of employees and tangible assets not being cash or cash equivalents, with regards to each country in which the group operates;
- Details of each constituent entity of the group, including the country in which such a constituent entity is incorporated or organised or established and the country where it is resident;
- Nature and details of the main business activity or activities of each constituent entity.

The key highlights of the proposed CbyC reporting provisions are as follows:

- The CbyC report will have to be furnished by the local constituent Indian entity,
 - If the parent entity is the resident of a country with which India does not have an agreement providing for exchange of information under the CbyC report; or
 - If there has been a systemic failure of that country.
- Where there are more than one constituent entities of the international group resident in India, the CbyC report

shall be furnished by any one constituent entity, if the international group has designated such an entity to furnish the CbyC report (information to be conveyed in writing to the prescribed Indian tax authorities).

- If any other alternate reporting entity of the international group has furnished the CbyC report with the tax authority of their country, there will be no need for the local constituent entity to furnish the same again locally, if the following conditions are satisfied:
 - a. The CbyC report is required to be furnished under the local law of that country;
 - b. That country has entered into an agreement with India providing for exchange of the CbyC report in respect of the international group;
 - c. That country's prescribed authority has not conveyed any systemic failure in respect of the said country to any constituent entity resident in India;
 - d. The said country or territory has been informed in writing by the constituent entity that it is the alternate reporting entity on behalf of the international group.

Penalty provisions relating to TP documentation:

- Failure to furnish information and documentation under the proposed three-tier documentation structure by the due date will be INR500, 000 (approximately USD7,500).
- Stringent penalties have also been proposed for failure to furnish the CbyC report by the prescribed due date, failure to provide information/documents sought by the prescribed authorities and in case of inaccurate information being filed as part of the CbyC report.
- Pursuant to a TP adjustment, the following specific penalty provisions have been proposed in situations wherein the taxpayer has failed to maintain appropriate documentation or failed to disclose international transactions:
 - Penalty at 50 per cent of the tax payable on under-reported transactions
 - Penalty at 200 per cent of the tax payable on misreporting of transaction

Administrative TP proposals:

- The time limit for completion of TP audits has been reduced by three months
- Revenue authorities will have no right to appeal against the instructions issued by the Dispute Resolution Panel.
- Where the time limit for completion of assessment proceedings is stayed (i) by an order/injunction of any court (ii) to obtain information under the agreement referred to in Section 90 or 90A of the Act, the period for completion of the assessment proceedings by the TPO, subsequent to such a stay shall be a minimum 60 days.

Union Budget 2016 presented on 29 February 2016

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

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

High Court's ruling

- The factual discussion in this case clearly reveals that, the taxpayer chose to import components not from the manufacturer (which was its AE) but an intermediary,

which normally, would have been accepted by the revenue authorities as a commercial decision. However, in the instant case, the vendor of the components viz. Sumitomo was also connected with both the taxpayer and the manufacturer.

- The above realities compelled the TPO to closely scrutinise the value of such imports and seek further details from the taxpayer. The explanations by the taxpayer that were forthcoming, were apparently unconvincing.
- The taxpayer's approach i.e. a bundled or an aggregated series or a chain of transactions to benchmark international transactions would normally be accepted by the authorities, if they did not show the features that call for his/her interference. However, the AO/TPO should extend his/her inquiry critically evaluating materials, where a detailed scrutiny is required. The unusual features in this case, which remained unexplained by the taxpayer, raised concerns and influenced the revenue authorities to benchmark the transaction separately.
- The High Court, while upholding the approach adopted by the TPO, relied on the decision of Sony Ericsson Mobile Communications India (P) Ltd vs CIT [2015] 374 ITR 118 (Del), which discusses a test as to when the revenue authorities can disregard the actual transaction, and re-characterise the same i.e. when the form and substance of the transaction though were the same but the arrangements made in relation to a transaction, when viewed in totality, differ from those which would have been adopted by an independent enterprise behaving in a commercially rational manner.
- Thus, the High Court upheld the restoration of the adjustment made by the Tribunal.

