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# India Tax Konnect

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## Editorial

The newly elected government presented its first union budget against a backdrop of huge expectations. The budget was introduced by the Finance Minister in the Lok Sabha on 10 July 2014. Subsequently, it has been passed by both the houses of Parliament and received president's assent on 6 August 2014.

On the direct tax front, tax rates remained unchanged for all taxpayers, with the recalibration of tax slabs for individuals providing a higher threshold of exemption, and a corresponding increase in several slabs, and with higher amounts provided for eligible investments that give tax breaks. The dividend distribution tax, however, went up by about 3 per cent due to a change in the manner in which its computation will now have to be done.

Unlisted shares and units of non-equity orientated mutual fund, held for not more than 36 months, will be treated as short term capital assets; the earlier threshold was 12 months. However, the unlisted shares and units of mutual funds transferred between 1 April 2014 and 10 July 2014 shall be regarded as long term capital assets if they are held for more than 12 months.

Encouragement is sought to be provided to the real estate and infrastructure sector funds by clarifying the basis of taxation in the hands of the Trusts/Funds and investors; however, provisions relating to charitable trusts have been tightened to curb abuse. Investment allowance has been continued as an incentive for manufacturing companies to encourage investment in plant and machinery, and by pegging a lower qualifying threshold.

On the indirect taxes front, besides the much-awaited clarity on goods and service tax, there were high expectations which do not seem to have materialised. Some provisions appeared retrograde and counterproductive to the promise of igniting growth or simplifying compliance requirements. Proposals like restricting the time limit to claim CENVAT credit, increasing the interest rate up to 30 per cent, introducing a penalty for delayed payments in addition to interest, and mandatory duty and penalty deposit to admit appeals are certainly not good tidings. However, bright sparks like neutralising the impact of the FIAT judgement, and rationalising the customs duty rates on import of coal is expected to benefit the industry.

On the judicial front, the Hyderabad Tribunal in the case of GFA Anlagenbau Gmbh held that supervisory services rendered by the taxpayer through foreign technicians do not constitute a permanent establishment (PE) in India under the Income-tax Act, 1961, as well as under the India-Germany tax treaty. Since the taxpayer rendered services at the project sites of its clients, and does not own or operate such sites independently, it would not be considered as a PE in India. Further, the supervisory services provided by the taxpayer themselves cannot constitute a PE of the taxpayer, since such services were not provided in connection with building, construction, or assembly activities of the taxpayer. The Tribunal held that supervisory services would be taxed as fees for technical services since such services were technical in nature.

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

# International tax

## Decisions

**Supervisory services not connected with the building, construction and assembling activity, in itself does not constitute a PE in India**

The taxpayer, a German company, was primarily engaged in the activity of supervision, erection, and commissioning of plant and machinery for steel and allied plants. The taxpayer entered into an agreement with certain Indian companies for supervision, erection, ramping-up, commissioning, demonstration of performance, performance guarantee test, etc. of various 'plant and machinery' for their steel and allied plants.

The receipts from the aforesaid services were offered to tax as Fees for Technical Services (FTS) under the India and Germany tax treaty.

The Assessing Officer (AO) held that since the duration of the stay in India of the taxpayer's technicians exceeded six months, the taxpayer had a PE in India under Article 5(2)(i) of the tax treaty. Accordingly, the receipts were liable to be assessed in accordance with the provision of section 44DA of the Income-tax Act, 1961 (the Act), or as 'business profits' under Article 7 of the tax treaty. The Dispute Resolution Panel (DRP) upheld the order of the AO that the taxpayer had a PE in India.

On appeal, the Income-tax Appellate Tribunal held that the supervisory activities of the taxpayer do not constitute a PE in India based on, inter alia, the following:

- To constitute a 'fixed place of business', the foreign enterprise must have at its disposal certain premises or a part thereof.
- In the present case, the taxpayer does not own or operate project sites independently, but rather such sites were provided by its Indian companies under contractual obligations. Hence, it cannot be said that the taxpayer had a fixed place of business for its supervisory activities.
- As per Article 5(2)(i) of the tax treaty, supervisory activities by themselves cannot constitute a PE since the activities are required to be in connection with a building, construction or assembly activity of the non-resident. In the instant case, the activities are not covered under Article 5(2)(i) of the tax treaty as the taxpayer does not have any building site or construction site of its own.
- The activities being technical in nature, would fall within the ambit of FTS under Article 12 of the tax treaty, and are taxable at the rates specified therein.

