Editorial

Recently, the Finance Minister said that the Indian economy has witnessed significant improvement in macroeconomic stability despite uncertain global economic situations. Addressing a meeting of the Parliamentary Consultative Committee attached to the Ministry of Finance on the ‘state of the economy’, he said that the macroeconomic outcome is evident in the economic recovery. India clocked a 7.3 per cent growth rate in 2014-15, higher than 6.9 per cent growth achieved in 2013-14 and 5.1 per cent in 2012-13.

The Minister of State for Finance in a written reply to a question in the Lok Sabha regarding top multi-national companies (MNCs) approaching the income tax department for resolution of disputes said that the government has appointed arbitrators in the tax dispute cases with MNCs.

Recently, the Central Board of Direct Taxes (CBDT) has issued a Press Release and a Notification to amend Rule 37BB of the Rules for furnishing of information in respect of payments made to non-resident. The CBDT prescribes that a Chartered Accountant’s (CA) certificate in Form No. 15CB will be required to be furnished only in respect of such payments made to non-residents, which are chargeable to tax, and where the amount of payment during the year exceeds INR5,00,000. Further, Form 15CA and 15CB will not be required to be furnished by an individual for remittance which does not require RBI approval under the Liberalised Remittance Scheme. The CBDT has expanded the number of specified payments mentioned in the specified list from 28 to 33 for which submission of Forms 15CA and 15CB is not required to include five more categories of import related payments. Further, the CBDT has also inserted a new Rule which states that Form 15CB shall be required to be furnished and verified electronically. There was no such requirement in the earlier Rule.

The Bangalore Tribunal in the case of Subex Technology Ltd. held that credit for the tax paid in a foreign country would be available against tax liability under the Minimum Alternate Tax (MAT) provisions of the Income-tax Act, 1961 (the Act).

The Delhi High Court in the case of Maruti Suzuki India Limited held that the Advertisement, Marketing and Sales Promotion (AMP) expenditure incurred by the taxpayer cannot be treated and categorised as an international transaction under Section 92B of the Act. Based thereon, the High Court concluded that the Transfer Pricing Officer (TPO) cannot make a transfer pricing adjustment on account of the AMP expenditure in this case. Distinguishing the Sony Ericsson High Court ruling as the one which looked at the AMP issue for taxpayers that were only distributors and not manufacturers themselves, the High Court rejected the tax department’s contention that after the aforesaid Sony Ericsson ruling, the existence of an international transaction in the case of the taxpayer cannot be questioned. Relying on the Sony Ericsson ruling, the High Court noted that the use of a Bright Line Test both for determining if there is an international transaction with respect to AMP expense, and for the determination of the Arm’s Length Price (ALP) is inappropriate.

We at KPMG in India would like to keep you informed of the 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.
Decisions

A taxpayer is entitled to foreign tax credit against MAT liability

The tax department filed an appeal against allowing of relief of foreign tax credit to the taxpayer under Section 90 of the Act, while computing tax liability under the MAT provisions. The tax department contended that taxes under MAT provisions, stood on a different footing than the regular tax computed under other provisions of the Act. Therefore, a rebate for taxes paid in a foreign country could not be granted to the taxpayer. The taxpayer relied on the decision of the co-ordinate Bench in the case of ACIT vs L&T Ltd. [ITA No. 4499/Mum/2008, dated 22 April 2009].

The Bangalore Tribunal while deciding the case, found that a similar issue had come up before the Mumbai Tribunal in the case of L&T Ltd. In that case, the Mumbai Tribunal observed that the income on which tax has been paid abroad was included in ‘book profit’ for the purpose of computing MAT. It was held that once taxable income was determined either under the normal provisions of the Act or MAT provisions, a subsequent portion relating to computation of the tax has to be governed by the normal provisions of the Act. In that case, it was also held that there was no provision in the Act, debarring granting of credit for tax paid abroad in case income is computed under MAT provisions. It was further held that the taxpayer could not be denied the set-off of tax relief against the tax liability determined under the MAT provisions.

Therefore, the Bangalore Tribunal by relying on the aforementioned case held that the credit for tax paid in a foreign country would be available under Section 90 of the Act against tax liability under MAT provisions.

DCIT vs Subex Technology Ltd. [ITA No. 913(B)/2013 (Assessment year: 2009-10)] (Bang) – Taxsutra.com
Corporation tax

Decisions

Presumptive taxation cannot be applied to a taxpayer’s income where the taxpayer had incurred losses or its assessable income is less than its presumptive income

The taxpayer is a body corporate having financial and administrative independence. It was a part of the Ministry of Transport of the Government of Jordan and it was to undertake all the scheduled air transport activities from and to Jordan. It was stated by the Transport Ministry of Jordan that the taxpayer is directly controlled by the Council of Ministers and that it has the status of a Department of the Government in the Kingdom of Jordan. The taxpayer has its principal office in Jordan. It appointed Jet Air Pvt. Ltd. as its general sales agent in India. The taxpayer commenced its operations in India, carrying passengers and cargo on international flights from and to India from 1989 onwards. Since commencement of its operations in India, the taxpayer has been incurring losses. It did not file any return of income in India.