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





Service tax - Decisions

Support services provided to a foreign customer are not liable to service tax

In the present case, the issue was whether a gamut of support services (viz. direct marketing, branding activities, offline marketing, supervision of quality of third party customer care centre, etc.) proposed to be provided by GoDaddy India Web Services Pvt Ltd (the taxpayer) to its group company located outside India would be liable to service tax.

The Authority on Advance Ruling (AAR) held that the services provided by the taxpayer would constitute naturally bundled services which are not in the nature of 'intermediary services' on the basis of the following reasons:

- Services proposed to be provided by the taxpayer are not peculiar to the taxpayer's case but are provided by various Indian entities to their overseas customers as a single package;
- Payment for the entire package would be a lump sum amount;
- Supporting the business of a foreign group company in India is the main service and services like processing payments and oversight of services of third party call centres are ancillary and incidental to the provision of main service i.e. business support service; and
- The definition of 'intermediary' does not include a person who provides the main service on his/her own account. In the present case, the taxpayer proposed to provide the main service i.e. 'business support service' to its foreign group company on his/her own account on a principle to principle basis.

Based on the above, it would get covered under Rule 3 of the Place of Provision of Services Rules, 2012 and hence, would qualify as 'export'.

M/s GoDaddy India Web Services Pvt. Ltd. vs Commissioner of Service tax, Delhi –IV [AIT-2016-25-AAR]

Services rendered during the period between the appointed date and the date of the High Court order constitutes as 'service to self'

In the instant case, the issue was whether service tax discharged on royalty paid by the transferee company to the transferor company during the period between the appointed date of amalgamation and the date of the High Court order would be eligible for refund.

The Delhi Tribunal held that service rendered during the said period qualifies as a service to self and thus, would not be liable to service tax on the basis of the following:

- The amalgamation was effective from the appointed date, even if the approval by the High Court and the letter of the Registrar of Companies approving the change of name were issued later;
- On account of the pending approval and sanction of the scheme by the High Court, the transferor company carried on its business and activities on behalf of the transferee company; and
- As the service was rendered to self and service tax was paid thereon, the burden can only be passed on to self. Further, passing on the burden to self would not tantamount to passing it to any other person and thus, there is no unjust enrichment.

Accordingly, excess service tax paid during the said period would be eligible as refund.

M/s Usha International Ltd vs CST, Delhi [2016-VII-191-CESTAT-DEL-ST]

TDS on consideration paid to a foreign service provider does not attract service tax

In the instant case, the issue was whether Tax Deduction at Source (TDS) deposited to the government on the consideration paid to a foreign service provider (which was agreed to be net of the TDS amount) would be liable to service tax under a reverse charge mechanism.

The Mumbai Tribunal held that on a plain reading of the service tax law as applicable at the time being in force, it appears that service tax liability should be discharged on the amount billed by the service provider. Accordingly, since the amount billed by the foreign service provider in the present case was net of TDS and the TDS amount was borne by the service recipient, such TDS amount would not be liable to service tax under a reverse charge mechanism.

M/s Magarpatta Township Development & Construction Co. Ltd. vs Commissioner of Central Excise, Pune – III [TS-90-CESTAT-2016(Mumbai)]

Notifications/Circulars/Press Releases

Swachh Bharat cess not to be levied on services exempted by way of a special order

With effect from 17 February 2016, services exempted by way of a special order issued by the government would not attract Swachh Bharat cess.

Notification No.5/2016 - Service tax dated 17 February 2016

Service tax leviable on all services provided by the government/local authority to a business entity with effect from 1 April 2016

With effect from 1 April 2016, any services provided by the government/local authority to a business entity have been excluded from the negative list of services and hence, are liable to service tax. Further, specific exemption has been granted to services provided by the government/local authority to a business entity with a turnover below INR1 million.

Notification No.6/2016 - Service tax and Notification No.7/2016-Service tax dated 18 February 2016

Notification amending service tax return format to incorporate Swachh Bharat cess

The government has issued a notification to amend the service tax returns format (Form ST-3) in order to incorporate details of Swachh Bharat cess payable/paid by the taxpayers.