*M/s. GFA Anlagenbau Gmbh vs. ADIT (ITA Nos. 1292/Hyd/2011, 1293/Hyd/2011, 1649/Hyd/2010, 1294/Hyd/2011, 2226/Hyd/2011, 1274/Hyd/2012)*

# Corporate tax

## Decisions

**Limitation period is applicable to TDS orders under Section 201(1)/(1A) of the Act, even though no time limit is prescribed under the Act for the subject assessment year**

During assessment proceedings, the AO observed that the payments to lead managers were in the nature of FTS covered under Section 9(1)(vii) of the Act, and hence were liable for deduction of tax at source. In the absence of deduction of tax at source, the taxpayer was treated as an assessee in default under Section 201(1) of the Act, and interest under Section 201(1A) was also charged. On appeal, the Commissioner of Income-tax (Appeal) [CIT(A)] substantially upheld the AO's order. On appeal before the Tribunal, the taxpayer raised an additional ground that the AO's order was void-ab-initio as it was barred by limitation.

The tax department made an application before the learned President of Income Tax Appellate Tribunal (the Tribunal) for constitution of a special bench under Section 255(3) of the Act for consideration of the issue of limitation which was raised by the taxpayer as an additional ground. This request of the Revenue was accepted and the learned President constituted a special bench. The Tribunal held that the reasonable time for initiating and completing the proceedings under Section 201(1) had to be at par with the time limit available for initiating and completing the reassessment, as the assessment includes reassessment. Aggrieved by the order of the Tribunal, the tax department preferred an appeal before the Bombay High Court.

After perusing Section 201(1) and Section 201(1A), the Bombay High Court held that though Section 201 did not prescribe any limitation period for a taxpayer being declared as an assessee in default, the tax department will have to exercise the powers in that regard within a reasonable time. The Bombay High Court relied on the decisions of Delhi High Court in the case of CIT v. NHK Japan Broadcasting Corporation [2008] 305 ITR 137 (Delhi) and CIT v. Hutchison Essar Telecom in [2010] 323 ITR 230 (Delhi) and refused to follow the Calcutta High Court ruling in Bhura Exports Ltd. v. ITO [TS-517-HC-2011(CAL)] in which it was held that a period of limitation was inapplicable to Section 201 orders. The High Court dismissed the departmental appeal, stating that the appeal does not raise any substantial question of law.

*DIT v. Mahindra & Mahindra Limited [TS-404-HC-2014(BOM)]*

**Tribunal deletes Section 40(a)(ia) disallowance for short deduction of tax, channel placement fee payment by NGC Networks to cable TV operators not 'royalty' for the Assessment Year 2009-2010 to trigger the Section 194J TDS provision**

The taxpayer paid a channel placement fee of INR71.8 million to the cable operators/DTH providers for placing its channel in a particular frequency to get better viewership on account of good picture and sound quality. The taxpayer deducted tax at source at the rate of two per cent under Section 194C of the Act for the aforesaid payment. The AO was of the opinion that the payment for placement of the taxpayer's channel was in the nature of royalty under Explanation 2 to Section 9(1)(vi) of the Act. Thus, the AO held that tax should have been deducted under Section 194J of the Act. The DRP held that the channel placement fee did not come within the ambit of 'royalty', and thus Section 194J of the Act was inapplicable.

The Mumbai Tribunal held that though there is an amendment in the provision, and though according to the newly inserted Explanation 6 with retrospective effect the term process has been defined and it includes transmission, uplinking and down linking of signals, etc., the said retrospective amendment cannot be pressed into service for the purpose of disallowance under Section 40(a)(ia) of the Act, because at the relevant time when the taxpayer had deducted tax at source, this amendment was not in the statute.

The Tribunal held that when the taxpayer deducted tax based on the provisions of Section 194C of the Act, which is a bonafide decision by the taxpayer, keeping in view the nature of payments and facts of the case, then the taxpayer was not supposed to foresee the subsequent retrospective amendment in the statute to be held liable to tax deduction at source under the provisions of Section 194J of the Act.

The Tribunal referred to co-ordinate bench ruling in Channel Guide India Limited v. ACIT [2012] 139 ITD 49 (Mum) and Ahmedabad Tribunal ruling in Sterling Abraive Ltd. v. ACIT [2011] 44 SOT 652 (Ahd). The Tribunal also relied on the decision of Calcutta High Court in the case of CIT v. S.K. Tekriwal [TS-902-HC-2012(CAL)] wherein it was held that in the case of shortfall in deduction of tax, disallowance under Section 40(a)(ia) of the Act is not warranted.

