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India Tax Konnect

Contents

Editorial

The new government has completed 100 days in their office. The initial measures taken by them seem to have created a positive sentiment for doing business in India and it has caught the attention of investors. From tax policies, land acquisition issues, environment approvals, manufacturing, to labour laws, the government is taking steps to ensure India regains the confidence of investors by discarding some of the hurdles. However, there are various challenges which need immediate action such as GDP growth, inflation, employment generation, transparency in governance, etc.

In a recent monetary policy review, the Reserve Bank of India (RBI) has maintained the existing interest rates. However, it has reduced the statutory liquid ratio requirement by 50 bps to 22 per cent, which is expected to increase bank lending. The RBI aims to reduce retail inflation to 6 per cent by January 2016 and has maintained the economy's growth outlook for the current fiscal year at 5 to 6 per cent.

On the international tax front, the Delhi High Court in the case of Zaheer Mauritius held that the gains resulting to the taxpayer from sale of equity shares and Compulsorily Convertible Debentures (CCDs) held in the joint venture (JV) company, are not taxable as 'interest' under Section 2(28A) of the Income-tax Act, 1961 (the Act) as well as under the India-Mauritius tax treaty. The High Court observed that there is sufficient commercial reason for the taxpayer to have routed its investment from Mauritius into the real estate project in India through equity shares and CCDs. Thus, neither the legal nature of CCD's can be ignored nor the corporate veil between the Indian investee company and the Indian JV company, be lifted.

The Delhi High Court, in the case of Siel Ltd., held that shares sale transaction between joint venture partners resulting in loss is not a 'colourable device' as the said transaction had commercial or business reasons. The High Court observed that the Ministry of Industry had granted approval for purchase/sale of shares. Further, RBI had given no objection to the transaction permitting JV partners to acquire shares in the JV from the taxpayer. The reliance of the taxpayer on the valuation report was also accepted by the RBI when they granted express permission.

The Chennai Tribunal, in the case of Redington (India) Limited, held that the transfer of shares of one foreign subsidiary to another without consideration is a valid gift. The Tribunal held that the Act does not prescribe that only persons can make a gift on the grounds of 'natural love and affection'. Therefore, transfer of shares cannot be regarded as transfer of capital asset for the purpose of capital gains taxation, and should be eligible to claim exemption under Section 47(iii) of the Act. Above mentioned transfer of shares as gift, results in no income in the hands of the taxpayer, and thereby transfer pricing provisions are not invoked.

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 the ways to make this publication more relevant.

International tax

Decisions

Use of software and computer systems to access a portal for finding relevant information and matching their request amounts to royalty

Reuters Transaction Services Limited (Reuters U.K.) is incorporated under the laws of U.K. and is a tax resident of U.K. Reuters U.K. is engaged in the business of providing electronic deal matching systems enabling authorised dealers in foreign exchange, such as banks, etc. to effect deals in spot foreign exchange with other dealers.

Reuters U.K. had entered into a dealing services marketing agreement with Reuters India Private Limited (Reuters India) whereby Reuters India was to market the services of Reuters U.K. to the subscribers in India. The server of Reuters U.K. was located in Geneva. Reuters U.K. claimed that its revenue from the Indian subscribers is not liable to tax in India under the provisions of India-U.K. tax treaty as the same is not in the nature of royalty or Fee for Technical Services (FTS).

The Assessing Officer (AO) concluded that the payments were in the nature of royalty as well as FTS. Alternatively, the AO also contended that Reuters India would constitute as a Permanent Establishment (PE) of Reuters U.K. in India.

Based on the facts of the case, the Mumbai Tribunal held as follows:

- By allowing use of software and computer systems to access the portal of Reuters U.K. for finding relevant information and matching the requests of Indian clients/ subscribers amounts to imparting of information concerning technical, industrial, commercial or scientific equipment. Effectively, the payments made by Indian clients/subscribers towards use and right to use of equipment and information for processing their request of foreign exchange dealings would constitute as royalty under Article 13 of the tax treaty
- The Tribunal distinguished the ruling of the Delhi High Court in the case of Asia Satellite Telecommunication Company Limited [2011] 332 ITR 340 (Del) wherein the transponder capacity was used only for uplinking and downlinking of signals without any manipulations. However, in the current case, Reuters U.K. was providing media as well as necessary information and data equipment to the subscribers
- With regard to the issue of PE under Article 5 of the tax treaty, the Tribunal observed that once the receipt has been characterised as Royalty then there is no requirement to go into the question of PE.

Reuters Transaction Services Limited v. DDIT (ITA No 6947/ Mum/2012)

Gains arising in the hands of a Mauritian company from sale of equity shares and CCDs of an Indian company are not taxable as interest income in India

The taxpayer is a company incorporated in Mauritius and a tax resident of Mauritius. The taxpayer along with Vatika Limited (Vatika), an Indian company, invested in SH Techpark Developers Ltd. (JV company) to undertake development of a real estate project in India.

The taxpayer entered into a Securities Subscription Agreement (SSA) and a Shareholder's Agreement (SHA) with Vatika and the JV company. The SHA recorded the terms of the relationship between the taxpayer, Vatika, and the JV company, their inter se rights and obligations, including matters relating to transfer of equity shares and the management and operation of the JV company.