Notification No.20/2016 - Service tax dated 8 March 2016

Central excise - Decisions

Activities undertaken do not amount to 'manufacture or deemed manufacture' under Section 2(f) of the Excise Act

The taxpayer is an entity incorporated in India undertaking wholesale operations. In this regard, the taxpayer proposes to set up warehouses to store the goods purchased from various manufacturers/channel partners. Further, the taxpayer will undertake the activities viz. assortment, packing, wrapping, folding, inspection, cleaning and putting stickers on the goods purchased and subsequently will sell the goods to retailers, industrial users or wholesalers. The proposed activities would be carried out at the time of inbound shipment of goods into the warehouse or on shipment of goods to the customer or on customer returns. The taxpayer may charge additional consideration/fees for undertaking certain proposed activities and such additional consideration/fees charged, if any, would be subject to service tax. The activities on which the ruling is being sought by the taxpayer would be undertaken at the said warehouse(s) or at other warehouses operated/to be operated by the taxpayer or at third party locations on its behalf in India. Currently, the taxpayer intends to operate from several warehouses located in and around the major cities and towns across India.

The question of law for which an advance ruling is sought is – Whether the following proposed activities to be undertaken by the taxpayer can be regarded as 'manufacture' or 'deemed manufacture' under Section 2(f) of the Excise Act.

The taxpayer submitted that the activities proposed to be performed would not alter the primary packing or original labelling affixed by the manufacturer of the goods under the applicable regulations. Further, the proposed activities would not involve affixation, alternation or change in the MRP/RSP of any product/item received in the warehouse; that all items, where required, would already have an MRP/RSP affixed or pre-printed. The activities proposed to be undertaken by the taxpayer are intended to protect the goods and facilitate inventory management, storage, minimise error shipment, pilferage, etc. The activities proposed to be undertaken by the taxpayer are not different from

the conventional supply chain adopted by the consumer goods industry and the overall intent is to facilitate the sale of products of the applicant on a wholesale basis and that no value addition is undertaken vis-à-vis the products itself.

Accordingly, it was observed that the activities undertaken by the taxpayer would not amount to manufacture or deemed manufacture under Section 2(f) of the Central Excise Act.

Amazon Wholesale (India) Pvt. Ltd. vs CCE (2016-TIOL-05-ARA-CX)