*NGC Networks (I) Pvt. Ltd. v. ACIT [TS-415-ITAT-2014(Mum)]*

**Liabilities recorded by way of journal entries clearly outside the scope of Section 269SS of the Act**

The taxpayer filed its return of income for the Assessment Year (AY) 2007-08. The AO found that the taxpayer had shown purchase of lands worth INR142.2 million, which were reflected as closing stock in trade. The taxpayer had

also reflected a sum of INR142.5 million as sundry creditors. The taxpayer contended that the sundry creditors reflected in its books was M/s PACL India Ltd., which had purchased lands on behalf of taxpayer from several landowners. M/s PACL India Ltd. had made payments through demand drafts to various landowners from whom the land was acquired on behalf of the taxpayer. The AO concluded that the transaction amounted to a loan given by the M/s PACL to the taxpayer. The AO also held that there was a contravention of provisions of Section 269SS/T of the Act, as the loan was not paid through an account payee cheque. The AO levied a penalty under Section 271D for alleged violation of the provisions of Section 269SS/T of the Act. The CIT(A) confirmed the penalty. On further appeal, the Tribunal had held that the penalty order passed by the AO under Section 271D of the Act was unsustainable, as it was passed beyond the period of six months as prescribed under Section 275(1)(c) of the Act.

Before the Delhi High Court the tax department contended that for the penalty order under Section 271D of the Act, the time limit prescribed under Section 275(1)(a) of the Act is applicable. The High Court observed that the penalty sought to be imposed on the taxpayer is for alleged violation of Section 269SS of the Act which is independent of the assessment. The action inviting imposition of penalty is the granting of loans above the prescribed limit otherwise than through banking channels, and as such infringement of Section 269SS of the Act is not related to the income that may be assessed or finally adjudicated. The High Court thus, concluded that time limit prescribed under Section 275(1)(a) of the Act would not be applicable and the provisions of Section 275(1)(c) would be attracted. For this proposition the High Court referred to the decision of the Rajasthan High Court in the case of CIT v. Hissaria Bros [2007] 291 ITR 244 (Raj.). The High Court also observed that the liability recorded in the books of accounts by way of journal entries, i.e. crediting the account of a party to whom monies are payable or debiting the account of a party from whom monies are receivable in the books of accounts, is clearly outside the ambit of the provision of Section 269SS of the Act, because passing such entries does not involve acceptance of any loan or deposit of money. Hence there is no infringement of Section 269SS of the Act. For this proposition the High Court relied on the decision of Delhi High Court in the case of CIT v. Noida Toll Bridge Co. Ltd [2003] 262 ITR 260 (Delhi HC).

*CIT v. Worldwide Township Projects Ltd. [TS-395-HC-2014(DEL)]*

**High Court dismisses the taxpayer's writ petitions challenging the reopening notice and the AO's order passed in response to the taxpayer's objections**

The taxpayer had filed several writ petitions before the Madras High Court under Article 226 of the constitution, challenging the reopening notice under Section 147/148 of the Act in a few cases, and the speaking order passed by the AO on the objections raised by taxpayer in other cases.

The Madras High Court held as follows:

- A challenge to an order passed on the objections of the taxpayer is in effect a challenge to a notice under Section 148 of the Act. Such an order passed by the AO is only at the stage of process of determination and is not a determination by itself. A writ can be filed to the limited extent in cases where an assessment is sought to be reopened by an officer who is not competent to do so, or where on the face of it, it would appear that reopening is barred by limitation or lacks inherent jurisdiction i.e. cases where no adjudication is required on facts (CIT v. Chhabil Dass Agarwal [2013] 357 ITR 357 followed).
- As held in GKN Driveshafts v. ITO [2003] 259 ITR 19 (SC), once a notice under Section 148 is issued, the taxpayer has to file a return and can seek the reasons for issuing notice. The AO is bound to furnish the reasons within reasonable time and the taxpayer is entitled to file objections over which the AO has to pass a speaking order. The Supreme Court has indicated that the taxpayer is not required to run to the Court before the passing of the assessment order by challenging a notice issued under Section 148 of the Act. Decision in the case of GKN Driveshafts has to be understood to mean that pre-adjudication proceedings not deciding the issues shall not be put into challenge while exercising the discretionary power under Article 226 of the Constitution of India, which, in the process, takes away the right of the AO to proceed further. Such a preliminary order, which does not have a statutory flavour, not deciding the dispute between the parties, cannot be challenged by invoking the extraordinary jurisdiction.
- The decision of the Supreme Court in the case of Calcutta Discount Co. Ltd [1961] 41 ITR 191 (SC) that was rendered much prior to the decision in the case of GKN Driveshafts. Further, the situation at the time of rendering the said judgment is no longer in existence today.
- Considering the scheme of the enactment, particularly with reference to Sections 147 to 153 of the Act, an order passed on the objections of the taxpayer over adjudicating facts is not open to challenge by way of filing a writ petition