During the year under consideration, the taxpayer has not declared its income in terms of Section 44BBA of the Act. In response to the notice issued under Section 142(1) of the Act, the taxpayer disclosed its gross receipts as well as its expenses, apart from the commission paid to its agents. The taxpayer had been paying income tax to the government since September 1993 in order to obtain a ‘No Objection Certificate’ for remittance of sales proceeds calculated on the basis of gross receipts less commission under Section 44BBA of the Act. The AO held that in terms of Section 44BBA of the Act, 5 per cent of the gross receipts were to be deemed to be taxable income on a presumptive basis. The Commissioner of Income-tax (Appeals) [CIT(A)] held that the taxpayer was not liable to pay tax as its entire income was in fact the income of the Government of Jordan. A reference was also made to the audited accounts of the taxpayer which stated that the Kingdom of Jordan was committed to cover the losses incurred by the taxpayer. The CIT(A) held that the entire income of the taxpayer was exempt from taxation. The Tribunal following its earlier ruling in the case of Iraqi Airways vs Inspecting Assistant Commissioner [1987] 23 ITD 115 (Del) upheld the order of the CIT(A) and held that the income of the taxpayer was not liable to be assessed to income tax.

High Court ruling

In the case of Union of India vs A. Sanyasi Rao [1996] 219 ITR 330 (SC), the Supreme Court was interpreting Section 44AC of the Act which provides for taxation of presumptive income based on gross receipts. The Supreme Court in the said case held that even where Section 44AC of the Act is sought to be applied to a trader, it was only a machinery provision and could not deny the normal relief afforded to all taxpayers. Accordingly, it was held that in such an instance an option would be available to the taxpayer to produce the books of accounts to show that the assessable income is in fact less than the presumptive income.

Section 44BBA of the Act is not a charging provision, but only a machinery provision and it cannot preclude the taxpayer from producing books of accounts to show that in any particular assessment year there is no taxable income. The High Court concurs with the view expressed by the Tribunal, which has not been challenged by the tax department and has attained finality. The High Court concurs with a view that where there is no income, Section 44BBA of the Act cannot be applied to bring to tax the presumptive income constituting 5 per cent of the gross receipts in terms of Section 44BBA(2) of the Act. For that purpose, the taxpayer has to produce books of accounts to substantiate that it has incurred losses or that its assessable income is less than its presumptive income, as the case may be. The Tribunal has noted the factual position regarding the losses incurred by the taxpayer. This has not been disputed by the tax department in its appeal against the aforesaid order.

DIT vs Royal Jordanian Airlines (ITA No. 159/2002)(Del)– Taxsutra.com

Notifications/Circulars/Press Releases

CBDT Circular on allowability of employer’s contribution to funds for the welfare of employees in terms of Section 43B(b) of the Act

The Supreme Court in the case of CIT vs Alom Extrusions Ltd, [2009] 185 Taxman 416 (SC), held that the amendments made in Section 43B of the Act, by way of deletion of the second proviso and amendment in the first proviso are curative in nature and should retrospectively be applicable from 1 April 1988. By these amendments, the contribution to welfare funds have been brought at par with the other duty, cess, fee, etc. Thus, the proviso is equally applicable to the welfare funds. Therefore, the deduction is allowable to the employer if he deposits the contribution to the welfare funds on or before the ‘due date’ of filing of the return of income.

The CBDT has stated that it is now a settled position that if the taxpayer deposits any sum payable by it by way of tax, duty, cess or fee by whatever name called under any law for the time being in force, or any sum payable by the taxpayer as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees, on or before the ‘due date’ applicable in his case for furnishing the return of income under Section 139(1) or the Act, no disallowance can be made under Section 43B of the Act.

The CBDT has directed that no appeals should be filed on this ground by the officers of the tax department and appeals already filed, if any, on this ground before Courts/Tribunals should be withdrawn/not pressed upon.

Circular No. 22/2015, dated 17 December 2015
CBDT amends rules relating to furnishing of information in respect of payments made to a non-resident

The CBDT has issued a Press Release and a Notification No. G.S.R. 978(E), dated 16 December 2015 to amend Rule 37BB of the Income-tax Rules, 1962 (the Rules) for furnishing of information in respect of payments made to a non-resident. The amendments to the Rules are summarised as follows:

- The person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum chargeable under the provisions of the Act, shall furnish the following, namely:
  - The information in Part A of Form No. 15CA shall be furnished, if the amount of payment or the aggregate of such payment made during the financial year does not exceed INR5,00,000.
  - For payments other than the payments referred above, the information shall be furnished:
    * In Part B of Form No.15CA after obtaining:
      i. A certificate from the Assessing Officer (AO) under Section 197; or
      ii. An order from the AO under sub-section (2) or sub-section (3) of Section 195;
    * In Part C of Form No.15CA after obtaining a CA certificate in Form No. 15CB.