CENVAT credit on 'sales commission' is eligible

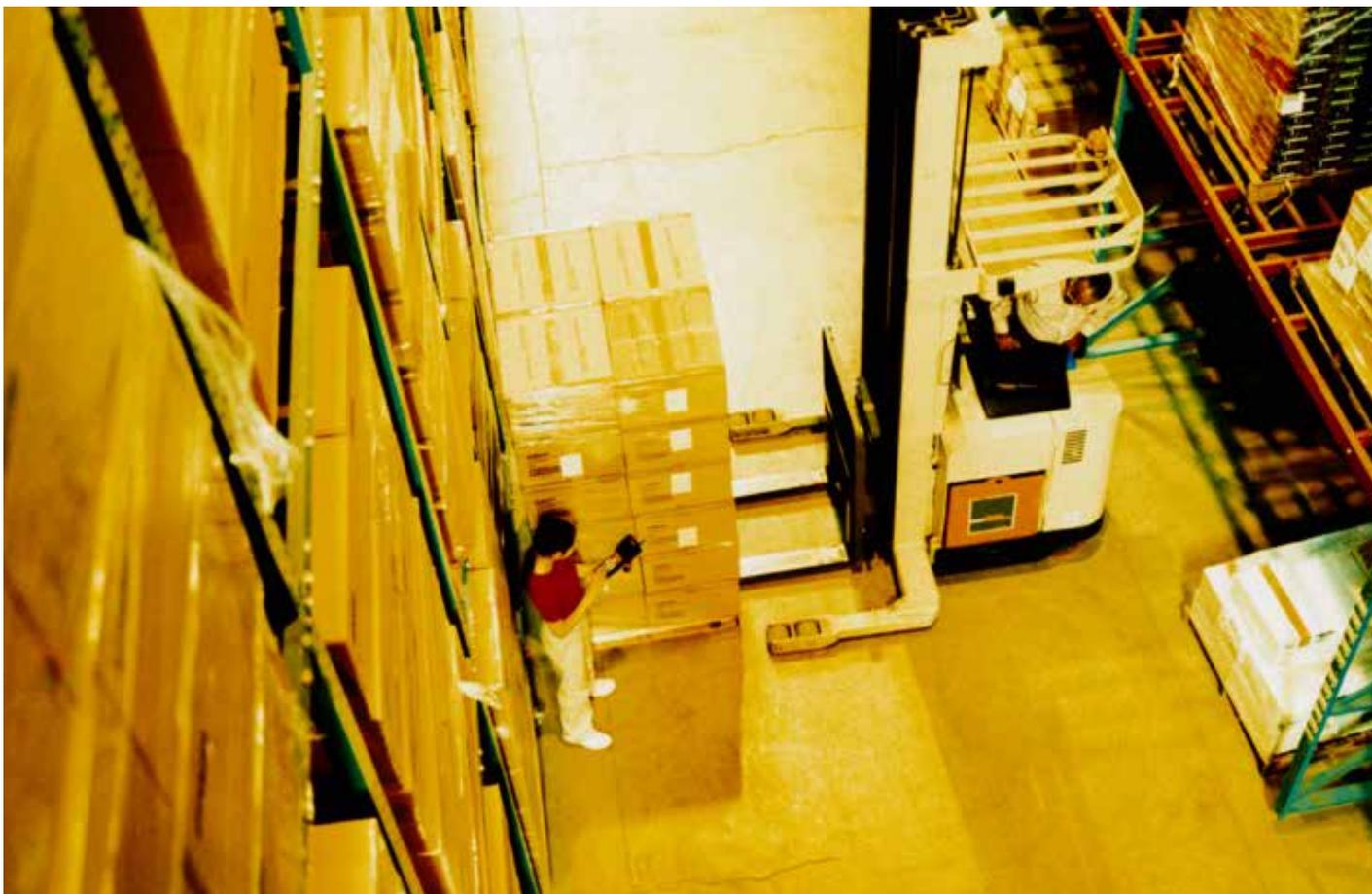
The taxpayer is engaged in the manufacture of hot briquetted iron, hot rolled coils, etc. The taxpayer had availed CENVAT credit on the sales commission paid to overseas agents for rendering services. A Show Cause Notice (SCN) was issued upon the taxpayer alleging irregular availing of credit as services received by the taxpayer are not related to manufacture and clearance of goods from the place of removal and accordingly, the sales commission service would not be considered as 'input service' in terms of Rule 2 of the CENVAT Credit Rules, 2004.

The taxpayer submitted that service tax was paid on the commission for the services rendered by various marketing agents, in overseas markets as well as in India for promotion of manufactured goods. Activities undertaken by the agents are in the nature of sales promotion, which get covered under the inclusive part of the definition of 'input service'. It was also submitted that the CENVAT credit of sales commission is allowed following the decision of the Gujarat High Court in the case of Cadila Healthcare Ltd [2013] (30) STR 3 (Guj).

The Ahmedabad Tribunal allowed the benefit of CENVAT credit of service tax paid on services in the nature of sales promotion.

Essar Steel India Ltd vs Commissioner of Central Excise and Service Tax (2016 – TIOL-520-CESTAT – AHM)





Notifications/Circulars/Press Releases

Amendment to Notification No. 20/2016-CE in regard to central excise (Removal of Goods at a Concessional Rate of Duty for Manufacture of Excisable and Other Goods) Rules, 2016

The above rules are now effective from 16 March 2016, instead of the earlier specified date of 1 April 2016. Further, the requirement of submission of security for availing a benefit under the said Notification No. 20/2016-CE (N.T) has now been dispensed with. The said Notification No. 20/2016-CE (N.T) prescribes the rules and procedures with regard to removal of goods at a concessional rate of excise duty for manufacture of excisable and other goods.

Notification no. 22/2016 – CE (NT), dated 15 March 2016

Valuation of imported ‘Set Top Boxes’ under Section 4 of the Central Excise Act

A Circular has been issued with regard to valuation of imported Set Top Boxes (STBs) under Section 4 of the Central Excise Act, 1944 (the Excise Act). The issue discussed therein pertains to the assessment of CVD payable on STBs, when imported by a Direct To Home (DTH) broadcasting service provider, where STBs are provided free of cost. Accordingly, the value for the purposes of calculation of CVD, should be determined on the basis of the Retail Sale Price (RSP) in terms of the proviso to Section 3(2) of the Customs Tariff Act, 1975.

