Editorial

The Union government is confident that it would be able to garner an adequate number of votes in the Rajya Sabha to ensure the passage of the constitution amendment bill on goods and services tax (GST) during the forthcoming monsoon session of the Parliament. Based on this, it has already begun working on a timeline that envisages a roll-out of GST from April 2017.

The Central Board of Direct Taxes (CBDT) has issued a press release requesting general public and stakeholders to provide their inputs/suggestions on the provisions of General Anti-Avoidance Rules (GAAR) in respect of which further clarity is required, from its implementation perspective. The inputs may be provided on or before 30 June 2016 electronically via an e-mail to gaar-dor@gov.in and/or by post with ‘Comments for Guidance Note on GAAR’ written on an envelope.

The Finance Act, 2016 has introduced an ‘Equalisation Levy’ (Chapter VIII) in line with the recommendation of the Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting (BEPS) project to tax e-commerce transactions. The Act provides that the Equalisation levy is to be charged on specified services (online advertising, provision of digital advertising space, etc.) at 6 per cent of the amount of consideration for specified services received or receivable by a non-resident payee not having a Permanent Establishment (PE) in India. The CBDT has now issued the Equalisation Levy Rules, 2016 to lay down the compliance procedure to be followed for such levy. The Rules will come into force from 1 June 2016.

As per news reports, after revising the tax treaty with Mauritius, the government will soon initiate the process of modifying tax agreements with Singapore and Cyprus and hopes to complete the process within the current financial year so that there is uniformity on capital gains tax with regard to investments.

Recently, CBDT has prescribed the manner of computation of fair market value of assets of the foreign company or entity and the reporting requirements by the Indian concern in relation to indirect transfer provisions through the amendments of the Income-tax Rules, 1962. Forms for reporting requirements have also been prescribed.

The Delhi High Court in the case of Herbalife International India Pvt. Ltd held that payment of administrative fees to a foreign company is not liable for disallowance under Section 40(a)(i) of the Income-tax Act, 1961 (the Act) for non-deduction of tax at source in view of the non-discrimination clause under the India-USA tax treaty.

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

Payment of administrative fees to a foreign company is not liable for disallowance under Section 40(a)(i) of the Income-tax Act for non-deduction of tax at source in view of non-discrimination clause under the India-USA tax treaty

The taxpayer is the Indian subsidiary of Herbalife International Inc. (HII), USA, engaged in the business of trading and marketing of herbal products for use in weight management, to improve nutrition and enhance personal care. The taxpayer entered into an Administrative Services Agreement (ASA) with Herbalife International of America Inc. (HIAI) for providing data processing services, accounting, financial and planning services, marketing services, etc. In terms of the agreement, the taxpayer was to pay an administrative fee to HIAI as consideration for the various services provided to the taxpayer under the ASA. During the Assessment Year (AY) 2001-02, the taxpayer claimed the administrative fee as expenditure while computing its taxable income.

The Assessing Officer (AO) held that the administrative expenditure was to be treated as Fees for Technical Services (FTS) since the services were utilised in India. Therefore, the taxpayer was liable to deduct tax at source under Section 195 of the Act on the said amount. On account of non-deduction of tax, the AO disallowed the expenditure under Section 40(a)(i) of the Act. The Commissioner of Income-tax (Appeals) [CIT(A)] upheld the order of the AO.

The Income-tax Appellate Tribunal (the Tribunal) held that administrative fees paid by the taxpayer to HIAI were allowable as deduction. It was held that Section 40(a)(i) of the Act could not be invoked by the AO to disallow the claim for deduction as the payment was not taxable at the hands of the payee. The Tribunal held that HIAI did not have a permanent establishment (PE) in India. Further in light of Article 26(3) of the India-USA tax treaty, Section 40(a)(i) of the Act was discriminatory and could not be invoked to disallow the claim for deduction even if the sum in question was chargeable to tax in India.

The Delhi High Court held that under Section 40(a)(i) of the Act, expenditure is allowed only when tax has deducted at source while making payment to a non-resident. However, for the relevant assessment year the payments to a resident were neither subject to the deduction of tax, nor the consequence of disallowance was applicable. Accordingly, it was held that Section 40(a)(i) of the Act is discriminatory and therefore, not applicable in terms of non-discrimination clause under the tax treaty.

CIT v. Herbalife International India Pvt Ltd. (ITA No. 7/2007) – Taxsutra.com

Taxpayer is a beneficial owner of royalty and interest income and therefore eligible for beneficial tax rate under the India-Singapore tax treaty

The taxpayer, a company, incorporated in Singapore, was a 100 per cent subsidiary of a French company. The principal activities of the taxpayer were to act as a headquarters for the Asia-Pacific region, rendering administrative, marketing and sales services to the group and affiliated companies, trading in paper and performance minerals and other related business activities including project work. A U.K. based company (a group company of the taxpayer) developed know-how for manufacture of products. The U.K. company wants to develop the sub-licensing market in the Asia Pacific region for its know-how and wished the taxpayer to act as sub-licensor in order to develop its market. Therefore, the U.K. company entered into a know-how agreement with the taxpayer.