CA certificate in Form No. 15CB will be required to be furnished only in respect of such payments made to non-residents which are chargeable to tax and where the amount of payment during the year exceeds INR5,00,000.

- The person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum which is not chargeable under the Act, shall furnish information in Part D of Form 15CA.

- No information is required to be furnished in Form 15CA and 15CB for any sum which is not chargeable under the provisions of the Act, if:
  - the remittance is made by an individual and it does not require prior approval of the Reserve Bank of India (RBI) as per the provisions of Section 5 of the Foreign Exchange Management Act, 1999 or
  - the remittance is of the nature prescribed in the specified list.

- The list of payments of specified nature mentioned in Rule 37BB of the Rules, which do not require submission of Forms 15CA and 15CB, has been expanded from 28 to 33 to include advance payment against imports, payment towards imports-settlement of invoice, intermediary trade, imports below INR5,00,000 (for use by ECD offices) and imports by diplomatic missions.

- The amended Rule 37BB of the Rules prescribes to continue submission of Form 15CA electronically and introduces the optional usage of the digital signature in accordance with the procedure, formats and standards to be provided by the Principal Director General of Income-tax (Systems) (PDGI (Systems)).

- A new sub-rule 6 has been inserted which states that Form 15CB shall be required to be furnished and verified electronically in accordance with the procedures, formats and standards to be provided by the PDGI (Systems). There was no such requirement in the earlier Rule.

- The authorised dealer shall furnish a quarterly statement for each quarter of the financial year in Form 15CC to the PDGI (Systems) or the person authorised by the PDGI (Systems) electronically under digital signature within 15 days from the end of the quarter of the financial year to which such a statement relates in accordance with the procedures, formats and standards to be prescribed by the PDGI (Systems).

- The amended Rules will come into effect from 1 April 2016.

CBDT Notification No. G.S.R. 978(E), dated 16 December 2015

CBDT notifies new forms for reporting by investment funds under Section 115UB(7) of the Income-tax Act in order to avail a ‘pass through’ status

The CBDT has inserted a new Rule i.e. Rule 12CB along with Forms 64C and 64D for reporting by investment funds (i.e. Category I and II Alternative Investment Funds (AIF)) under Section 115UB(7) of the Act.

As per Rule 12CB of the Rules, the person responsible for crediting or making a payment of income on behalf of the Investment Fund shall furnish the following forms:

- Form 64C to the unit-holders by 30 June of the financial year following the previous year during which the income is paid or credited; and
- Form 64D to the prescribed income tax authority by 30 November of the financial year following the previous year during which the income is paid or credited, electronically under the digital signature, duly verified by an accountant.

In light of the above notification, all investment funds (including Venture Capital Funds (VCF) registered as a Category I AIF) will have to file Forms 64C and 64D (instead of Form 64 which was filed earlier).

CBDT Notification No. 92/2015, dated 11 December 2015

CBDT prescribes new monetary limits for filing of appeals by the tax department before the Tribunal, High Court and Special Leave Petition before the Supreme Court

The CBDT issued a Circular where it stated that the tax department may file an appeal on merits before the Tribunal, High Courts and Special Leave Petition (SLP) before the Supreme Court keeping in view the specified monetary limits and conditions.

The CBDT Circular prescribes new monetary limits and conditions. The appeals/SLPs shall not be filed where the tax effect does not exceed INR10 lakh where an appeal is before the Tribunal, INR20 lakh where an appeal...
is before the High Court and INR25 lakh in case of appeals before the Supreme Court. It is clarified that the appeal should not be filed merely because the tax effect in a case exceeds the monetary limits prescribed. Filing of an appeal is to be decided on the merits of the case.

The CBDT Circular prescribes that in case chargeability of interest is the issue under dispute, the amount of interest shall be the tax effect.

- In cases where returned loss is reduced or assessed as income, the tax effect would include a notional tax on disputed additions.
- In the case of penalty orders, the tax effect will mean a quantum of penalty deleted or reduced in the order to be appealed against.

If the disputed issues arise in more than one assessment year, an appeal can be filed in respect of such assessment year(s) in which the tax effect in respect of the disputed issues exceeds the monetary limit prescribed.

In case of a composite order of any High Court or appellate authority, which involves more than one assessment year and common issues in more than one assessment year, an appeal shall be filed in respect of all such assessment years even if the tax effect is less than the prescribed monetary limits in any of the year(s), if it is decided to file an appeal in respect of the year in which the tax effect exceeds the monetary limit prescribed. In a case where a composite order/judgement involves more than one taxpayer, each taxpayer shall be dealt with separately.