As per the SSA, the taxpayer agreed to acquire 35 per cent ownership interest in the JV company by making a total investment of INR1 billion in five tranches. The taxpayer agreed to subscribe to 46,307 equity shares having a par value of INR10 each, and 882,585,590 zero per cent CCDs having a par value of INR1 each, in a planned and phased manner. The SHA also provided for a call option given to Vatika by the taxpayer to acquire all the aforementioned securities during the call period and likewise, a put option was given by Vatika to the taxpayer to sell to Vatika all the aforementioned securities during the determined period.

Vatika partly exercised the call option and purchased 22,924 equity shares and 436,924,490 CCDs from the taxpayer for a total consideration of INR800 million. Subsequently, the taxpayer transferred further equity shares and CCDs to Vatika.

The taxpayer filed an application with the Authority for Advance Ruling (AAR), wherein the AAR concluded that the entire transaction which is embodied in the SSA, SHA, and other documents is a sham and the real transaction was only of the taxpayer granting a loan to Vatika. Based on Article 10 of the SHA, the AAR concluded that these agreements indicated that the taxpayer would receive a fixed rate of return. Accordingly, the AAR held that the entire gains on the sale of equity shares and CCDs held by the taxpayer are interest within the meaning of Section 2(28A) of the Act and Article 11 of the India-Mauritius tax treaty, and are taxable in India.

The taxpayer filed a writ petition before the Delhi High Court. The High Court observed that there was sufficient commercial reason for the taxpayer to have routed its investment from Mauritius into the real estate project in India through equity shares and CCDs. Thus, neither the legal nature of CCD's could be ignored nor the corporate veil between the Indian investee company and the Indian JV company, can be lifted.

Therefore, the High Court held that the gains from sale of equity shares and CCD's are not taxable as interest under the Act and the India-Mauritius tax treaty.

Zaheer Mauritius v. DIT International Taxation II [WP (C) 1648/2013 &CM No 3105/2013] (Delhi)

Share sale transaction between JV partners resulting in loss is not a 'colourable device'

The taxpayer had entered into a JV agreement, followed by a first amendatory agreement with Plansee Tizit Aktiengesellschaft (Plansee), an Austrian company. The agreement was entered into for setting-up and forming the company Siel Tizit Ltd. for carrying on business of manufacture, sale, distribution, export, and other dealings in hard metals.

The two JV partners equally acquired the paid-up equity capital of 15 million equity shares of INR10 each. During the year under consideration, the JV declared rights issue of six million equity shares whereby, the taxpayer renounced its entitlement to subscribe 3 million equity shares of INR10 in the rights issue in favour of Plansee. Thereafter, Plansee's shareholding increased to 58.3 per cent, while the taxpayer's share holding decreased to 41.7 per cent.

Subsequently, the taxpayer and Plansee entered into an agreement, whereby Seil Tezit Ltd. proposed to offer 10 million fresh equity shares for cash at par on rights basis, but the taxpayer due to financial difficulties, was unable to subscribe the shares. Therefore, the taxpayer decided to renounce the rights in favour of Plansee.

Further, Plansee on request agreed to buy the taxpayer's 12.7 million shareholding for a consideration of USD600,000 which on conversion, came to INR2.02 per share on face value of INR10 each. This resulted in book loss of INR101.2 million or indexed loss of INR136.2 million on capital account.

The AO did not accept the said capital loss challenging that the aforesaid transaction was a colourable device.

The Delhi High Court held that share sale transaction between JV partners resulting in loss is not a 'colourable device' as the said transaction had commercial or business reasons. The High Court observed that the Ministry of Industry had granted approval for purchase/sale of shares. Further, the RBI had given no objection to the transaction permitting JV partners to acquire shares in the JV from the taxpayer. The reliance of the taxpayer on the valuation report was also accepted by the RBI when they granted express permission.

CIT v. Siel Ltd. (ITA No. 1616/2010 and ITA No. 1619/2010)

Commission paid to non-resident agent is not FTS

The taxpayer is a company engaged in manufacture and export of leather articles. For AY 2009-2010, the taxpayer entered into an agency agreement with a non-resident agent to secure orders from various customers, retailers, and traders, for export of leather shoes. As per the agreement the agent was eligible for a commission of 2.5 per cent on Free On Board (FOB) value which was claimed as allowable under Section 37 of the Act. The AO disallowed the taxpayers claim by invoking section 40(a)(i) and held that commission payment to the non-resident agent was in the nature of FTS and was taxable under Section 9(i)(vii).

The Madras High Court held that the commission paid to the agent was to secure orders for export of leather shoes and was therefore not in the nature of FTS. The non-resident agent did not provide any technical services to the taxpayer.

The High Court relied on the Supreme Court ruling in the case of Toshuku Limited and GE India Technology.

The Commissioner of Income Tax v. Faizan Shoes Pvt Limited (TCA 789 of 2013)

Services which do not impart technical know-how or transfer of any knowledge, experience, or skills, cannot be taxed as royalty

The taxpayer is a non–resident company incorporated in Thailand, engaged in the business of providing services to meet the needs of various GE group companies. The taxpayer entered into a Master Service Agreement (MSA), 2005 with GE Countrywide Consumer Financial Services Ltd. (GEMFSL), in terms of which the taxpayer is required to provide accounting and finance support services, human resources services, legal and compliance services, risk management services, quality consultation and training, sales and marketing, information technology and system support, and strategic management assistance.