*JCIT v. Kalanithi Maran [TS-413-HC-2014(MAD)]*

**Tribunal allows expenditure incurred for brand building of 'Nirvana' by the taxpayer (jewellery manufacturer cum exporter) as revenue, admissible under Section 37(1) of the Act**

The taxpayer is a manufacturer and exporter of jewellery. For AY 2009-10, the taxpayer claimed expenditure incurred for brand building for a jewellery brand, Nirvana. However, the AO disallowed thze taxpayer's claim. The said disallowance was upheld by CIT(A).

The Mumbai Tribunal allowed the expenditure incurred for brand building of Nirvana by the taxpayer as revenue, being deductible in accordance with the provisions of 37(1) of the Act. The Tribunal observed that since the predominant character of expenditure being advertisement campaign, this expenditure was incurred for purposes of business, not resulting in acquisition of any capital asset or any profit-making apparatus. The Tribunal also held that merely debiting

expenditure in books towards brand building and a statutory recognition being accorded to such an intangible asset as a 'brand' would not by itself imply that an advantage in capital field had arisen. The Tribunal also rejected the tax department's contention that expenditure was in capital field in the absence of data showing any brand value coming into existence, in terms of brand equity or loyalty, leading to increased customer base or any price premium.

*Fine Jewellery (India) Ltd. v. ACIT [TS-371-ITAT-2014(Mum)]*

## Notifications/Circulars/Press Releases

**Central Board of Direct Taxes revises monetary limit for the appeal before the Tribunal / High Court / Supreme Court**

The Central Board of Direct Taxes (CBDT) vide its Instruction No. 5/2014 dated 10 July 2014 clarifies as follows:

- The revised monetary threshold limit for a Tribunal appeal is INR0.4 million; a High Court appeal it is INR1 million; and for a Supreme Court appeal is INR2.5 million. Such revised threshold limit would be applicable to appeals filed on or after 10 July 2014.
- An Appeal should not be filed merely because the tax effect in a case exceeds the monetary limits prescribed above. Filing of an appeal in such cases is to be decided on merits of the case.
- 'Tax effect' means the difference between tax on the total income assessed and tax that would have been chargeable after reduction of income in respect of disputed issues.
- However, tax will not include any interest thereon, except where chargeability of interest itself is in dispute.
- In cases where returned loss is reduced or assessed as income, the tax effect would include notional tax on disputed additions.
- In the case of penalty orders, tax effect will mean quantum of penalty deleted or reduced in the order to be appealed against.
- However, in the case of a composite order of any appellate authority, which involves more than one AY, an appeal shall be filed in respect of all such AYs even if the 'tax effect' is less than the prescribed monetary limits in any of the year(s).
- If, due to less than monetary threshold tax effect, an appeal is not filed, it cannot be inferred that the department implicitly accepted the decision of the Tribunal/Court. Such cases shall be maintained by CITs in the judicial folder for their evidentiary value.
- Issues of constitutional validity of the Act/Rule, ultra vires of notification/instruction, shall be contested on merits notwithstanding the fact that tax effect is less than the monetary threshold.
- Cases where tax effect is not quantifiable or not involved, like registration of trusts or institutions under Section 12A, shall not be governed by the prescribed limits, but by their merits.

*CBDT Instruction No 5/2014 dated 10 July 2014*

**Key highlights of the Central Action Plan 2014-15**

On 30 June 2014, CBDT has released a Central Action Plan (CAP) 2014-2015 focussing on measurable activities necessary for revenue mobilisation. It sets out certain strategies / key result areas with respect to specific areas for revenue mobilisation which lays down the strategy for improving revenue collection and suggested approach of tax authorities to effectuate the same. The key highlights are as follows:

**International taxation**

- Revenue authorities have been directed to verify cases of foreign remittances, primarily the cases where no taxes have been withheld by 31 October 2014 (for cases where the remittances exceeding INR20 million in Delhi and Mumbai) and 31 December 2014 (for cases where the remittances are below INR20 million in Delhi and Mumbai).
- Further, tax authorities have been asked to obtain information from overseas jurisdictions, where they feel the transactions are not genuine in accordance with the guidelines provided in The Manual for Exchange of Information and Instruction No. 1 of 2013, dated 17 January 2013.

**Prosecution and compounding of offences**

- It has been provided that all cases involving defaults on TDS need to be identified. Further, cases involving components of the prosecution must be processed on priority.
- Also, the offences should be sorted within three months of receipt of application by the tax department.