The Commissioner of Income-tax shall keep a record of the cases wherein an appeal before the Tribunal or a Court is not filed on account of a tax effect being less than the monetary limit. In such cases, no inference shall be drawn as the decisions rendered were acceptable to the department. Further, the tax department shall not be precluded from filing an appeal against disputed issues in the case of the same taxpayer for any other Assessment Year (AY) or in the case of any other taxpayer for the same or any other AY, if the tax effect exceeds the monetary limit.

Adverse judgements on following issues should be contested on merits, notwithstanding that the tax effect entailed is less than the monetary limit or that there is no tax effect:
- Where the constitutional validity of the Act or the Rules is under challenge, or
- Where a CBDT order, notification, instruction or circular has been held to be illegal or ultra vires, or
- Where the revenue audit objection in the case has been accepted by the tax department, or
- Where the addition relates to undisclosed foreign assets/bank accounts.

The Circular prescribes that the monetary limits shall not apply to writ matters and direct tax matters other than income tax. Filing of appeals in other direct tax matters shall continue to be governed by relevant provisions of the statute and rules. Further, the filing of an appeal in cases of income tax, where the tax effect is not quantifiable or not involved i.e. registration of trusts or institutions under Section 12A of the Act, shall not be governed by monetary limits and the decision to file an appeal in such cases may be taken on the merits of a particular case.

The CBDT circular will apply retrospectively to pending appeals and appeals to be filed henceforth in High Courts/the Tribunal. Pending appeals below the specified tax limits may be withdrawn/not pressed. Appeals before the Supreme Court will be governed by the instructions on this subject, operative at the time when such an appeal was filed.

Circular No. 21/2015, dated 10 December 2015

The CBDT extends the collegium system to consider withdrawal of appeals from High Courts

The CBDT has issued an Office Memorandum to extend the collegium system to consider withdrawal of appeals from the High Courts where the same are no longer considered prosecutable. The collegium system existing in multi-CCsIT stations would be responsible for reviewing all appeals pending before the High Courts relating to jurisdictional CCsIT.

CBDT Office Memorandum No. F. No. 279/Misc./52/2014 - (TTJ)
Decisions

Issue of a corporate guarantee is in nature of ‘shareholder activities’/’quasi capital’ and thus, could not be included within the ambit of ‘provision for services’ under the definition of ‘international transactions’ under Section 92B of the Act

The taxpayer issued various corporate guarantees on behalf of its subsidiaries, without charging them any consideration on the ground that these guarantees did not cost anything to the taxpayer, nor were any charges recovered for the same, and the ‘said guarantees were in the form of corporate guarantees/quasi capital and not in the nature of any services’.

The TPO made an adjustment by computing the ALP of the corporate guarantee at two per cent at the prevalent market rate for guarantee fees. The Dispute Resolution Panel (DRP) rejected the objections raised by the taxpayer and the AO thus proceeded to make the ALP adjustment.

Tribunal’s ruling

The Tribunal:

- Relying on the decision of Micro Inks Ltd vs ACIT [2013] 144 ITD 610 (Ahd), observed that the question of excess credit period arises only when there is a standard credit period for the product sold at the same price and where the credit period allowed to the Associated Enterprises (AEs) is more than the credit period allowed to independent enterprises. That is not the case here. The credit period for finished goods cannot be compared with that of unfinished goods and raw materials, and therefore, when the products are not the same, prices cannot be the same.

- Held that issuance of corporate guarantee was in the nature of ‘shareholder activities’/’quasi capital’ and thus could not be included within the ambit of ‘provision of services’ under the definition of ‘international transaction’ under Section 92B of the Act.

- In the case of Vodafone India Services Limited vs Union of India [2013] 37 Taxmann.com 250 (Bombay), the applicability of a retrospective amendment to Section 92B of the Act had been considered in the context of ‘transfer’ and not ‘international transactions’. The issue considered by the High Court was prior to the amendment, whereas in the present case, it is the amended definition which is to be considered. Therefore, the Tribunal did not find it necessary or proper to apply Section 2(47) of the Act as amended to the present proceedings and hence, the decision is equally misplaced and devoid of legally sustainable merits.

- Distinguished the G E Capital Canada vs Her Majesty the Queen [2009]TCC 563 decision relied upon by the Revenue.

- Held that the Revenue cannot seek to widen the net of transfer pricing legislation by taking refuge of the best practices recognised by the OECD work.

- Held that bank guarantees are not comparable with corporate guarantees.

- Relying on the decision of CIT vs EKL Appliances Ltd [2012] 345 ITR 241 (Del), the Tribunal stated that even if the issuance of a corporate guarantee is accepted as ‘provision for service’, such a service is needed to be re-characterised to bring it to tune with commercial reality, as ‘no independent enterprise would issue a guarantee without an underlying security as has been done by the taxpayer’.