The taxpayer in lieu of this license granted, entered into a technology agreement with an Indian company. Under the technology agreement, the taxpayer undertook to provide a non-exclusive, non-transferable, non-assignable and revocable license to an Indian company. Such license was provided to use the technology and know-how in connection with the development, manufacture, use and sale of calcium carbonate and calcium carbonate products in the geographical territory of India.

During the year under consideration, the taxpayer had received payment on account of royalty and interest income. The receipt was offered to tax at the beneficial rate prescribed under the tax treaty. The Assessing Officer (AO) held that the taxpayer was not the beneficial owner of the royalty and interest, and therefore, it was not eligible to claim the lower rate of tax for interest and royalty under the tax treaty. The AO held that beneficial owner of royalty was the U.K. company. The know-how was actually transferred to the Indian entity by the U.K. company, and the taxpayer was only acting as an agent for taking the benefit of the lower rate as per the tax treaty.

Based on facts of the case, the Tribunal held that the taxpayer was the beneficial owner of royalty in line with the provisions of Article 12 of the tax treaty and the same was to be taxed at 10 per cent. The Tribunal observed that the taxpayer had entered into the know-how agreement with the U.K. based company which in turn was sub-licensed by the taxpayer to an Indian company and received royalty income on the same. The royalty income has been received in its own right as the beneficial owner. With regard to interest income received by the taxpayer, it has been held that since the amount was advanced by the taxpayer as an ECB loan to an Indian company, the interest income received by the taxpayer being the beneficial owner, taxable at 15 per cent under Article 11 of the tax treaty.

In the facts of the present case, it is not the case of tax department that the amount has not been remitted to Singapore, but the benefit of tax treaty have been denied to
the taxpayer since the said amount has not been remitted in the current fiscal year i.e. the financial year 2009-10. Where the amount has been remitted to Singapore and has been subject to the tax, there is no merit in the orders of the lower authorities in denying the benefit of tax treaty provisions to the taxpayer in taxing the income at lower rates.

*Imerys Asia Pacific Pvt. Ltd., v. DDIT (ITA No.233/PN/2014) – Taxsutra.com*

**Notification/Circulars/Press Releases**

**India and Mauritius sign a protocol amending the India-Mauritius tax treaty**

On 10 May 2016, India and Mauritius has signed a protocol amending the India-Mauritius tax treaty at Mauritius. The key features of the protocol are as under:

- Gains from the alienation of shares acquired on or after 1 April 2017 in a company which is a resident of a state may be taxed in that state. In other words, gains from transfer of shares of an Indian resident company may be taxed in India. The tax rate on such capital gains arising during the period from 1 April 2017 to 31 March 2019 shall not exceed 50 per cent of the tax rate applicable on such gains in the state of residence of the company whose shares are being alienated.
- A Limitation of Benefit (LOB) clause has been introduced which provides that a resident of a state shall not be entitled to the benefits of 50 per cent of the tax rate applicable in transition period (1 April 2017 to 31 March 2019) if its affairs were arranged with the primary purpose to take advantage of such benefits.
- The service permanent establishment (PE) clause has been introduced in the India-Mauritius tax treaty.
- The existing tax treaty does not have ‘Fees for Technical Services’ (FTS) related article. The protocol has introduced FTS article. FTS has been defined to mean payments of any kind (other than those mentioned in Articles 14 and 15) as consideration for managerial or technical or consultancy services, including the provision of services of technical or other personnel.
- Interest may also be taxed in the state in which it arises, and according to the laws of that state, but if the beneficial owner of the interest is a resident of the other state, the tax so charged shall not exceed 7.5 per cent of the gross amount of the interest. Further, interest arising in a state shall be exempt from tax in that state provided it is derived and beneficially owned by any bank, resident of the other state carrying on bona fide banking business. However, this exemption shall apply only if such interest arises from debt claims existing on or before 31 March 2017.
- The existing tax treaty gives the right to the resident state to tax other income. However, the protocol provides that other income of a resident of a state may also be taxed in the source state.

**CBDT issues draft rules on Foreign Tax Credit**

The CBDT had set up a committee to suggest the methodology for grant of Foreign Tax Credit (FTC). After due consideration of the issues raised by various stakeholders, the committee submitted its report. On the basis of the report of the committee and the provisions of the Act, CBDT proposed the following draft rules for the grant of FTC:

- The resident taxpayer shall be allowed FTC of any tax paid in a country or specified territory outside India, by way of deduction or otherwise, in the year in which the income corresponding to such tax has been offered to tax or assessed to tax in India.
- The FTC shall be available against the amount of tax, surcharge and cess payable under the Act but not in respect of any sum payable by way of interest, fee or penalty.
- FTC shall not be available in respect of any amount of foreign tax which is disputed by the taxpayer.
- The FTC shall be the aggregate of the amounts of credit computed separately for each source of income arising from a particular country or specified territory and given effect to in the following manner:
- The FTC shall be the lower of the tax payable under the Act on such income and the foreign tax paid on such income.
- The FTC shall be determined by conversion of the currency of payment of foreign tax at the telegraphic transfer buying rate on the date on which such tax has been paid or deducted.
- In the case where any tax is payable under the provisions of Minimum Alternate Tax (MAT) under the Act, the credit of foreign tax shall be allowed against such tax in the same manner as is allowable against any tax payable under the normal provisions of the Act.
- Where the amount of FTC available against the tax payable under the provisions of MAT, exceeds the amount of tax credit available against the normal provisions, then while computing the amount of MAT credit in respect of the taxes paid under MAT provisions, as the case may be, such excess shall be ignored.
- The FTC shall not be allowed unless the prescribed documents are furnished by the taxpayer i.e. certificate from the tax authority of a country or specified territory outside India specifying the nature of income and the amount of tax deducted, acknowledgment of online tax payment or bank counter foil or slip or challan for foreign tax payment and a declaration that amount of foreign tax in respect of which credit is being claimed is not under any dispute.