**Strategy for quality assessments**

- Tax authorities have been asked to ensure compliance by the taxpayer to help ensure time bound completion of scrutiny assessment proceedings.
- It has been advised to grant adjournments for the hearing only for valid reasons and not in a routine manner.
- The non-compliances by the assessee is required to be followed up promptly and penal provisions are to be invoked appropriately.
- Key focus areas of AO during scrutiny assessment:
  - Verification of source of money received from outside India in form of gift/share capital/share application/debt/ loans.
  - Verification of payments outside India for goods/ services or loan/debt/capital.
  - Verification of genuineness of credit claimed for taxes paid outside India.
  - Verification of payments to persons located in a low tax jurisdiction.

**Strategy for widening tax base**

- The Non-filers Monitoring System (NMS) was implemented to prioritize action on non-filers with potential tax liabilities. Data analysis was conducted to identify taxpayer's who have not filed income-tax returns despite having high value transactions.
- Bulk letters were sent to Permanent Account Number (PAN) holders who have obtained a tax identification number in India but have not filed their income-tax returns. The letters were issued to them seeking their income-tax returns. The tax authorities have been asked to issue letters to non-filers within 15 days of non-filing being detected.
- Action for penalty/ prosecution for non-filing of income-tax returns should also be considered in appropriate cases.

**Strategy for tax deduction at source**

- Non filing of TDS returns by deductor results in consequential mismatch of TDS in the case of deductee taxpayers. The TDS authorities shall provide a window to taxpayers to flag non-compliance on the part of the deductor for further action.
- Following payments are to be closely scrutinized to identify cases of non-deduction/short deduction of TDS:
  - Payments by universities/education institutes to guest lecturers, event managers, and to medical transcription companies are to be covered under Section 194J of the Act.
  - E-commerce transactions to bring under the purview of TDS.
  - Compensation structure of top executives working in top companies/ PSUs to be reviewed to examine the nature of allowances/ perks and reimbursements.

**Strategy for improving advance tax collections**

- The corporates will be closely monitored to see if advance tax payments are made on a timely basis. If there is deferring of advance tax payments, taxpayer authorities shall issue a notice of demand to the taxpayer

**Strategy for recovery**

- Attachment of operational bank accounts, debtors, assets (both movable and immovable) to be pursued to help ensure effective recovery;
- In case of firms/private companies, partners/directors can be traced for further recovery.

# Transfer pricing

## Decisions

**Bangalore Tribunal concluded that reopening completed assessments under Section 153C of the Income-tax Act and making reference to transfer pricing is invalid when no incriminating material is found during the search**

During the assessment proceedings under Section 143(3) for AY 2009-2010, according to the taxpayer, the AO did not make a reference to the TPO for determination of ALP of international transactions and concluded the assessment. Aggrieved by the order of the AO, the taxpayer preferred an appeal before the CIT(A) and the Tribunal. Subsequently, during the course of proceedings under Section 153C, the AO made a reference to the TPO for determination of ALP of international transactions. The TPO proposed transfer pricing adjustment and the DRP confirmed the same.

The taxpayer contended that the DRP had failed to issue directions within the period of nine months from the end of the month in which the draft assessment order is served to the taxpayer, and that the DRP order was time barred as the directions were issued to the AO on 4 September 2012, and the time limit for issuance of directions by DRP had expired on 31 August 2012. The taxpayer also contended that the reference to the TPO was not valid as there was no incriminating material found during the search which was related to TP for non- abated assessments.

The Tribunal held as follows:

- **Validity of DRP directions -** The taxpayer's contention was rejected observing that there were several hearings which had taken place before 16 August 2012 and therefore, it was possible for the DRP to issue directions on 16 August 2012. The Tribunal held that directions are forwarded to the taxpayer only on principle of natural justice and such issuance of direction does not give rise to any cause of action. Further, the taxpayer's argument that dispatch of DRP direction on the taxpayer is immaterial and what is contemplated under Section 144C of the Act as the issue of directions to the AO is 'too technical'. The Tribunal referred to DRP Rules, 2009, and observed that the rules indicate that the first directions must be issued, and later on should be communicated to the eligible taxpayer and the AO.
- **Whether the final assessment order passed was barred by limitation -** The assessment order under Section 153C was barred by time limitation as the actual order was passed on 29 October 2012. However, in accordance with Section 153B, the assessment needed to be completed on 31 December 2011.
- **Validity of reference to TPO -** Legislature has brought about a single assessment concept in place of dual assessment contemplated under Chapter XIV-B with the introduction of Sections 153A, 153B, 153C, and 153D of the Act. Pending assessment during the proceedings under Section 153A or 153C of the Act will abate and only single assessment is to be made both for disclosed and undisclosed income. The assessments made under Section 153C for the AYs 2003-04 to 2006-07 were invalid as the assessment proceedings for those years had already attained finality and no incriminating material pertaining to transfer pricing adjustment was discovered in the search.
- **Validity of DRP's direction in respect of AMP expenditure -** The DRP is empowered to take cognisance of any new issue observed during the course of proceedings under Section 144C(8) of the Act.