- Issuance of corporate guarantees is covered by the residuary clause of Section 92B of the Act. However, in the decision in Bharti Airtel Limited vs ACIT [2014] 63 SOT 113 (Del), the Delhi Tribunal has explained the legal position of Section 92B of the Act and has specifically brought that the onus is on the Revenue to demonstrate that the transaction shall have a bearing on its profits, income, losses or assets. These conditions are not satisfied in the present case. It was held that, ‘when a taxpayer extends its assistance to the AE, which does not cost anything to the taxpayer and particularly for which the taxpayer could not have realised money by giving it to someone else during the course of its normal business, such assistance or accommodation does not have any bearing on its profits, income, losses or assets, and, therefore, it is outside the ambit of international transactions under Section 92B(1) of the Act’ and thus, deleted the transfer pricing adjustment.

Micro Ink Limited vs ACIT (ITA No. 2873/Ahd/10)

The Delhi High Court held that AMP expenses incurred by Maruti Suzuki India does not constitute an international transaction. It also held the use of a bright line approach inappropriate for determining the existence of an international transaction and for making an adjustment

The taxpayer is engaged in manufacturing of passenger cars in India and is a subsidiary of Suzuki Motor Corporation, Japan (SMC). During the AY 2005-06, the TPO made an adjustment to the total income on account of the AMP expenditure incurred by the company by application of the Bright Line Test (BLT). The Revenue contended that as the taxpayer undertakes sale of products under the brand name ‘Maruti-Suzuki’, any excess AMP expense incurred by the company vis-à-vis the comparables, is promoting the brand Suzuki which is legally owned by SMC.

High Court’s ruling

The High Court has pronounced a landmark ruling on the issue of marketing intangibles for licensed manufacturers through this case. Earlier this year, the Delhi High Court in the case of Sony Ericsson Mobile Communications Pvt. Ltd. CIT [2015] 374 ITR 118 (Del) had adjudicated on
the issue of marketing intangibles for taxpayers engaged in marketing and distribution functions. It had held that AMP expenses constituted an international transaction. Taking a contrary stand based on the specific facts of the taxpayer, and distinguishing the Sony Ericsson High Court ruling as the one which looked at the AMP issue for taxpayers that were only distributors and not manufacturers themselves, the High Court rejected the Revenue’s contention that after the aforesaid Sony Ericsson ruling, the existence of an international transaction in the case of the taxpayer cannot be questioned.

The findings of the High Court have briefly been given below:

**BLT is not permitted under the law -** BLT applied by the Revenue authorities is not permissible under the Indian transfer pricing regulations. AMP expense cannot constitute an international transaction merely by application of BLT, especially when its application has been struck down by the High Court in the Sony Ericsson ruling.

**Onus is on the Revenue to demonstrate the existence of an international transaction -** The onus to demonstrate that an AMP expense incurred by a taxpayer constitutes an international transaction would rest upon the Revenue authorities without application of BLT. Neither the substantive, nor the machinery provisions of the Indian transfer pricing regulations permit undertaking an adjustment by the application of BLT, in the manner applied by the Revenue authorities.

**Lack of statutory guidance on the approach -** Even in a case where an AMP expense incurred by the taxpayer is held to be an international transaction, there is no machinery provision under the transfer pricing regulations to enable the Revenue authorities to determine the compensation entitled to an Indian entity and clear statutory guidance is required on the approach to be adopted for such determination.

**Benefit to the related party is only incidental -** In the subject case, based on an intercompany agreement, SMC had granted permission to the taxpayer to use the co-brand ‘Maruti-Suzuki’. Neither did the co-brand belong to SMC nor did it have the right to use the co-brand in India or outside. The High Court noted that as SMC is not entitled to use the co-brand, the benefit does not arise. The High Court held that the benefit of additional AMP spend flowing to SMC is merely based on presumption of the Revenue authorities.

**No adjustment warranted if transactions are held to be at ALP -** The High Court relied upon the Sony Ericsson ruling that if on application of the Transactional Net Margin Method (TNMM), an Indian entity has operating margins higher than that of the comparable companies, no separate adjustment on account of AMP expense is warranted. Based on the same, the High Court observed that since the net operating margin of the taxpayer is higher vis-à-vis comparable companies, there is no question of a transfer pricing adjustment on AMP expense.

**Erstwhile ruling in the case of Maruti Suzuki is not binding -** The erstwhile ruling in the case of Maruti Suzuki is no longer binding in light of the observations of the Supreme Court in the same case.

*Maruti Suzuki India Limited vs CIT (ITA 110/2014)(Del)*
Indirect tax

Service tax

Decisions

**Maintaining and repairing one's own equipment under a BOOT contract is not liable to service tax**

In the instant case, the issue was whether the activity of design, manufacture, supply, installation and commissioning of a micro-processor based energy saving device undertaken by the taxpayer under a Build Own Operate Transfer (BOOT) contract would be liable to service tax.

The contract clearly mentioned that ownership of the equipment would be with the taxpayer during the BOOT period. Based on the same, the Mumbai Tribunal held that maintaining own equipment and optimising its usefulness during the BOOT period by the taxpayer would be construed as service to self and thus, not liable to service tax.