*Source - http://mof.govmu.org, 12 May 2016*
Decisions

Payment made for buy-back of shares from its employees cannot be allowed as expenditure under the Income-tax Act

The taxpayer is engaged in the business of share broking. During the year under consideration, the taxpayer implemented Employee Stock Option (ESOP) Scheme for the benefit of its employees, through Shriram Insight Welfare Trust (the Trust). The Trust purchased 350,000 equity shares from the existing promoters of the company at a price of INR15 per equity share and thereafter, these shares were allotted to the eligible employees at the same price. Subsequently, the Trust purchased 32,700 equity shares from the employees at the price of INR340 per equity share. The taxpayer granted a sum of INR11.12 million for buying back these shares. The original assessment was completed under Section 143(3) of the Act. Subsequently, the AO issued a notice to reopen the assessment under Section 147 of the Act on the ground that the ESOP cost of INR11.12 million cannot be allowed as expenditure in the hands of the taxpayer.

The Tribunal observed that there is no material available on record to suggest when the shares were allotted to the employees of the taxpayer. It is not known when the shares were allotted at INR15 per equity share, why the very same shares were claimed to be purchased at a cost of INR340 per equity share. This arrangement of allotment of shares at INR15 per equity share and then buy-back at INR340 per equity share creates a doubt whether the shares were in fact allotted to the respective employees or not. In the absence of any material, the CIT(A) has rightly confirmed the disallowance made by the AO.

In the case of Nova Nordisk India Pvt. Ltd. v. DCIT [2014] 63 SOT 242 (Bang), the actual issue of shares of the parent company by the taxpayer to its employees is not in dispute. Therefore, the difference between the fair market value of the shares of the parent company on the date of issue of shares and the price at which those shares were issued by the taxpayer to its employees was reimbursed by the taxpayer to its parent company. This sum was claimed as expenditure in the Profit & Loss account. However, in the present case, the taxpayer is not claiming the difference between fair market value and allotment price as expenditure. The taxpayer is claiming the purchase price at INR340 per share from its employees as expenditure and therefore, the decision in the case of Nova Nordisk India Pvt. Ltd. is not applicable to the facts of the case. Since the shares were purchased by the trust from the promoters of the taxpayer at the rate of INR15 per equity share and the same was also claimed to be allotted to the employees of the taxpayer at a price of INR15 per equity share, the buy-back of the shares from the same employees at a cost of INR340 per equity share cannot be treated as an expenditure for the taxpayer.

The claim of the taxpayer is only to reduce the taxable income of the taxpayer. Therefore, the same cannot be allowed under Section 37 of the Act.

Shriram Insight Share Brokers Limited v. DCIT (ITA Nos. 733, 734 & 735/Mds/2015) – Taxsutra.com

Subscription payments are liable for taxation under Section 194C of the Income-tax Act and not under Section 194J of the Act

Subscription payments

The taxpayer was engaged in the business as a Multi System Operator (MSO) in the Indian Cable Industry, which is a principal mode of distribution of television channels. The taxpayer subscribed to various TV network pay channels like Star, Sony, Zee, etc. and paid them subscription charges for redistribution of the TV channels through cable operators by de-encryption of signals, with the help of IRDs and viewing cards. Payment of subscriptions of channels was debited in its books of accounts as pay channel subscription. In consideration of redistribution and viewing, the taxpayer recovered subscription from ultimate subscribers through cable operators. Such receipts were shown as subscription income in the books of the taxpayer. The taxpayer deducted tax on the pay channel subscription paid to broadcasters under Section 194C of the Act. The AO observed that tax should have been deducted under Section 194J of the Act on the ground that the said payment was in the nature of ‘royalty’ defined under Explanation (ba) to Section 194J read with explanation 2(iv) to Section 9(1)(vi) of the Act. Thus, the taxpayer was treated as assessee in default for ‘short deduction’ of tax. The CIT(A) accepted the stand of the taxpayer and reversed the order passed by the AO.

The Tribunal observed that these payments shall be covered in the specific provisions provided under Section 194C of the Act, wherein prior to amendment by the Finance Act, 2009 it has been provided that “work” shall include broadcasting and telecasting, etc. Even post amendment of the section, the situation remains same, as clarified by Explanation (iv) to Section 194C of the Act, wherein a similar definition has been given to explain scope and meaning of the term ‘work’. It is a well-established rule of interpretation of law that when a particular situation is covered in a specific provision of law then its inclusion in the general provisions of the law is ruled out. It is noted that in the Explanation to Section 194J of the Act, it has been mentioned in Explanation (ba) that ‘royalty’ shall have the same meaning as given in Explanation 2 to clause (vi) of sub Section (1) of Section 9 of the Act. The dominant purpose of the impugned payment was not for the purpose of use of the equipments provided to the taxpayer but is transmission, broadcasting and telecast of the programme contents. A careful analysis of the provisions, it indicates that the taxpayer’s case falls under Section 194C of the Act. It has been observed that this issue is no more res-integra. Where the work of broadcasting and telecasting of the programmes specifically falls under the ambit of provisions of Section 194C, then in view of the decision of CIT v. Prasar Bharati [2007] 292 ITR 580 (Del), the provisions of
Section 194J of the Act cannot be applied on such payments. The CBDT Circular No. 720 dated 30 August 1995, also supports this view.