The taxpayer received payments from GEMFSL and proceeded to file a return of income disclosing nil income as the taxpayer did not have a PE in India. However, the AO held that the amounts would fall under FTS as well as Royalty. The DRP held that such payments would fall within the scope of Royalty.

The Mumbai Tribunal relied on the Article 12 of the OECD commentary and explained the term 'industrial, commercial, or scientific' experience. The Tribunal held that the royalty payment received as consideration for information concerning industrial, commercial, scientific experience alludes to the concept of know-how. There is an element of imparting know-how to the other, so that the other person can use or has the right to use such know-how.

On this basis the Mumbai Tribunal held that, where services do not impart technical know-how or transfer of any knowledge, experience, or skill, such services will not fall within the definition of 'royalty' under Article 12 of the India-Thailand tax treaty.

Since in the present case, lower authorities had not examined the nature of the service rendered by the taxpayer, the matter was remitted back to the AO to examine the nature of services and whether the same falls within the ambit of FTS.

GECF Asia Limited v. DIT (ITA no. 8922/Mum./2010)

Notifications/Circulars/Press Releases

Tax treaty between India and Fiji notified

The Government of India has notified its tax treaty with the Government of Fiji on 12 August 2014. The tax treaty was signed on 30 January 2014 and would be effective from 1 April 2015.

The tax treaty expands the scope of a PE by including insurance PE. The tax treaty taxes royalty and FTS at 10 per cent, dividend at 5 per cent and interest at 10 per cent. The provisions of the tax treaty do not prevent the contracting states from application of provisions of the domestic law and measures of tax avoidance or tax evasion by having clauses on limitation of benifit and exchange of information.

Notification No. 35/2014 dated 12 August 2014

Corporate tax

Decisions

Relief under Section 10A to be granted even though software development done partly outside STPI unit

The taxpayer claimed deduction under Section 10A of the Act for development and export of 'computer software'. The taxpayer was the proprietor of EMac Technologies which was set up at Software Development Park, Dehradun, where it developed and exported PC suit software chip used in Chinese mobile phones, MT 6255. The taxpayer had initiated the development work on basic engine in Mumbai and transferred the same to Dehradun STPI. Thereafter, with the help of third party tools, known as Graphical User Interface (GUI), Skin Crafter and Digital Library, the taxpayer developed its final product, i.e. PC Suit Software, which was exported out of India. On this income, the taxpayer claimed deduction under Section 10A. Rejecting the taxpayer's claim for deduction, the AO held that substantial development of software was carried out either outside STPI premises and/or by using third party tools. The CIT(A) upheld the order of the AO. Aggrieved, by the same the taxpayer filed an appeal before Mumbai Tribunal.

The Mumbai Tribunal observed that the taxpayer developed basic engine facility at Mumbai. Further the same was developed into separate, superior software, a PC Suit Software called as MYSYNC, at STPI, Dehradun. The stage of development of PC suit software was possible only after the basic engine was developed at the Mumbai facility and PC suit software was a distinct software which was a further exported out of India.

The Tribunal noted that in coordinate bench ruling of Mumbai Tribunal in ISBC Consultancy Services Ltd [88 ITD 134] (Mum) the standard software was bought by the taxpayer from another company. Allowing Section 10A deduction, coordinate bench had held that the basic and standard software acted as a raw material for development of the software which was exported. In the instant case, the Tribunal noted that the taxpayer itself developed the basic engine and based on that created the end product, which was an exportable software.

The Tribunal held that the basic engine and PC Engine Software are two entirely independent products. The Tribunal also considered a question that whether a unit at STPI loses its character of STPI unit, if some of the development work is done outside STPI and whether employment of third party tools can be called as intervention, leading to denial of deduction. The Tribunal noted that as per the scheme of the STPI under the EXIM policy, undertaking in STPI was free to accept knowledge and/or services or the product from any area including domestic tariff area to manufacture or produce articles or things and computer software. This proved that even the government recognises the fact that not everything is done within ones' own premises to develop the software.

In view of this, the Tribunal rejected revenue's objection with respect to third party tools and development outside STPI.

In view of above, the Tribunal concluded that development of PC suit software to be used as an interface with the personal computer was a separate marketable product and hence eligible for deduction under Section 10A of the Act.

Ajay Agarwal (HUF) v. ITO [TS-474-ITAT-2014(Mum)]

Depreciation not implicit under Rule 10; actual allowance relevant for determining post amalgamation WDV

The taxpayer is an Indian company and a subsidiary of a U.K. company, May and Baker Ltd. The U.K. company was assessed for taxation in India in respect to its profits in relation to its branch in India. The profits from the Indian branch of the U.K. company were determined as per the then existing Rule 33 of Income-tax Rules, 1962 (the Rules) and thereafter under Rule 10 of the Rules. The U.K. company had an industrial undertaking in India which was hived off to the taxpayer under a scheme of amalgamation (approved by Bombay High Court) in 1975. Accordingly, assets and liabilities of industrial undertaking were taken over by the taxpayer under an amalgamation scheme. Schedule 'A' of the scheme had set out value of fixed assets (at cost less depreciation) at INR 17.2 million and original cost of assets was INR25.4 million. For three AYs 1976-1977, 1977-1978 and 1978-1979, the taxpayer claimed that for granting depreciation, cost of assets should be taken at original cost, i.e., INR25.4 million or alternatively at INR17.2 million (cost less depreciation). Rejecting both these figures, the AO granted depreciation on written down value (WDV) computed under Rule 10(ii) of the Rules. The AO arrived at the WDV of INR9.31 million after taking into account depreciation that would have been granted to the U.K. Company under the Act. Rule 10 stipulates as to how income accruing/arising to any non-resident person through or from any business connection/property in India should be computed when it cannot be definitely ascertained. In light of this Rule, profits and gains should be computed under the Act.