*Commissioner of Central Excise vs Sahastronics Controls Pvt. Ltd. (2015-TIOL-2644-CESTAT-MUM)*

**Salary and allowances paid by an Indian company to an expatriate is not liable to service tax under the negative list regime**

In the present case, the issue involved was whether salary and other allowances paid by an Indian company to an expatriate employee as per the terms of a tripartite agreement with the expatriate and the foreign group company would be liable to service tax. Further, the social security obligation borne by the foreign company are not reimbursed by the Indian company.

The Authority for Advance Rulings (AAR) observed that so long as the expatriate was an employee of the Indian company, bearing of certain interests (such as social security) by the foreign company would not alter the nature of the transaction. Further, with the introduction of the negative list regime of taxation of services, the services provided by an employee to an employer in the course of or in relation to employment are not included in the definition of services.

Accordingly, the AAR held that payment of salary and other allowances by the Indian company would not be liable to service tax since the employee was providing services to the employer (i.e. the Indian company) in his capacity as an employee.

*North American Coal Corporation India Pvt. Ltd. vs Commissioner of Central Excise (Advance Ruling Ruling No. AAR/ST/13/2015 in Application No. AAR/44/IST/2/2014)*

Notifications/Circulars/Press Releases

**Clarification of applicability of service tax on services of fabrication of garments received by apparel exporters**

The Central Board of Excise and Customs (CBEC) clarified that facts of each case and terms of agreement including the scope of activity should be analysed to determine whether the services received by apparel exporters pertaining to fabrication, stitching, labelling, etc. are in the nature of manpower supply (subject to service tax) or job work (exempt if amounting to manufacture).

Further, it has also specified various situations wherein, an activity shall be considered in the nature of manpower supply or job work. For instance, if the service provider is responsible only for extent/quality of manpower in case of manpower supply whereas in case of job work, the job worker is responsible for deployment and use of manpower.


Central excise

Decisions

**Whether interest is leviable on the differential duty amount paid under supplementary invoices due to price increase**

In the instant case, the question before the Apex Court was ‘whether interest is leviable under Section 11AB of the Central Excise Act, 1944 (Section 11AB) on the differential duty amount paid under supplementary invoices due to price increase by virtue of a price variation clause in the sale contract’.

The taxpayer cleared the manufactured goods on the payment of excise duty. In terms of the price variation clause, the taxpayer had discharged differential duty and also intimated the same to the Revenue authorities.

With the above background, a show cause notice was issued demanding interest under Section 11AB. The Commissioner, Central Excise and Customs, Excise and Service Tax Appellate Tribunal (CESTAT) had also confirmed the demand for interest. Aggrieved by the same, the taxpayer preferred an appeal before the Supreme Court.

The Supreme Court observed that the interest under Section 11AB can be levied/charged, where any duty of excise has not been levied or paid or has been short levied or short paid. In
such an event, interest is liable to be paid from the first date of the month succeeding the month in which, the duty ought to have been paid. Further, the right of the seller to receive the revised price crystallises only, when the buyer agrees to sanction the same, and only at that time, a liability to pay duty, if at all, on the revised price arises. Both parties are not aware of the final price at the time when the goods are removed.

The Supreme Court further observed that one has also to bear in mind the difference between ‘what should be the quantum of duty to be paid’ and ‘when such duty is payable’. In the case of price revision, the quantum of duty would be on the escalated price but the time for payment of differential duty is when the parties agree for the escalation in price. On that reckoning, it would follow that interest clock for differential duty will start ticking from the date, differential duty is due.

To conclude, the Supreme Court observed that the decision in the case of Maruti Udyog Limited requires a relook and the Registry is directed to place the matter before the Chief Justice of India for constituting a larger Bench.

**Steel Authority of India Limited vs Commissioner of Central Excise (2015-TIOL:292-SC-CX)**

### Whether ‘Pre-delivery inspection charges and ‘After sales service charges’ are to be included in the assessable value

In the present case, the question of law before the Apex Court for consideration was whether the ‘Pre-Delivery Inspection Charges’ (PDI) and ‘After Sales Service Charges’ (ASS) are to be included in the assessable value.

The taxpayer is engaged in the manufacture of two wheeled motor vehicles classifiable under HS Code 8711.20 and 8711.10. The taxpayer sold the goods directly to the customers through sales depots and had requested for provisional assessment with respect to the depot sales as they could not determine the normal transaction value. The provisional assessment was finalised and the said order included PDI charges and free ASS charges in the assessable value. The reason for doing so by the Adjudicating Authority was the clarification issued vide Circular No. 643/34/2002 dated 1 July 2002, wherein it has clarified the same to be included in the assessable value.

Aggrieved by the same, the taxpayer filed an appeal before the Commissioner(A), who disallowed inclusion of PDI charges and free ASS charges relying on the CESTAT decision in the case of Maruti Udyog Limited. Aggrieved by the said order, the Department filed an appeal before the Bangalore Tribunal, which also rejected the Department’s appeal considering the decision in the case of Maruti Udyog Limited.