*The Himalaya Drug Company v. DCIT (ITA Nos. 1634 to 1639/Bang/2012)*

**The Delhi High Court upheld the Tribunal's ruling that trading intermediary ('Sogo Shosha' in Japanese) is akin to trading activities, not provision of service**

The taxpayer is a wholly owned subsidiary of Mitsubishi Corporation (MC) Japan, which is one of Japan's leading 'Sogo Shosha' or general trading companies. The taxpayer in this case was engaged in the import of products from associated enterprises, and further resale. The taxpayer contended that it effectively performs as a provider of support services to the 'Sogo Shosha' activities of MC, Japan. The TPO adopted operating profit/total cost as the Profit Level Indicator (PLI) to review the arm's length nature of transactions, wherein the total cost was computed, including cost of goods sold, as the TPO and the DRP were of the view that the transactions in question were trading transactions.

The Tribunal held that both, purchases and sales made by the taxpayer are recorded in its books of accounts. The title of goods is held by the taxpayer for some time and transactions were done on a principle to principle basis. Such activity cannot be bracketed with that of a commission agent or

a broker. Thus, the activities in question are akin to trading activities. Further, the Tribunal held that the comparables in this case have not been selected keeping in view the functional profile of a trading entity. Both the taxpayer and the TPO have benchmarked the transactions by using comparables which have the functional profile of a service provider. The Tribunal set aside the issue to the file of the AO for fresh adjudication in accordance with the law. Aggrieved, the taxpayer filed an appeal at the High Court

The High Court held as follows:

- The Tribunal had concluded that the taxpayer's activities were in the nature of trading as such transactions are entered into on a principal to principal basis, and cannot be considered the activities of a commission agent/broker. The High Court held that it found no infirmity with the reasoning of the Tribunal.
- Regarding the taxpayer's apprehension that in view of the findings of the Tribunal, the taxpayer is likely to be treated as an ordinary trader, and compared with other traders who may not be similarly situated, the High Court did not find any grounds for such apprehension as the Tribunal had made it clear that appropriate comparables would have to be considered for the determination of ALP i.e. entities which are similarly placed as the taxpayer, including in respect of their functional and risk profile as well as working capital exposure, would be chosen as comparables. The High Court found no reason to interfere with the order of the Tribunal, and dismissed the appeal of the taxpayer.

*Mitsubishi Corporation India Private Limited v. ACIT [(ITA No 322/2014) Delhi High Court (AY 2006-07)]*

# Indirect tax

## Service tax - Decisions

### Trading activity is neither 'service' nor 'exempted service' prior to April 2011

The issue was whether for the period prior to April 2011, CENVAT credit of service tax paid on input services used for trading of goods (treating the same as 'exempt service') could be availed and utilised for remitting output service tax liability.

The Tribunal held as follows:

- In terms of CENVAT Credit Rules, 2004 (as effective prior to April 2011), trading was neither a service nor an exempt service.
- Circular No 943/04/2011-CX dated 29 April 2011, clarifies that trading is an 'exempt service', is effective prospectively i.e. from April 2011 and not retrospectively.

Hence, CENVAT credit of service tax paid on input services used for trading of goods would not be admissible.

*CCE v. HCL Infosystem Limited [2014-VIL-110-CESTAT-DEL-ST]*

### Trade margin earned on trading of goods cannot be constituted as 'commission' for rendering of services

In the instant case, the issue was whether the trade margin (mentioned as 'commission' in the invoice) earned by the taxpayer on sale of CNG gas to the third party, at the price fixed by the vendor, would qualify as provision of 'business auxiliary service'

The Mumbai Tribunal, relying on the Judgment of Bangalore Tribunal in the case of Bhagyanagar Gas Ltd. [2013-TIOL-241-CESTAT-BANG], held that the transaction between the vendor and the appellant was in the nature of trading of goods on principal to principal basis and no services were provided, irrespective of the fact that the 'trade margin' was termed as 'commission' and the sale price of the appellant was fixed by the vendor.