The Bombay High Court observed as per definition of 'actual cost' in Section 43(1) of the Act if no depreciation was actually allowed to the Amalgamating Company, then the original cost of the capital asset transferred pursuant to the amalgamation, would be taken into account for the purposes of allowing depreciation to the Amalgamated Company. The High Court thereafter examined whether any depreciation was actually allowed on fixed assets of the Indian Branch of the U.K. Company, when they were being assessed for tax in India. The High Court noted that, in extant case, the U.K. Company was being assessed for income tax in India right from the AY 1960-1961 in respect of profits from its branch in India which

were calculated under Rule 33/ Rule 10 and there was nothing on record to show that while computing profits under the said rules, any depreciation was actually allowed to the U.K. Company. Setting aside the Tribunal's order the High Court held that there is no concept of depreciation being allowed on a notional basis or that the same can be granted implicitly. The High Court relied on the decision of the Supreme Court in Madeva Upendra Sinai v. UOI [1975] 98 ITR 209 (SC). Accordingly, the High Court has taken WDV as per books of account at the time of transfer i.e. INR17.2 million (cost less depreciation) to grant the depreciation

Rhone-Poulenc (India) Ltd. v. CIT [TS-504-HC-2014(BOM)]

Notice under 148 can be challenged by way of a writ petition

The taxpayer was engaged in the business of trading of shares. Noting that the taxpayer had offered short term capital gains taxable at a concessional rate under Section 111A, notice for reopening under Section 148 of the Act was issued to the taxpayer for AY 2007-2008. The taxpayer filed its objection to said notice, which was rejected by the tax officer. Aggrieved, the taxpayer filed a writ petition before the Bombay High Court against the initiation of reassessment proceedings.

The tax authorities inter-alia submitted that the Court should not exercise its jurisdiction under Article 226 of the Constitution of India in view of the Madras High Court ruling in case of Kalanithi Maran [TS-413-HC-2014(MAD)]. The Madras High Court had relied on the Supreme Court decision in the case of Chhabil Dass Agarwal [2014] 1 SCC 603 (SC) and held that a notice under Section 148 cannot be challenged under a writ petition. The tax authorities submitted that in view of the said ruling wherein Madras High Court did not exercise jurisdiction, the Bombay High Court should also do the same in the taxpayer's case.

The Bombay High Court noted that the Madras High Court proceeded on the basis that the dispute urged before it were with regard to adjudicatory facts and not with regard to jurisdictional facts as raised in the taxpayer's case. The Madras High Court had also held that 'when an assessment sought to be reopened by an officer who is not competent to do so or where on the face of it would appear that the reopening is barred by limitation or lacks inherent jurisdiction, the court would certainly entertain a challenge to the reopening notice in its writ jurisdiction'. The Bombay High Court noted that jurisdictional facts were those facts which give jurisdiction to enter upon enquiry, while adjudicatory facts come up for consideration after validly entering upon enquiry i.e. having jurisdiction. The Bombay High Court observed that in the taxpayer's case, the challenge was based on lack of jurisdiction in issuing the notice for reopening by the tax officer on the ground that the precondition for issuing notice under Section 147 of the Act was not satisfied i.e. notice should not be on account of the change of opinion. Bombay High Court held that AO can acquire the authority to deal with the matter on adjudicatory facts only when the jurisdictional facts were satisfied. There could be occasions where jurisdictional facts could itself be a matter of factual enquiry i.e. leading of evidence and appreciation of facts. After discussing the facts of the case at hand the High Court came to a conclusion that there was no reason for the tax officer to have reasonable cause to believe that the income chargeable to tax had escaped assessment. Thus the Bombay High Court set aside the notice issued by tax officer for reopening under Section 148 of the Act and the writ petition was allowed.

Aroni Commercials Ltd. v. ACIT & anrs. [TS-486-HC-2014(BOM)]

Absent new tangible material, reassessment exercise amounts to re-appreciation or review of facts provided with original return, hence not valid

The taxpayer had filed a return of income for AY 2006-2007 and was scrutinised by the tax officer. The tax officer framed the assessment accepting explanations by the taxpayer. Later the tax officer issued a notice under Section 148 of the Act, dated 25 March 2013. The taxpayer in reply stated that he stays by his original returns and also requested reasons for reopening. The reasons for reopening stated that the taxpayer had failed to furnish details of amount added to his capital account during the AY under consideration and due to absence of information, the same needed to be brought to tax under Section 68 of the Act. Taxpayer objected to the reasons for reopening however the objections were rejected by the tax officer. Aggrieved, the taxpayer filed a writ petition against notice under Section 148 before the Delhi High Court.