In this regard, it has been mentioned in the Circular that the same issue was decided by the CESTAT in the case Bharti Telemedia Ltd [2015-TIOL-1863-CESTAT-MUM], wherein it inter alia observed that CVD shall not be leviable on the basis of RSP. Therefore, in view of the said judgement, it is clarified that the judgement of the Tribunal in case of Bharti Telemedia Ltd, may be followed for assessment of CVD on imported STBs, where the circumstances are identical.

Circular 1020/8/2016 –CX, dated 11 March 2016

Customs - Decisions

Customs officers are competent for sanctioning refund to SEZ units

The taxpayer, in the present case, is a unit situated in Dahej Special Economic Zone (SEZ) and is engaged in the manufacture of stone wool insulation products. The taxpayer on their clearances to customs in the domestic tariff area paid the countervailing duty, though it was not payable. The taxpayer, therefore, made a refund claim before the Customs Authority. The refund claim was returned by the Assistant Commissioner of Customs on the ground that they don't have the authority to process the same. Aggrieved by the same, the taxpayer filed a writ petition before the Gujarat High Court.

The High Court observed that as long as the duty is in the nature of customs duty, the refund application is maintainable in terms of Section 27 of the Customs Act, 1975. Such refund application would be maintainable before the specified authority of the customs. It was further observed that without

amending the said statutory provisions, it was not possible for the Government of India to prevent the competent customs authority from entertaining and deciding upon such refund applications.

Roxul Rockwool Insulation India Private Limited vs UOI and others (2016-TIOL-319-HC-AHM-CUS)

Notifications/Circulars/Press Releases

India-ASEAN Trade in Goods Agreement (Safeguard Measures) Rules, 2016

The India-ASEAN Trade in Goods Agreement (Safeguard Measures) Rules, 2016 have been notified vide this Notification.

Notification No. 37/2016 – Customs (N.T), dated 4 March 2016

Dispensation of the 'Customs Baggage Declaration Form' for domestic passengers

It is clarified that the 'Customs Baggage Declaration Form', prescribed for domestic passengers travelling along with international passengers in the international flight flying in its domestic leg would be dispensed herewith.

Circular No. 08/2016 - Customs, dated 8 March 2016

VAT - Decisions

Concession on inter-state purchases cannot be denied in case of leasing of tricycles/deep-freezers to distributors

The taxpayer in the present case is a registered dealer under the Uttar Pradesh Value Added Tax Act, 2008 (UP VAT Act) engaged in the business of purchase and sale of various items from Vadilal Industries Limited such as ice-creams, processed food, etc. which are sold through its chain of distributors all over the state. The taxpayer also, provides deep-freezers and tricycles on lease to its distributors and dealers to extend the shelf life of perishable products and ensure proper preservation.

In the taxpayer's VAT registration certificate, it has been indicated that deep-freezers and tricycles are intended for resale by the taxpayer. The deep-freezers and tricycles given on lease, amount to transfer of the right to use the products liable to VAT which was deposited by the taxpayer. Based on the registration certificate, the taxpayer has applied for issuance of C Forms in respect of interstate purchase of the said goods, but the same were denied by the assessing authority without providing any reasons. Aggrieved, the taxpayer filed a writ petition which was disposed of, directing the assessing authority to pass an appropriate order. However, subsequently the taxpayer received Show Cause Notices as to why the registration certificate should not be amended and deep-freezers and tricycles should not be deleted therefrom.

The taxpayer stated that they had purchased deep-freezers and tricycles for giving them on lease and the transfer of right to use such goods is deemed to be sale. However, the Deputy Commissioner deleted the two items from the registration certificate on the ground that the taxpayer was not re-selling them and thus rejected the contention of the taxpayer.

Aggrieved by the said order, the taxpayer filed a writ petition before the High Court submitting that the Revenue has committed an error in amending the registration certificate without any valid cause. The taxpayer reiterated their submission that sale or resale would include transfer of right to use any goods and that the Deputy Commissioner had committed an error in refusing the issuance of Form C. The Revenue submitted that the goods mentioned were not for resale and they were justified in amending the certificate.