**Provision for expenses**

During the year under consideration, the taxpayer made provision of expenses in the books of accounts. However, tax was not deducted at source on the same. The AO had held that the taxpayer should have deducted tax on the amount of provision of expenses credited by the taxpayer in the books of accounts. The CIT(A) held that the taxpayer was not liable to deduct tax on the amount of provisions since the same was disallowed under Section 40(a)(ia) of the Act or some of these expenditure were paid in the subsequent year on identification of the creditor or these were reversed in the subsequent year.

The Karnataka High Court in the case of Karnataka Power Transmission Corporation Ltd v. DCIT [2016] 238 Taxman 287 (Kar) has made detailed analysis of requirement of law regarding withholding of tax on mere provision of interest, without there being any actual liability of payment of interest as per the terms between the parties, and held that as per law tax was not required to be deducted under such circumstances. In the present case the Tribunal remitted back the issue to the file of the AO for verification of facts with the following guidelines:

- If provision is made without making specific entries into account of parties and payee was not identifiable, then, TDS provisions would not be applicable.
- Once the amount has been disallowed under Section 40(a)(ia) of the Act for non-deduction of tax, it cannot be subjected to TDS provision again so as to make the taxpayer liable to pay tax under Section 201 and interest under Section 201(1A) of the Act.
- It has to be shown by the taxpayer that whenever payment has been made out of the provision after crediting the amount in the account of the payees, as and when identified, then, tax has been deducted before making the said payment or crediting the amount in the account of the payee, whichever has occurred first.
- Wherever, payees were not identified, the amount of provision was reversed.

**Notification/Circulars/Press Releases**

**CBDT prescribes an online procedure for filing TDS statement**

The CBDT has prescribed the procedures of registration on the e-filing portal, the manner of preparation of TDS statements and submission of TDS statements. As per the new procedure, deductors/collectors will have an option of online filing of e-TDS/TCS returns through an e-filing portal or submission at TIN facilitation centres.

As per the online procedure, the deductor/collector holding a valid TAN is required to get registered through the e-filing website. The deductor/collector is required to download Return Preparation Utility (RPU) from the tin-nsdl website. The RPU shall prepare the TDS/TCS statement and File Validation Utility (FVU) to validate the statements. The deductor/collector is required to upload the zip file along with the signature file. The uploaded file shall be processed and validated at the e-filing portal. Upon validation the status shall be either ‘Accepted’ or ‘Rejected’ which will reflect within 24 hours from the time of upload. The status of the uploaded file will be visible on the portal. In case the submitted file is rejected, the reason for rejection shall be displayed.

**Notification No. 6/2016, dated 4 May 2016**

**CBDT prescribes an online procedure for declaration by a person claiming receipt of certain incomes without deduction of tax**

The CBDT issued a notification prescribing the procedure for online submission of declaration by a person claiming receipt of certain incomes without deduction of tax through the e-filing portal.

As per the online procedure, the deductor/collector holding a valid TAN is required to get registered through the e-filing website. The Form 15G/15H utility can be used to prepare the XML zip file. The declaration is required to be submitted using a digital signature certificate (DSC). The designated person is required to upload the zip file along with the signature file. The uploaded file shall be processed and validated at the e-filing portal. Upon validation, the status shall be either ‘Accepted’ or ‘Rejected’ which will reflect within 24 hours from the time of upload. The status of the uploaded file will be visible at ‘My account’. In case the submitted file is rejected, the reason for rejection shall be displayed.

**Notification No. 7/2016, dated 4 May 2016**

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*ITO(TDS) v. Wire & Wireless (India) Ltd. (ITA NO.2383/Mum/2013) – Taxsutra.com*
CBDT prescribes an online procedure for submission of form by an authorised dealer in respect of foreign remittances

The CBDT has prescribed the procedure for submission of Form 15CC by an authorised dealer in respect of remittances under Section 195(6) of the Act. The authorised person is required to login to the e-filing website with the ITDREIN, PAN and password. The prescribed schema for the report under Form 15CC and a utility to prepare an XML file can be downloaded from the e-filing website home page under the forms (other than ITR) tab. The authorised person will be required to submit the PAN of the reporting entity, period for which report is to be submitted and the reporting entity category for which the report is to be submitted. The authorised person will then be provided the option to upload the Form 15CC. The form is required to be submitted using a DSC of the authorised person.