The taxpayer contended that he could not be said to be faulted for the omission to discuss the materials on record. Also in absence of tangible material on record the tax officer had acted without any jurisdiction and was merely seeking to revisit the matter which in effect amounted to review or change of opinion.

The High Court noted the provisions of Section 147 of the Act and held that the tax officer is allowed to reopen the assessment and to issue notices if he had reasons to believe that any income chargeable to tax had escaped assessment for any Assessment Year. The High Court observed that in the taxpayer's case no details as to what excited the tax officer's notice and attention was specifically mentioned. Also there was no mention of tangible material facts that lead to reasons to believe that income had escaped assessment. The entire exercise of reopening of assessment was not based on new tangible material on record and the same was re-appreciation or review of the facts that were provided along with the original return filed by the taxpayer. The concept of 'change of opinion' is an in-built test to check abuse of power by the tax officer. Hence, after 1 April 1989, the tax officer has power to reopen, provided there is 'tangible material' to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Even in case of an assessment completed under Section 143 (1), the requirement of recording 'reasons to believe' were mandatory as indicated by the text of Sec 147 of the Act. The High Court noted the division bench ruling in Orient Craft [2013] 354 ITR 536 (Delhi) wherein it was held that Section 147 makes no distinction between an order passed under section 143(3) and the intimation issued under section 143(1). Therefore it is not permissible to adopt different standards while interpreting the words 'reason to believe' vis-à-vis Section 143(1) and Section 143(3) of the Act.

In light of discussion of above jurisprudence, the High Court concluded that the foundation of the tax officer's jurisdiction of a reassessment notice are the 'reasons to believe'. This should have a relation or a link with an objective fact, in the form of information or facts external to the materials on the record. Such external facts or material constitute the driver, or the key which enables the authority to legitimately reopen the completed assessment. In absence of this objective 'trigger', the AO does not possess jurisdiction to reopen the assessment. Thus, allowing taxpayer's writ petition the High Court quashed the reassessment notice.

Madhukar Khosla v. ACIT [TS-511-HC-2014(DEL)]

Tax officer cannot mechanically apply Rule 8D for making a disallowance under Section14A

The taxpayer had filed his return of income for Assessment Year (AY) 2009-2010. The tax officer noted that the taxpayer had earned exempt income, however audit report did not show disallowance of any expenses relating to exempt income. The tax officer held that part of expenses on account of salary, telephone, and other administrative expenses must have been related to activities for earning exempt income. Accordingly, invoking Section 14A read with Rule 8D he made disallowance of INR1.6 million. In appeal before CIT(A) the taxpayer contended that he had taken certain portfolio management services (PMS) for which he made payments to various investment advisors. The taxpayer stated that those expenses as well as demat expenses and STT were debited to his capital account. He further submitted that expenses relating to salary, telephone, and other administrative expenses were incurred by him for his professional income. Thus, he stated that disallowance made by the AO was without any basis and without establishing any nexus. The CIT(A) agreed with the contentions of the taxpayer and deleted the disallowance. Aggrieved, the revenue preferred an appeal before the tribunal.

The Tribunal noted that expenses in respect of exempt income were shown at nil in audit report and the taxpayer had debited direct expenses on account of demat charges and STT in his capital account. It observed that 'AO had presumed' that the taxpayer must have incurred some expenditure under the heads salary, telephone, and other administrative charges for earning exempt income. Further noting that the tax officer had made disallowance of INR1.6 million though total expenditure claimed by the taxpayer was about INR1.3 million the Tribunal held the tax officer had merely adopted the formula of estimating expenditure on the basis of investments. But, the justification for calculating the disallowance was missing. The taxpayer had not claimed any expenditure in its P&L account, so, the onus was on the tax officer to prove that out of the expenditure incurred under various heads some were related to earning of exempt income. Also he had to give the basis of such calculation. In any manner disallowance of INR1.6 million as against the total expenditure of INR1.3 million claimed by the taxpayer in P&L account, is not justified. Provisions of Rule 8D cannot and should not be applied in a mechanical way. Facts of the case have to be analysed before invoking them. The Tribunal confirmed the CIT(A)'s order.

ACIT v. Iqbal M Chagala [TS-507-ITAT-2014(Mum)]

Notifications/Circulars/Press Releases

CBDT clarifies on allowability of deduction under Section 10A/10AA on transfer of technical manpower in the case of software industry

Section 10AA of the Act, *inter alia*, provides for deduction in respect of the profits derived by a unit set up in Special Economic Zone (SEZ) from export of computer software or from providing any Information Technology Enabled Services (ITES). The said deduction is available if, inter alia, the new SEZ is not formed by split-up or reconstruction of an existing business or by transfer of used plant or machinery. However, the deduction is available if the earlier used plant and machinery will not exceed 20 per cent of total value of the plant or machinery used in new business. The tax department, in certain cases, has considered the transfer/redeployment of technical manpower from the existing units of a taxpayer engaged in computer software development to its new SEZ unit, as splitting up or reconstruction of the existing business and therefore, denied the deduction under Section 10AA of the Act.