*M/s Bharat Petroleum Corpn. Ltd. and Others v. CST [2014-TIOL-1114-CESTAT-MUM]*

# Central Excise - Decisions

### Credit on input services which are used partly by other parties

In the present case, the taxpayer had entered into an agreement with Maharashtra Maritime to construct a jetty on the water front, through which the taxpayer would transport goods. There exists a common water channel which provides access to the jetty and it is used by others as well as the taxpayer. Further, the taxpayer had undertaken dredging activity for functioning of the water channel.

The taxpayer had availed CENVAT credit of service tax paid on the dredging services, which the excise authorities had denied on the grounds that it is not being used in relation to manufacturing activities.

In this background, the Mumbai Tribunal held that the channel belongs to the Maharashtra Maritime Board and is not a private property of the taxpayer. Further, it is also used by others and not solely by the taxpayer; therefore, it cannot be said that the benefit of dredging the channel accrues only to the taxpayer and hence, such dredging is entirely in relation to the manufacturing activity undertaken by the taxpayer. Accordingly, the CESTAT has ordered for a pre-deposit and granted a stay.

*Welspun Maxsteel Limited v. CCE [2014-TIOL-1065-CESTAT-MUM]*

### Whether affixing of labels and MRP on packages at the customs warehouses amounts to 'manufacture'

In the present case, the taxpayer had imported cosmetics and toilet products (both above and less than 10ml/gm) and undertaken the process of affixing labels and Maximum Retail Price (MRP) on the individual packages, in the customs bonded warehouses / private warehouse on execution of bond and bank guarantee with the Customs authorities. The Central Excise authorities assessed that affixing labels and declaring MRPs amount to 'manufacture' as the products are notified under the Third Schedule to the Central Excise Tariff Act and, accordingly, demanded excise duty on the same.

The Mumbai Tribunal held that as long as the goods remain under customs control, they cannot be construed as imported into India and in the present case, the taxpayer undertook the activity of affixing MRPs and labelling in the Customs bonded warehouse / private warehouse as mandatorily required under the Standards of Weights and Measures (Packaged Commodity) Rules, 1977 (PC Rules) along with the DGFT Notification No. 44(RE: 2000) /1997-2002. Therefore, control of the goods remained with the customs and importation of goods cannot be said to have been completed. Accordingly, such activities would not be termed as 'manufacture' and hence, excise duty liability would not arise before the goods are cleared for home consumption. Further, the Tribunal observed that since additional custom duty (CVD) had already been discharged on MRP, which remained the same both before and after clearance, there was no additional duty liability as basis of valuation and the rate of duty was the same, and the entire exercise was revenue-neutral.

In relation to goods weighing less than 10gm/ml, the Tribunal observed that there was no statutory requirement of affixing MRP or labelling under the PC Rules. Hence, excise duty liability would be attracted even if labelling/affixing MRPs was done in a bonded warehouse as there was no statutory requirement of undertaking such activities before the import of such packages was completed, and clearance for home consumption was permitted. However, the Tribunal held that CENVAT credit of CVD paid would be available while discharging excise duty liability.

*L'Oreal India Private Limited and Others v. CCE [2014-TIOL-1170-CESTAT-MUM]*

# Notifications/Circulars/Press Releases

### Excise duty relief for the auto sector extended for six months

In the interim budget presented on 16 February 2014, the Central Government lowered the excise duty on small cars, motorcycles, scooters, and commercial vehicles to 8 percent from 12 per cent, and the duty on sports utility vehicles had also been cut to 24 percent (from 30 percent), on mid-size cars to 20 percent (24 percent), and on large cars to 24 percent (27 percent). This duty relief was originally scheduled to end on 30 June 2014. However, the Central Government has now extended the duty relief till 31 December 2014.

*Notification No. 6/2014-C.E dated 25 June 2014*

# VAT - Decisions

### VAT provisions applicable on construction of immovable property, not sale after construction

In the instant case, the issue before the Uttarakhand HC was whether development of residential complexes would be liable to tax.

The taxpayer, engaged in development of residential complexes, filed an application before the VAT Commissioner seeking an opinion on the taxability of activities undertaken by him. The taxpayer submitted that the land upon which

the residential complexes were to be constructed belongs to him and necessary sanctions have been obtained for the construction thereon, and that he intends to sell the constructed area. The Commissioner contented that such activity is in nature of the works contract and, accordingly, is liable to tax. The Appellate Authority confirmed the Commissioner's finding, against which the taxpayer had filed a Revision petition before the Uttarakhand High Court.