Notification No.8/2016, dated 4 May 2016

CBDT clarifies on taxability of income from the transfer of unlisted shares

The CBDT has issued a clarification that the income arising from the transfer of unlisted shares would be considered under the head ‘capital gain’, irrespective of the period of holding, with a view to avoid disputes/litigations and to maintain uniform approach. Further, the clarification would not be necessarily applied in the following situations:

- The genuineness of transactions in unlisted shares itself is questionable or
- The transfer of unlisted shares is related to an issue pertaining to lifting of the corporate veil; or
- The transfer of unlisted shares is made along with the control and management of the underlying business.

The AO would take the appropriate view in such situations.

CBDT Clarification F No. 225/12/2016/ITA.II, dated 2 May 2016
Decisions

Overseas AEs selected as tested parties in light of the APA that concluded for later year

The taxpayer is engaged in the business of manufacturing and sale of Active Pharmaceutical Ingredients (APIs) (bulk drug/formulations). The overseas Associated Enterprises (AEs) act as distributors/secondary manufacturers for the products manufactured by the taxpayer. During Assessment Year (AY) 2008-09, the taxpayer entered into transactions with its AEs in the nature of sale of APIs and drug formulations apart from other transactions which were not questioned by the Transfer Pricing Officer (TPO). The taxpayer had benchmarked the impugned international transactions by considering overseas AEs as tested parties with Transactional Net Margin Method as the most appropriate method. The taxpayer selected regional comparables for benchmarking the margins earned by overseas AEs. The TPO rejected the selection of overseas AEs as the tested parties and tested the company-wide margins of the taxpayer while determining the Arm’s Length Price (ALP) of the international transactions. The Dispute Resolution Panel (DRP) upheld the Transfer Pricing (TP) adjustment made by the TPO.

Tribunal’s ruling

- Observing the fact that Indian TP regulations do not provide any guidance on the concept of tested party, the Tribunal relied on international guidance.

- Taking cognizance of the Advanced Pricing Agreement (APA) entered by the taxpayer, the Tribunal stated that principles laid down in an APA by the highest revenue authority (CBDT) for comparability analysis should be given highest sanctity. Witnessing the fact that the Functions, Asset and Risk (FAR) analysis and nature of international transactions are identical, it was held that the APA must mandatorily be followed by the TPO to determine ALP of transactions for the year under appeal.

- Relying on Rule 10MA, the Tribunal appreciated that even in the absence of rollback, the methodology accepted in the APA may be followed for an earlier year (not covered under the APA) if the facts and nature of international transactions remain the same.

- Distinguishing the earlier years’ order in the taxpayer’s own case, the Tribunal held that the benchmarking approach followed in the current year was different to that undertaken in AY 2004-05. It was also noted that in the order for AY 2004-05, it was held that least complex entities must be selected as tested parties, which the taxpayer has also argued extensively.

- The Tribunal held that the taxpayer has adduced reasonably comparative data based on regional benchmarking and that the TPO was incorrect in rejecting foreign AEs as tested parties. Reliance was also placed on various case laws cited by the taxpayer wherein selection of overseas parties has been upheld.

- Based on the above, the Tribunal held that overseas AEs should be considered as tested parties and that due weightage be given to the APA on other issues as well.

Ranbaxy Laboratories Limited vs ACIT (ITA No. 196/Del/2013)

Agreement between the taxpayer and its AE and proof that the AMP expenditure is not for the taxpayer’s business in India are prerequisite for treating AMP expenditure as an international transaction

The taxpayer is engaged in the business of manufacturing and distribution of cosmetics. The TPO found all international transactions of the taxpayer to be at arm’s length, except one i.e. Advertisement Marketing and Promotion (AMP) expenses. The TPO, for benchmarking the international transaction of AMP expenses adopted Profit Split Method (PSM) and held that profits could be attributed to three major activities of the taxpayer viz. manufacturing – 50 per cent, research and development – 15 per cent and AMP – 35 per cent.

The TPO computed that AMP expenses incurred by the taxpayer were 0.63 per cent of the global AMP expenses. Thus, out of 35 per cent of the global profits, he attributed 0.63 per cent of the profits to the taxpayer. Alternatively, the TPO had also determined the ALP of AMP expenses based on Bright Line Test (BLT) for the manufacturing segment and distribution segment of the taxpayer and computed an adjustment based on Cost Plus Method. The DRP upheld the TP adjustment made by the TPO.

Tribunal’s ruling

- The Tribunal appreciated the argument of the taxpayer that AMP expenditure incurred by it was for products launched especially for the Indian market and that the brand of the AEs was not promoted. In coming to this conclusion, the Tribunal had taken cognizance of the taxpayer’s growth in sales of 19 times since the year 1999. It held that AMP expenses incurred by the taxpayer had played an important role in the rapid progress made by the taxpayer in the Indian market.

- The Tribunal held that the TPO’s assumption that AMP expenditure incurred by the taxpayer would have benefitted the AE who owned the brands used by the taxpayer, suffered from a basic flaw since it presumed that the taxpayer would not incur AMP to promote its own business.

- The Tribunal held that the moot question in this case was whether in absence of any agreement for payment of AMP

expenses, it could be held that there was an international transaction. The answer was an emphatic ‘no’ in view of the decision of the Hon’ble Delhi High Court in the case of Maruti Suzuki India Ltd. vs CIT [2015] 64 Taxmann.com 150 (Del), CIT vs Whirlpool of India Ltd. [2015] 64 Taxmann.com 324 (Del) and Bausch & Lomb Eyecare (India) Pvt. Ltd (ITA No. 643 of 2014).