In this regard, the software industry has represented before the Central Board of Direct Taxes (CBDT) that there is a limited pool available with a software developer of skilled, talented, and experienced manpower with domain knowledge. Given the highly technical and competitive nature of software development, some technical persons having prior experience are required to manage the critical functions of software development in a new unit. Accordingly, the movement of technical manpower from an existing unit to a new SEZ unit should not be a constraint in availing deduction under Section 10AA of the Act. Attention was also drawn to the Instruction No.70, dated 9 November 2010 issued by the Ministry of Commerce which states that there is no bar on transfer of manpower to SEZ units. Also, there is a specific prohibition on transfer of plant or machinery from an existing unit to a new SEZ unit under Section 10AA, subject to a ceiling of 20 per cent but no such bar on transfer/redeployment of manpower has been explicitly laid down in the Section.

Recently, the CBDT has issued a circular clarifying that mere transfer or re-deployment of existing technical manpower from an existing unit to a new SEZ unit in the first year of commencement of business will not be construed as splitting up or reconstruction of an existing business, provided the number of technical manpower so transferred does not exceed 20 per cent of the total technical manpower actually engaged in developing software at any point of time in the given year in the new unit. Further, the CBDT has clarified that the circular will be applicable only in the case of taxpayers engaged in the development of software or in providing IT Enabled Services in SEZ units eligible for deduction under Section 10A or 10AA of the Act.

Circular No. 12/2014, dated 18 July 2014

Merger and acquisition

Decisions

Formation of an undertaking - deduction under Section 80-IB

A proprietor was carrying on business of manufacturing of electronic goods from an undertaking in Jammu & Kashmir since 2002. The undertaking was entitled to deduction under Section 80-IB of the Act. On 1 April 2004, two partners were added and the business was carried on by the partnership (taxpayer). The AO held that the undertaking under proprietorship was converted into partnership and the partnership used the old machineries, which earlier were used by the proprietorship, and therefore was not entitled to deduction under Section 80-IB of the Act.

The Allahabad High Court held that the formation of the undertaking should not be confused with the ownership of the business. In the instant case, the undertaking was already in existence since 2002 and was not formed by splitting up or by reconstruction of the business. Consequently, the High Court held that the assesse is entitle to claim deduction under Section 80-IB of the Act.

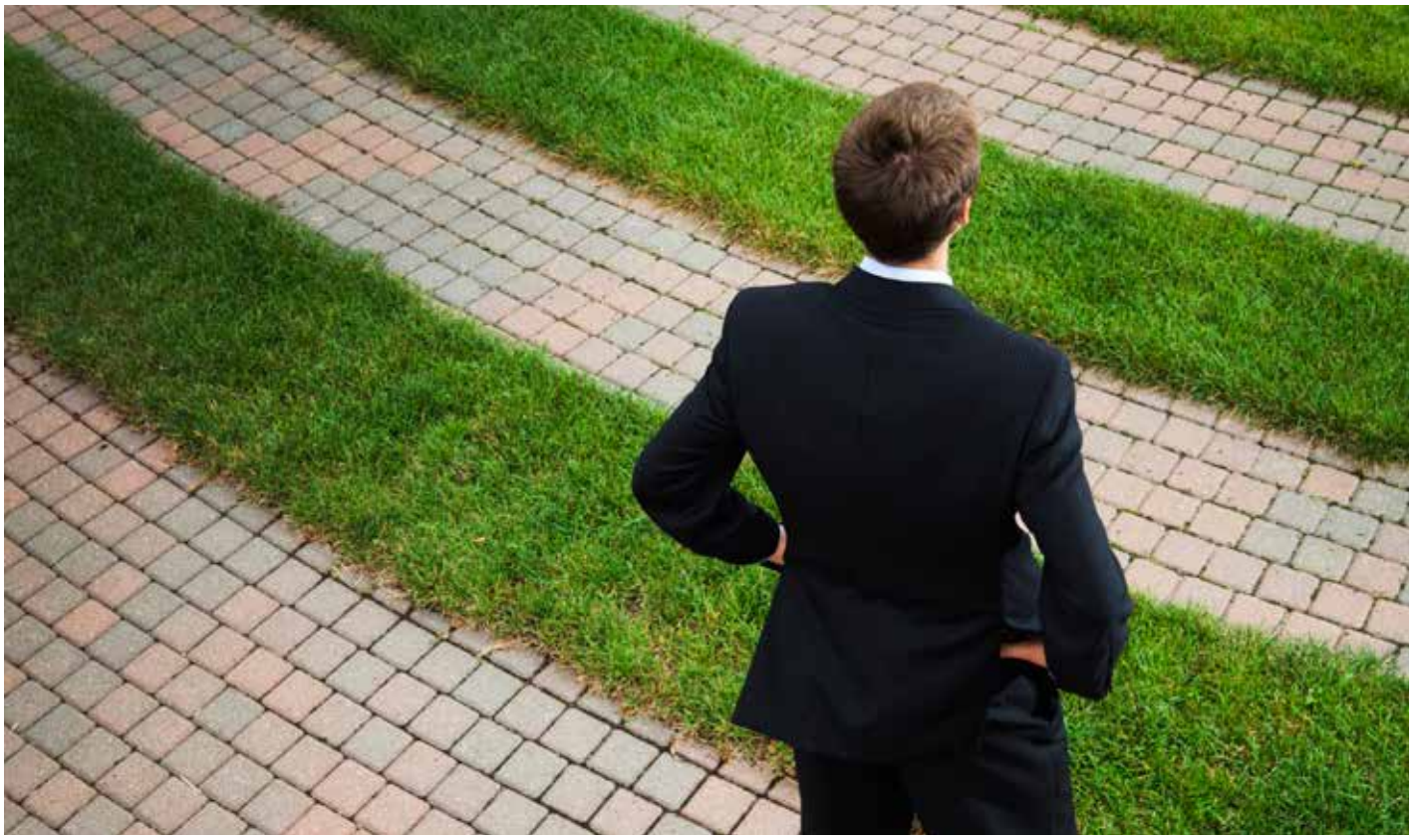
CIT v. Prisma Electronics [Income Tax Appeal No.283 of 2010 – All HC]