The High Court observed that the term sale, under the CST Act as well as under the UP VAT Act includes the transfer of right to use any goods for any purpose. Thus, the amount received on transfer of the right to use is taxable. Accordingly, the taxpayer would be entitled to a concessional rate of tax against issuance of Form C, if the goods mentioned in the registration certificate were purchased from outside the state and were subsequently sold or resold.

Vadilal Enterprises Limited vs State of U.P and another [TS-86-HC-2016(ALL)-VAT]

Time limit for assessment under the Punjab General Sales Tax Act is not extendable after normal expiry of the said period of three years

The taxpayer in the present case, is a registered dealer under the Punjab General Sales Tax Act, 1948 (Punjab Sales Tax Act) and had filed quarterly returns in respect of three AYs. The time limit for completing the assessment as per the Punjab Sales Tax Act was three years from the end of the year. However, no assessment was made in respect of any of these AYs within the stipulated dates. Subsequently, the AO sent notices to the taxpayer for the aforesaid years after the expiry of three years.

Aggrieved by the said notices, the taxpayer took an objection that these notices were sent beyond the period of assessment and, therefore, it was not permissible to issue a notice. However, the Excise and Taxation Commissioner passed orders subsequent to the objection taken by the taxpayer, granting an extension of time on the grounds that the case of the taxpayer for the year 1999-2000 was pending with the Tribunal.

The order of extension was challenged by the taxpayer before the Tribunal which dismissed the appeal of the taxpayer holding that since there was a power of extension conferred upon the Commissioner under the Act and that the Commissioner was within his/her powers to extend the period. Against this, the taxpayer contended that though there was a power of extension, such a power could be exercised only within the limitation prescribed. In other words, it was contended that when the normal period of limitation for passing an assessment order by the AO was three years, the power to extend the period could be exercised within the said period of three years and not after the expiry of the limitation period.

Aggrieved by the order of the Tribunal, the taxpayer approached the High Court, which ruled in favour of

the taxpayer. However, the Revenue filed an appeal before the Supreme Court contending that there was no such embargo or impediment mandating the Commissioner to pass an order of extension necessarily within the normal period of three years.

The Supreme Court observed that as the taxpayer was a registered dealer and had also filed their returns regularly within the prescribed period, the assessments were to be completed within the normal period prescribed. Further, the Supreme Court observed that even though the Commissioner has the power to extend the time limit, there would be no question of extending the time for assessment when the assessment has already become time barred. Additionally, the Supreme Court contended that if the Commissioner is permitted to grant an extension even after the expiry of the original period of the limitation prescribed under the Act, it will give him/her the right to exercise such a power at any time even much after the last date of assessment.

In view of the above, the Supreme Court concluded that the only way to interpret the same is by holding that the power to extend the time is to be exercised before the normal period of the assessment expires. Accordingly, the SC dismissed the appeals filed by the Revenue.

State of Punjab & Ors. vs Shreyans Indus Ltd. Etc.(TS-69-SC-2016-VAT)

Notifications/Circulars/Press Releases

Maharashtra

The Government of Maharashtra has amended certain procedures with regard to the refund of excess tax paid by dealers. In case a dealer has made double payment of taxes, the dealer shall file an application along with Annexure A (as provided in the Trade circular) to the Joint Commissioner of Sales Tax (Nodal Division) for refund

of the excess tax payment. Such applications will be treated as miscellaneous refund applications and will be taken up for disposal on priority, instead of waiting till the completion of the year for processing the claim.

Trade Circular No. 6T of 2016, dated 23 February 2016

Uttarakhand

With effect from 4 March 2016, every transporter who intends to transport goods, from any place in the state to any place outside the state or within the state shall prepare a 'Lorry Challan' subject to the conditions specified in the Uttarakhand Value Added Tax Act, 2005. Further, the transporter shall prepare a Lorry Challan for such goods and of such quantity or measure or value as may be specified by the Commissioner, in this behalf, by a general order in writing.