The matter was taken up by and the Supreme Court considering the arguments observed that PDI charges and free ASS charges would not be included in the assessable value under Section 4 of the Act for the purpose of paying excise duty.


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### Notifications/Circulars/Press Releases

#### Suspension of benefits under the North-East Industrial and Investment Promotion Policy by the Department of Industrial Policy & Promotion and its bearing on central excise duty exemption

Doubts were raised regarding the availability of central excise duty exemption under Notification 20/2007-CE dated 25 April 2007 to new unit or units undertaking substantial expansion after 1 December 2014 in the North-Eastern region including Sikkim pursuant to the suspension of fresh registrations by the Department of Industrial Policy & Promotion (DIPP) under the North-East Industrial and Investment Promotion Policy (NEIIPP) with effect from 1 December 2014 vide OM No. 10(1)/2014-DBA-II/NER dated 1 December 2014.

The matter was examined in the ministry in consultation with the DIPP. Fresh registrations for the scheme under NEIIPP have been suspended by the DIPP, essentially due to shortage of funds allocated to DIPP. Therefore, DIPP OM No. 10(1)/2014-DBA-II/NER dated 1 December 2014 has not suspended the entire package of incentives offered for the schemes under NEIIPP. Further, Notification 20/2007-CE does not mandate registration under NEIIPP to avail of the excise duty exemption.

In view of the above, it has been clarified that new unit or units undertaking substantial expansion after 1 December 2014 and up to the cut-off date of 31 March 2017 shall continue to be eligible for excise duty exemption under Notification 20/2007-CE dated 25 April 2007 subject to the conditions specified.

*Circular No. 1012/19/2015-CX dated 2 December 2015*

#### Monetary limits increased for filing appeals by the Department before CESTAT, High Courts and Supreme Court

The Central Board of Excise and Customs has revised the monetary limits, below which, an appeal shall not be filed in the Tribunal, High Court and the Supreme Court.

<table>
<thead>
<tr>
<th>Sr. no.</th>
<th>Appellate forum</th>
<th>Monetary limit</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>CESTAT</td>
<td>INR10,00,000</td>
</tr>
<tr>
<td>2.</td>
<td>High Court</td>
<td>INR15,00,000</td>
</tr>
<tr>
<td>3.</td>
<td>Supreme Court</td>
<td>INR25,00,000</td>
</tr>
</tbody>
</table>

*Instruction F.No.390/Misc./163/2010-JC dated 17 December 2015*

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### Customs Notifications/Circulars/Press Releases

#### Trade Facilitation – Monitoring of pending ‘Bills of Entry’

The involvement of the Commissioners and Chief Commissioners has increased to monitor the pending ‘Bills
of Entry’. The Commissioners shall put in place an operating procedure, where the details of all the Bills of Entry pending for more than 72 hours from the time of either ‘Entry Inwards’ or filing of ‘Bill of Entry’ will be received. Each such case will be reviewed by the Commissioner to examine the reasons for delay and in particular qualitatively evaluate the queries raised, if any.

Similarly, the Board has desired that the Chief Commissioners shall review all pending Bills of Entry, which are not cleared within seven days (from ‘Entry Inwards’ or filing of ‘Bill of Entry’).

Instruction F.No.450/25/2009 – Cus IV dated 18 November 2015

**VAT**

**Decisions**

**Input tax credit for a particular period cannot be claimed beyond six months under Karnataka VAT law**

In the present case, during the course of audit, it was noticed that in the VAT returns filed for the month of July 2006, neither did the taxpayer claim input VAT and also didn’t revise the return within six months of putting forth such a claim. The Input Tax Credit (ITC) was claimed in the month of February 2007 i.e. after the expiry of six months. The AO as well as the first Appellate Authority held that the claim for ITC made in February 2007 for the period of June 2006 cannot be allowed.

The taxpayer filed an appeal against the same order before the Tribunal, who held that ITC credit of VAT paid by the taxpayer is a statutory promise and the provisions do not restrict availingment of input VAT credit if the same is not availed in month of purchase and allowed the input VAT credit. Aggrieved by the same, the Revenue filed a revision petition in the Karnataka High Court challenging the order passed by the Tribunal.

The Revenue contended that as per the provisions prescribed, a return is to be filed in time and if there is a lapse in claiming ITC, a revised return is to be filed within six months of putting forth such a claim. On the contrary, the taxpayer contended that in law there is no prohibition for putting forth such a claim beyond the period prescribed in the statute and hence the ruling given by the Tribunal is justified.

In view of the above, the High Court observed that the taxpayer had not filed any revised return within six months of putting forth the said claim. Therefore, the assessing authority as well as the first Appellate Authority rightly held that the claim for input tax rebate put forth for the first time in February 2007 for the period of June 2006 cannot be allowed. The High Court further stated that the Tribunal without any reference to statutory provisions assumed that allowing input tax is a statutory promise made to the dealer buying the goods from the registered dealer by paying the tax mentioned in the invoice.