On the tax department’s contention that the matter ought to be remanded to the file of the TPO, the Tribunal held that non-availability of a particular decision of thehigher forum cannot justify the restoration of issues in each and every case. Unnecessary litigation has to be avoided and issues have to be settled for once and all.

The Tribunal held that in the absence of an agreement between the taxpayer and the AE on AMP expenditure, the first and primary precondition of treating the transaction in question an international transaction remained unsatisfied. Without crossing the first threshold, the second threshold of application of principles of Sony Ericsson Mobile Communication India Private Limited vs CIT [2015] 231 Taxman 113 (Del) could not be approached. Hence, when AMP expenditure itself was not an international transaction, the matter was not required to be restored to the file of the TPO.

L’Oreal India Private Limited vs DCIT [ITA Nos. 7714, 1119, 976/Mum-2014 and 518, 335/Mum-2015]
**Indirect Tax**

**Service tax - Decisions**

**Service tax on admission to entertainment events and access to amusement facilities is constitutionally valid**

The issue in the instant case was whether levy of service tax on admission to entertainment events and access to amusement facilities is unconstitutional on the pretext of trenching of powers of the state.

The Kerala High Court held that the aforesaid levy is constitutionally valid based on the following observations:

- The Union’s powers cannot be affected merely basis the reasoning of services being covered under the state list.
- There is no trenching of the Union on the powers conferred to the states as the two legislature tax two different aspects.
- The respective legislations i.e., the Union and the states are levying tax on the respective aspect of ‘service’ and ‘amusement’.
- Incidental overlapping or trenching upon one legislature by the other is permissible and to be ignored.

*M/s Kanjirappilly Amusement Park and Hotels Pvt Ltd v. Union of India and others [TS-164-HC-2016]*

**Advance rulings**

**Integrated testing/commissioning for metro rail projects constitutes original works, not taxable**

In the instant case, the taxpayer entered into contracts for design, manufacture, testing and commissioning, etc. of rolling stock of metro rail projects. The issue was whether the aforesaid services qualify for exemption pertaining to commissioning of original works in relation to railways, including monorail or metro covered under the Mega Exemption Notification.

The Authority for Advance Ruling (AAR) held that the said activity would be exempt, basis the following reasoning:

- Commissioning is not defined under the service tax law, referring to the dictionary meaning, it means to bring a machine, plant, equipment, etc. into operation and the said activity undertaken by the applicant amounts to commissioning; and
- Integrated testing provided by the applicant qualifies as ‘original works’ in terms of the meaning assigned to it under the service tax law.

*M/s Hyundai Rotem Company, New Delhi v. CCE, Hyderabad-II and Commissioner of Service tax, New Delhi, [AIT-2016-45-AAR]*

**Volume discounts do not indicate service provider – service receiver relationship**

In the instant case, the taxpayer provided advertisement placement services to advertisers. The taxpayer proposes to enter into two types of arrangement with advertisers to procure inventory from Media Owners (MO).

In the first arrangement, the taxpayer would be procuring media content on behalf of advertisers and MO would raise invoices to advertisers. In the second arrangement, the taxpayer would procure media content on its own account and the MO would raise invoices to the taxpayer. Under both the arrangements, the taxpayer would receive incidental incentives/volume discounts at the end of the financial year. The issue in the instant case was whether it can be inferred from the discounts that the taxpayer was providing services to the MO in each of these arrangements.

The AAR held that the incidental receipts or volume discounts were gratuitous payments and there was no activity undertaken by the taxpayer which resulted in the MO giving volume discounts, especially when the choice of selecting the MO is reportedly with the advertiser and hence, there is no service element.

*M/s AKQA Media India Private Limited v. Commissioner of Service tax, Mumbai – II -[AIT-2016-47-AAR]*

**Unincorporated association arising in a revenue sharing agreement is a different person in terms of service tax**

In the instant case, the taxpayer and another entity entered into a revenue sharing arrangement to provide education services (upto Higher Secondary School), wherein the taxpayer undertook to provide infrastructural requirement of the educational institution and the partner entity undertook to ensure day to day administration activities.

The key issue in the instant case was whether service tax is payable on the revenue share of each of the members of the partnership arrangement as services provided inter-se.

The AAR held that service tax is leviable on revenue share of the respective parties which pertains to rendering of taxable services. However, service tax is not leviable on the fees collected from the students to the extent it is covered under the Negative list. Further, in terms of the service tax law, students not being service providers are not required to discharge service tax. The decision of the AAR is based on the reasoning that the taxpayer, another entity and the resulting entity i.e., partnering person are three separate persons in terms of service tax law and provision of services inter-se would not amount to service to self.

*M/s Choice Estates and Constructions Ltd. v. Commissioner of Customs, Excise and Service tax [ALT-2016-46-AAR]*
Notification/Circulars/Press Releases

Service tax is applicable on a reverse charge basis on services provided by an arbitral tribunal to a business entity

The Central Board of Excise and Customs (CBEC) has clarified that service tax is applicable under a reverse charge mechanism on services provided by an arbitral tribunal only to a business entity located in a taxable territory with a turnover exceeding INR 10 lakh in the preceding financial year.