If the undertaking satisfy all the specified conditions of Section 80-IB of the Act in the initial year, the undertaking is entitled to the benefit of 10 consecutive years

The taxpayer, a small scale industrial company (SSI) was manufacturing CNC plates, was entitle to and was claiming deduction under Section 80-IB(3) of the Act for the past eight years. In the current year, in view of value of its plant & machinery exceeding INR10 million, the taxpayer lost it's SSI status. Consequently, it's claim under Section 80-IB(3) of the Act was denied.

The Karnataka High Court held that in the entire provision under Section 80-IB of the Act, there is no indication that these conditions had to be fulfilled by the taxpayer in all the 10 years. If the undertaking satisfy all the specified conditions in the initial year, the undertaking is entitled to the benefit of 10 consecutive years. Accordingly, the High Court allowed the taxpayer's claim under Section 80-IB(3) of the Act.

Ace Multiaxes systems Ltd. v. DCIT (I.T.A. NO. 477 OF 2013) (Kar)



Transfer pricing

Decisions

The Delhi Tribunal held that the view taken in the case of BMW India Pvt. Ltd. is in conformity with the special bench ruling in the case of LG Electronics India Pvt. Ltd., and does not override the special bench

The taxpayer is the sole distributor of Bose products in India. The taxpayer characterised itself as a 'buy sell distributor' and selected Resale Price Method (RPM) to benchmark its international transactions. The advertising, marketing, and promotion (AMP) expenses were not benchmarked. The Transfer Pricing Officer (TPO) held that the taxpayer was a limited risk distributor and the AMP/sales of the company was much higher than that of companies selected as comparables. Based on the bright line test applying AMP/sales ratio, excessive AMP expenses were determined, and mark-up was applied to the same. The Dispute Resolution Panel (DRP) upheld the findings of the TPO. The taxpayer contended that since it is a distributor, it's case should be decided following the precedent laid down in BMW India Pvt. Ltd v. ACIT [2014] 146 ITD 165 (Del), as opposed to the decision of the special bench in LG Electronics India Pvt. Ltd. v. ACIT [2013] 140 ITD 41 (Del) which was principally deciding a case where the taxpayer was a licenced manufacturer.

The Tribunal held as follows:

The advancing of arguments that a distributor remuneration model is separate and distinct is accepted in L.G. Electronics, and is also brought out in parameter one of para 17.4 of L.G. Electronics' case. In the case of L.G. Electronics, the special bench had no occasion to analyse and consequently adjudicate on a distributor's case, and went on to candidly admit the fact that it is not possible to have a straight jacket formula for all eventualities. The view taken in BMW India Pvt. Ltd. was that a distributor remuneration model was distinct and peculiar. It is a well-accepted fact that the decisions in transfer pricing are fact specific. The Tribunal confirmed that the view taken in BMW India Pvt. Ltd. is in conformity of the special bench ruling and does not override the special bench. There is no conflict between the decisions in BMW India Pvt. Ltd. and L.G. Electronics.

In view of the ratio of the special bench order in L.G. Electronics, the Tribunal also held as follows:

- The transaction to be an international transaction and upheld the applicability of the bright line as a methodology for calculating AMP
- Directed the TPO to carry out a fresh search for selecting the comparables keeping the 14 parameters set out in para 17.4 of the order of the special bench in mind
- Directed the TPO to correctly calculate the AMP expenses by excluding the selling expenses
- TPO was to decide the application of mark-up by following the precedent laid down in L.G. Electronics.

Bose Corporation India Pvt. Ltd. [ITA No - 5178/Del/2011 & 263/Del/2013 (AYs-2007-2008 and 2008-2009)]

Chennai Tribunal deleted transfer pricing adjustment on transfer of shares without consideration, free of charge corporate guarantee, and trademark licence fee.

The taxpayer has a wholly owned subsidiary company in Dubai i.e. Redington Gulf FZE (RGF Gulf). The taxpayer first set-up a wholly owned subsidiary company in Mauritius in July, 2008 (RIML Mauritius). RIML Mauritius, in turn, set-up its own wholly owned subsidiary in Cayman Islands (RIHL Cayman). Subsequently, on 13 November 2008, the taxpayer transferred its entire shareholding in RGF Gulf to RIHL Cayman without any consideration. Once this transfer of shareholding was made, RGF Gulf became a step down subsidiary of RIML Mauritius and the taxpayer. According to the taxpayer, the transaction was not an international transaction and provisions of Section 92 of the Act were not applicable.