Therefore, the High Court concluded that the taxpayer would not be entitled to claim input tax rebate as the same was claimed beyond six months and quashed the decision of the Tribunal.

**State of Karnataka vs Centum Industries (TS-376-HC-2014(KAR)-VAT)**

**Sodexo meal vouchers are not ‘goods’ and hence not liable to octroi or local body tax**

In the present case, the taxpayer provides preprinted meal vouchers viz ‘Sodexo meal vouchers’. The taxpayer enters into contracts with its customers i.e. establishments/companies having number of employees on their rolls, for issuing the said vouchers. These customers provide food/meals and other items to their employees. Further, for utilisation of these vouchers by such employees, the taxpayer has made arrangements with various restaurants, departmental stores, shops, etc. (‘affiliates’). The employees can procure food and other items on presentation of the said vouchers and the affiliates, after receiving the said vouchers, present the same to the taxpayer and get reimbursement of the face value of those vouchers after deduction of service charge payable by the affiliates to the taxpayer as per their mutual arrangement.

In view of the above, the question before the Supreme Court was whether, based on the aforementioned arrangement, these vouchers can be treated as ‘goods’ for the purpose of levy of Octroi or Local Body Tax (LBT) as per the relevant provisions of the Maharashtra Municipal Corporation Act (Act No. LIX of 1949) or does the said activity only amount to rendering of service by the taxpayer.

The Supreme Court observed that the vouchers are not ‘sold’ by the taxpayer to its customers, as wrongly perceived by the Bombay High Court, and this fundamental mistake in understanding the whole scheme of arrangement has led to a wrong conclusion by the High Court. The High Court has also wrongly observed that vouchers are capable of being sold after they are brought into the limits of the city. These vouchers are printed for a particular customer, which are used by the said customer for distribution to its employees and these vouchers are not transferrable.

Further, without the sanction/authorisation of the RBI to operate such a payment system under the Payment and Settlement Systems Act, 2007, nobody can operate such a system, as the purpose of the said Act is to regulate the payment and settlement thereof by means of ‘Paper Based Vouchers’. The Supreme Court also observed that an insight into the Policy Guidelines issued by the RBI to regulate such transactions would also highlight that the real nature of the transaction is to provide service and by no stretch of imagination these vouchers can be termed as ‘goods’.

The Supreme Court also noted that the real character of the transaction is the facility provided by the customers as employers to their employees. The value of such free food and non-alcoholic beverages provided by an employer to an employee is treated as expenditure incurred by the employer and an amenity in the hands of the employee.
It is a perquisite given by the customer to its employees by adopting the methodology of vouchers and for its proper implementation, services of the taxpayer are utilised.

In view of the above, the Supreme Court held that Sodexo meal vouchers are not ‘goods’ and therefore not liable for either octroi or LBT.

Sodexo SVC India Private Limited vs State of Maharashtra and ORS (2015-TIOL:293-SC-MISC)

Notifications/Circulars/Press Releases

**Assam**

In terms of the new Rule 8EC inserted in the Central Sales Tax (Assam) Rules, 1957, a dealer will be required to electronically apply for declaration forms. The same will also be issued electronically by the Department.

*Notification No. FTX.90/2004/Pt-II/65 dated 13 November 2015*

**Delhi**

All dealers conducting sales through web portals/e-platforms of other e-commerce companies/firms shall be required to furnish details of such sales in Annexure 1E. In case of sales through more than one e-commerce company/firm, separate formats in Annexure 1E shall be filed for each such company/firm. Sales in Annexure 1E have to mandatorily be included in sales figures in Annexure 2B (summary of sale/outward branch transfer register).

*Notification no. F.3(20)/Fin(Rev-I)/2015-2016/dsvi/906-dated 12 November 2015*

**Punjab**

Entry no. 27 has been added to Schedule E of the Punjab VAT Act, 2005 (goods taxable at 12 per cent) to include ‘all automobiles (i.e. commercial vehicles, passenger vehicles, three wheelers, two wheelers)’. Earlier, the said goods were part of the residual schedule ‘Schedule F’ and taxable at 13 per cent.

*Notification No. S.O.50/PA.B/2005/S.B/2015/- dated 17 November 2015*

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Personal tax

**Decisions**

**Allowability of a deduction under Section 80E in respect of higher education pursued outside India**

Section 80E of the Act allows a deduction in the hands of individual taxpayers in respect of interest paid on a loan taken from any approved financial/charitable institution for the purpose of pursuing his/her higher education or for the purpose of higher education of his/her relative.

The Pune Tribunal held that interest on an education loan availed for pursuing higher education outside India is eligible for a deduction under Section 80E of the Act.

*Nitin Shantilal Muthiyan vs DCIT [2015] 59 taxmann.com 416 (Pune)*

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