_Circular No. 193/03/2016 – ST, dated 18 May 2016_

Central Excise - Decisions

Job worker allowed to take credit of duty paid by manufacturer under Rule 4(5)(a) of CENVAT Credit Rules, 2004

In the instant case, the issue was whether a job worker can take the credit of duty paid by principal manufacturer on non-receipt of capital goods sent to a job worker on expiry of 180 days.

The principal manufacturer transferred injection moulding machines to a job worker without payment of excise duty under Rule 4(5)(a) of the CENVAT Credit Rules, 2004 ('the Credit Rules') under job work challans. The goods sent on job work were not received within the expiry of 180 days. Therefore, the principal manufacturer paid the excise duty and raised supplementary invoices. The benefit of CENVAT credit was availed by the job worker however, the said credit availment was regarded as irregular by the department for the reason that the clearance by the principal manufacturer was through job work challans under Rule 4(5)(a) of the Credit Rules, which does not contemplate passing of CENVAT credit to the job worker and goods at the time of actual removal were not accompanied by the invoices.

Subsequently, a Show Cause Notice was issued to the job worker proposing recovery of credit availed under job work challans together with interest and penalty. The notice was adjudicated by the Commissioner of Central Excise, who confirmed the demand on the ground that this amount was not eligible for CENVAT credit availment. Aggrieved by the Commissioner Order's, the matter was appealed before CESTAT, which was decided in favour of the job worker.

The Revenue preferred an appeal before the High Court. The High Court considering the arguments observed that there is no dispute that excise duty was paid by the manufacturer on capital goods sent to the job worker. As a consequence, the recipient of the goods was entitled to avail credit of such excise duty paid. However, the entitlement under Rule 4(5)(a) of the Credit Rules is restricted only to the period of 180 days. Since the job worker did not return it within the period stipulated, the manufacturer reversed the CENVAT credit and raised revised invoices upon the job worker.

Even on admitted facts, the fact remains that duty has been paid and the CENVAT credit is claimed only once. Therefore, the twin components that are required to be satisfied are satisfied in this case. Accordingly, the appeals are dismissed and CENVAT credit was allowed.

_CCE vs Shinhan Plasto India Pvt Ltd and Hyundai Motor India Ltd (2016-TIOL-991-HC-MAD-CX)_

Notification/Circulars/Press Releases

Imposition of central excise on jewellery - Extension of ‘time limit’ for obtaining registration

Central Government has extended the time limit for obtaining central excise registration up to 1 July 2016 for jewellers, though the liability for central excise duty payment will be with effect from 1 March 2016. The assessee i.e. jewellers may make the payment of excise duty for the months of March 2016, April 2016 and May 2016 along with the payment of excise duty for the month of June 2016.

_Circular 1026/14/2016-CX dated 23 April 2016_

Customs duty - Decisions

Refund of Additional duty of Customs

In the present case, the Commissioner of Customs (Appeals II), Chennai rejected the SAD refund claim for non-submission of chartered accountants appointment letter and board resolution for his scrutiny to grant refund of additional duty of customs (ADC).

The Madras Tribunal considering the order passed by Commissioner of Customs (A) mentioned that no such law so far has been enacted requiring board resolution to be filed for examination by Commissioner (A). With regard to chartered accountants' appointment letters, CESTAT mentioned that this is also a surprising condition, which has been misconceived by the Commissioner (A). Thus, it appears that he/she has a clear mind to deprive the appellant from the zone of consideration under law. Such misconception of the authority became an embargo against the appellant and was detriment to the process of justice.

With the aforesaid observation and direction, the CESTAT remanded the matter to the Commissioner (Appeals) to dispose the matter in accordance with law within the time stipulated.

_M/S Becton Dickinson India Pvt Ltd vs CC (2016-TIOL-1111-CESTAT-MAD)_

Notification/Circulars/Press Releases

Relaxation of Know Your Customer (KYC) norms

With regard to import consignments meant for an individual, CBEC has clarified that in cases, where the proof of address is not available with the individual, the proof of identity collected at the time of delivery along with the address recorded for the delivery purpose by the courier companies would suffice for KYC verification.

Further, the courier company would keep a record of the address where the goods are delivered and the same would be treated as proof of address of the individual. However, courier companies must show due diligence in maintaining the records of proof of address. The above dispensation for proof of address would be available only in
respect of individuals for import of documents, gifts/samples/low value dutiable consignments up to the maximum CIF value limit of INR50,000.

Circular No 13/2016-CUS dated 26 April 2016

DGFT Notification

Criteria for status holder has been amended
With effect from 1 April 2016, the criteria for recognition as ‘Status Holder’ has been changed. Accordingly, now the status shall be granted basis exports in the current and previous three financial years instead of the existing criteria of current and previous two financial years. For gems and jewellery sectors the existing criteria of export performance in the current and previous two years shall continue.

Notification No 04/2015-2020, dated 29 April 2016

Receipt in ‘Indian Rupee’ – Fulfilment of export obligation under EPCG
New Appendix 5D has been notified containing list of services (rendered in Customs notified areas to a foreign liner), payments for which are received in ‘Rupee’ terms, shall be counted for fulfilment of Export Obligation under the EPCG scheme.