The High Court observed that VAT is levied on every sale made by a dealer/person. The definition of sale includes any transfer of property in goods. Further, the HC observed that as per definition of works contract, sale of goods being a sine qua non for application of the Act will include agreement for carrying out construction of immovable property or commissioning of any immovable property. In other words, a person agreeing with another person to undertake construction for a valuable consideration will be selling such construction as goods covered by the Act, however, if the person sells an immovable property after construction, he will not be selling goods to be liable to tax. Accordingly, the HC remanded the case to the Commissioner to find the objective of the taxpayer's business and disposed of the taxpayer's revision petition.

*M/s Iravanshi Builders and Developers vs. Commissioner, Commercial Tax, Uttarakhand (TS-220-HC-2014(UTT)-VAT)*

## Notifications/Circulars/Press Release

### Assam

Following registered dealers are required to mandatorily file e-returns which are due from 1 July 2014 onwards:

- Registered under Central Sales Tax Act, 1956;
- Registered as "company" under the Companies Act, 1956;
- Annual gross turnover exceeds INR1 million in any of the last three financial years.

*Circular No. 2/2014 No. CT/Comp-3/2009/426 dated 9 J une 2014*

### Gujarat

The key budget 2014-2015 proposals pertaining to Gujarat VAT are as follows:

- Input tax credit restriction in respect of purchases effected within the state and used in the course of inter-state trade or commerce is to be reduced from 2 per cent to 1 per cent. This benefit will not be available on petroleum products and natural gas.
- Exemption in respect of liquefied petroleum gas for domestic use is being withdrawn.
- A new scheme has been announced whereby all the dealers (registered as well as unregistered) engaged in civil works contracts, can make payment of taxes retrospectively at the rate of 0.6 percent for the past years. This scheme provides immunity from interest and penalty, and will be operative for 180 days from the date of its announcement. The detailed instructions of the scheme shall be declared shortly.

### Haryana

With effect from 20 June 2014, the rate of WCT TDS has been increased from 4 per cent to 5 per cent.

*Notification No. S.O.67/H.A.6/2003/S.24/2014. dated 20 June 2014*

### Madhya Pradesh

The budget 2014-2015 proposals are listed below:

- The VAT rate in case of industrial thermal insulators, computer scanner, x-ray film, butter, all kinds of sewing machines, flush door, ceramic and vitrified tiles is to be reduced from 13 per cent to 5 per cent.
- Changes have been proposed in relation to granting of refund of input tax rebate remaining unadjusted at the end of the financial year, re-assessment by submitting declaration forms, stay of recovery in appeal cases and automatic stay of recovery in cases, pending before the Appellate Board.

### Orissa

Procedure for obtaining electronic waybills (e-waybills) in Form VAT-402, with effect from 1 July 2014, has been prescribed.

*Notification No. V-43 /2013 /10118 /CT dated 20 June 2014*

### Rajasthan

The due date for filing of annual returns in Form 10A for Financial Year 2012-2013 has been extended up to 15 August 2014.

*Notification No F.26(315)ACCT/MEA/2014/317 dated 2 July 2014*

An input tax credit (ITC) claim is allowed only after verification of the tax deposit. Therefore, directions have been issued for verifying such tax deposits to allow the ITC claims.

*Circular No. F.26(197)/ACCT/MEA/2013/235 dated 19 June 2014*

The key highlights of Budget 2014-2015 are specified below:

- The threshold limit for registration as a manufacturer has been increased from INR0.2 million to INR0.5 million.
- Interest on refund of tax will be payable with effect from 1st April of the year immediately following the year to which the refund relates to. Earlier, it was allowed if the refund is received after 30 days from the date on which it has become due.

- E-application is to be made for fresh / amendment / cancellation of VAT / CST registration, obtaining duplicate VAT / CST registration certificate, opting for composition schemes, reopening of ex –parte assessments and rectification of assessment order.
- Time limit for submission of the Annual Return i.e. VAT-10A has been reduced from ten months to nine months and for VAT-11 the time limit has been extended from three months to nine months.
- Returns filed under Form VAT 10 or Form VAT 10A or Form VAT 11 can be revised within nine months of the end of the relevant financial year or issuance of any notice under the RVAT Act, whichever is earlier.
- Application for rectification of declaration under Form VAT-15 (Declaration of Purchases within the State for Export), can now be filed within six months of the generation of such form or upto 30 September 2014, whichever is later, instead of the earlier time limit of sixty days.
- New Rule 22A has been inserted for determining the taxable turnover in case of execution of works contract by builders or developers or any such contractor undertaking activity in relation to construction of building, roads, dams, bridges, canals etc.

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