Notification No. 126/2016/03(120)/XXXVII(8)/2016, dated 3 March 2016

West Bengal

With regards to all the new registration applications made under the West Bengal Value Added Tax, 2003 and the CST Act, 1956, registration shall be granted within the next working day of furnishing the hard copy of the completed application along with the necessary documents, application fees and security payment details, provided the said application along with the documents is found in order.

Circular No. 02/2016, dated 15 March 2016





The Government of India starts issuing OCI cards in lieu of PIO cards

The Government of India merged the Person of Indian (PIO) card and the Overseas Citizen of India (OCI) card schemes through the Citizenship (Amendment) Act, 2015. Under the new regime, PIO cardholders are deemed to be OCI cardholders and are entitled to benefits such as a lifelong visa and exemption from police registration. The government has now mandated all PIO cardholders to apply for OCI cards in lieu of their existing PIO cards.

Key changes

- The application for an OCI card in lieu of a PIO card needs to be submitted to the Indian Embassy/Foreigners' Regional Registration Office (FRRO), which originally issued the PIO card to the applicant.
- The OCI card in lieu of the PIO card would be granted, if the PIO card was valid on 9 January 2015.
- The OCI card will be issued free of cost to all existing PIO cardholders.

Source - <http://passport.gov.in/oci/captchaActionPIO>

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

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

However, recently the Ministry of Labour and Employment, Government of India issued a notification dated 10 February 2016 to amend the EPFS with regards to the provisions relating to early withdrawal of PF accumulations on the cessation of employment. The notification came into effect from 10 February 2016.

Key amendments in the notification

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

02. Revised Para 68 NN of EPFS – Withdrawal within one year before the retirement

03. Para 69 (2) of EPFS for non – IWs

04. Para 69 (2) of EPFS for non – IWs

05. Para 68 NNNN of EPFS - Option for withdrawal on cessation of employment

06. Withdrawal under Para 68 NNNN of EPFS

07. As per Revised Para 68 O of EPFS – Payment of withdrawal or advance

08. Explanation to Para 26A and Para 69(5) of EPFS for non – IWs

- Now the members of the EPFS are eligible to withdraw² upto 90 per cent of their PF accumulations on attaining the age of 57 years or within one year before their actual retirement, whichever is later.

- **Removal of the provision for early withdrawal**

- As per the earlier provisions³, members could withdraw their full PF accumulations on the cessation of employment and on not being re-employed with an establishment which is covered under the EPF Act for a continuous period of not less than two months before making the PF withdrawal application.
- The above facility for an early withdrawal⁴ has been removed by this notification.

- **Inserting a provision enabling partial withdrawal**

- A new provision⁵ has been inserted for enabling partial PF withdrawals. Members can now apply for withdrawal (after two months of the waiting period) of their own share of PF contributions along with interest earned on their own contribution on the cessation of employment on the condition that they are not re-employed with an establishment which is covered under the EPF Act.
- The payment of partial withdrawal⁶ of the amount can be made directly into the member's bank account or through the employer⁷ as well.

- **Removal of the provision relating to fresh membership**

- As per the earlier provisions⁸, employees could be treated as fresh members after taking their early PF withdrawals on the cessation of employment in a covered establishment.
- With the omission of these provisions, individuals shall remain the members of EPFS till they withdraw their full PF accumulations.

The new amendments in the EPFS, that have limited pre-retirement withdrawals, could have a significant impact on employees who were eligible for early withdrawals under the previous regulations. Since individuals can now avail a full refund of their PF accumulations only on retirement after reaching the age of 58 years, it appears that the members will continue to earn interest on their PF accumulations till 36 months after they become eligible for a full refund. Clarification on this aspect from the PF department would be helpful for the industry.

The regulations on the refund of PF accumulations in case of IWs who are covered under an effective SSA with India have not been changed in the latest amendment and they would continue to enjoy the special facility of a full refund of PF accumulations at the time of cessation of their employment in Indian establishments covered under the EPF Act.

Employers would need to engage with their employees and communicate these new changes to help them to take informed decisions about their retirement planning.

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

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

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

The government notified that the EPF Act shall apply to all banks, employing 20 or more number of persons as a class of

establishment, for those employees who are not entitled to the benefit of contributory provident fund or old age pension under any scheme or rules framed by the:

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

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

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



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