Notification No 06/2015-2020, dated 3 May 2016

VAT - Decisions

Transfer of goods is essential and mandatory for any contract of sale and mere sale invoices are not sufficient to claim Input Tax Credit (ITC)
The taxpayer, in the present case, bought goods from local registered dealers on payment of VAT and sold the same within the state and claimed input tax credit in its returns. The revenue alleged that ITC should be reversed since the sellers have not reported their sales. The taxpayer filed its objections against the notice issued by the Revenue and requested the Revenue to furnish details of the registered dealers whose registration certificates has been cancelled.
Against this, the Revenue requested the taxpayer to appear for a personal hearing along with the relevant records in support of their claim. In response to this, the taxpayer filed a writ petition
before the High Court. The main issue before the High Court was whether submission of mere invoices will suffice to claim ITC.

The taxpayer submitted that revenue was wrong in passing the impugned orders without verifying the books of accounts of the taxpayer and also, without conducting an appropriate enquiry. However, the Revenue submitted that they found various defects and that the objections filed by the taxpayer were not acceptable. Further, Revenue contended that the taxpayer had purchased goods from dealers whose registration certificate was cancelled and the dealers had merely issued bills without actual transaction of goods. The Revenue had also found that the purchase bills were not supported by the transport documents to prove the actual transaction of goods.

The High Court contended that the burden of proving the genuineness of transaction lies on the dealers. Further, it was the duty of the taxpayer to substantiate their claim by producing their books of accounts and prove that the dealers from whom purchases were made were in existence. In the present case, since the taxpayer had failed to substantiate their claims, the Revenue was correct in disallowing the ITC claim.

*Manoj Metals v. Assistant Commissioner (TS-186-HC-2016(MAD)-VAT)*

Notifications/Circulars/Press Release

**Haryana**

The due date for filing online quarterly returns for the quarter ending 31 March 2016 has been extended upto 31 July 2016 only for registered dealers who have been affected during the reservation agitation in the state in February 2016 and who have lodged valid claim for compensation within the prescribed period, before the appropriate authority designated by the government for this purpose.

*Order dated 18 April 2016*

**Maharashtra**

The works contract TDS return in Form 424 is required to be filed electronically, within 21 days from the end of the month in which tax is remitted. Earlier, the works contract TDS returns was required to be filed annually in Form 424, within three months from the end of the year.

*Notification No. VAT1516/CR 64/Taxation-I dated 29 April 2016*

**Uttarakhand**

The annual return for the financial year 2014-15 can be filed upto 30 June 2016 without any payment of late fees. However, the tax or WCT TDS should be paid on time.

*Notification No. 252/2016/19(120)/XXVII (8)/2012 dated 30 March 2016*

**Delhi**

A new online Form viz Delhi Sugam-1 (DS-1) has replaced Form T-1 for providing information to the department in respect of movement of any goods from Delhi to any place outside the territory of Delhi, before the actual movement of the goods occur.

Earlier, Form T-1 was only required to be filed for providing information to the department in respect of petroleum products (except petrol, diesel, aviation turbine fuel, petroleum gas, or compressed natural gas), tobacco and gutka, consequent to their sale, stock transfer or local movement, for whatsoever reasons, by the registered dealers engaged in their trade before the actual movement of such goods occur.

*Notification no. F.3(671)/Policy/VAT/2016/251-63 dated 19 May 2016*
Government of India withdraws the restrictions on early provident fund withdrawals

The Ministry of Labour and Employment, Government of India issued a notification dated 10 February 2016 to amend the Employees’ Provident Funds Scheme, 1952 (EPFS) relating to withdrawals of Provident Fund (PF) accumulations. The notification placed restrictions on early withdrawal of full accumulated balances in the PF account of employees.

Pursuant to representations from various stakeholders, the government has decided to withdraw the earlier notification. The Employees’ Provident Fund Organisation (EPFO) issued a circular dated 19 April 2016 in this regard.

The Government of India amends Employees’ Pension Scheme allowing members to contribute till 60 years of age

The Employees’ Pension Scheme (EPS) was introduced by the Government of India in November 1995. It replaced the Family Pension Scheme, 1971 which provided pension benefits only to the family members of the deceased member. Under the EPS, individual members are also eligible to avail the benefit of monthly pension subject to fulfillment of certain conditions laid down in the EPS. It was not possible for members either to defer the start of pension or to contribute towards the pension fund after attaining the age of 58 years under the existing EPS.

Recently, the Ministry of Labour and Employment, Government of India issued a notification dated 25 April 2016 to amend the age criteria for contributions as well as for benefits by inserting a new provision in EPS. This notification is effective from 25 April 2016.

Key amendments in the notification

Contributions allowed after the age of 58 years but not beyond 60 years

A member may opt to continue contributions under EPS till the age of 60 years, if the employment is continued.

Option to defer the age of drawing pension

An eligible member may also opt to defer the date of drawing the pension benefit beyond 58 years but not beyond 60 years of age.

Entitlement of pension in the event of death of a member

In the event of death of a member, who opted for deferring the age of drawing a pension, the family of the member would be entitled to pension from the date following the date of death of the member as if the member monthly pension had started on the date of death of the member.

New changes in the EPS can help members draw higher pensions by way of deferment of pension and/or by contributing to the EPS till the age of 60 years.
The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

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