The TPO held that transfer of shares made by the taxpayer is an international transaction falling within the TP regulations. Accordingly, the TPO determined the ALP of RGF Gulf. The taxpayer had outstanding corporate guarantee extended on behalf of its AEs for which no guarantee fee was charged. Adjustment was made by the TPO adopting a commission rate of 2 per cent on the outstanding corporate guarantee. The taxpayer paid trademark fee to its AE for use of the 'Redington' trademark. TPO determined the ALP of the trademark fee at nil on the grounds that there was no rationale for such trademark fee payment.

The Chennai Tribunal held as follows:

Transfer pricing on gift transaction

- Section 92 of the Act provides that any income arising from an international transaction shall be computed in reference to ALP. The computation of ALP, therefore, is dependent on the income arising to the taxpayer from an international transaction.
- The AAR in various cases [Vanenburg Group B.V. [2007] 289 ITR 464 (AAR), Dana Corporation, Amiantit International Holding, Goodyear Tire and Rubber Co., Praxair Pacific Ltd. [2010] 326 ITR 276 (AAR), VNU International BV [2011] 334 ITR 56 (AAR)] had held that TP provisions would apply only to those international transactions, which are liable to income tax in India. However, in case of transfer of shares, TP provisions do not apply.
- In the present case, the shares were transferred by way of gift and no income arose in the hands of the taxpayer. Thus, ALP determination does not extend to this transaction and therefore, the gift of shares made by the taxpayer was not liable for TP provisions.

TP adjustment for corporate guarantee and trademark fees

- The Tribunal observed that the corporate and bank guarantees extended by the taxpayer were for the overall interests of its business. Relying on the decision in the case of Bharti Airtel Ltd v. ACIT [2014], the Tribunal upheld that the guarantee extended by the taxpayer is not an international transaction as the same does not have any bearing on profits, income, losses or assets of the taxpayer.
- The Tribunal observed there was nothing uncommon in the taxpayer making payment for the use of trademark. Such payment made is not unique to the taxpayer and it is for the taxpayer to decide the dynamics of its business. The Tribunal upheld that any expenditure incurred by the taxpayer, if justified by commercial expediency, is an expenditure allowable for the purpose of taxation, and what is commercial expediency is something for the taxpayer to decide, and accordingly the TP adjustment was deleted.

Redington (India) Limited v. JCIT (ITA No.513/Mds/2014)

Chennai Tribunal rejects the TPO's approach of reducing cash discount, outward freight, and storage charges from selling price, with regard to computation of gross profit margin

The taxpayer purchased goods from its AE for re-sale in India and adopted RPM to determine ALP of the goods purchased from the AE with Gross Profit Margin (GPM) as the Profit Level Indicator (PLI). Dispute was with regard to determination of selling price and the calculation of GPM of the taxpayer and the comparable companies. In reference to the same, the TPO/AO, made transfer pricing adjustments in relation to purchase cost from the AE and development and business promotion expenses. The TPO while calculating the GPM reduced the cash discount offered by the taxpayer for early realisation of outstanding dues on account of sales. The TPO also added the freight and storage charges by treating them as direct expenses incurred in relation to purchase of goods. Further, the TPO did not distinguish between brand promotion and marketing expense, and made an upward adjustment towards development and business promotion expenses.

The Tribunal held as follows:

- The Tribunal stressed that cash discounts were offered by the taxpayer to its debtors for early realisation of payments, and were thus in the nature of financial charges. Further, cash discounts were in the nature of incentives for early payments for the sales made by the taxpayer. The Tribunal held that the TPO erred in equating cash discounts with trade discount and that the cash discounts in the present case were offered after the completion of sales, and hence are entirely different in nature from trade discounts, and therefore held that the contention of the TPO to reduce it from the selling price was mis-conceived.
- On the issue relating to reducing freight and storage expenses from selling price, the Tribunal observed that these expenditures were towards cost of packing and transportation of goods from the warehouse of the taxpayer to the customers, and that the expenditure on outward freight is in the nature of selling and distribution expenses. The Tribunal held that by no stretch of imagination, can the freight and storage expenses be reduced from selling price to determine the cost of goods sold.
- With regard to marketing expenditure, the Tribunal followed the co-ordinate bench decision in the taxpayer's own case Panasonic Sales & Services (I) Company Limited v. ACIT (ITA No.1911/Mds/2011) for the AY.2007-2008 wherein the Tribunal relied on the decision of the Special Bench in the case of LG Electronics India Pvt. Ltd. v. ACIT [2013] 140 ITD 41 (Del).

Panasonic Sales & Services (I) Company Limited v. ACIT (ITA No. 1957/Mds/2012)

Hyderabad Tribunal adjudicated on rejection of certain comparables from the standard ITES set selected by the TPO in three different rulings, consequentially dropping the average PLI as low as 10.78 per cent

The facts cover three Tribunal rulings pertaining to the AY 2009-2010 in the following companies (the taxpayers), all operating as captive service providers:

- Capital IQ
- Excellence Data
- Hyundai Motors

The TPO rejected the documentation maintained by the taxpayers due to (i) Use of multiple year data (ii) Improper application of export filters (iii) Selection of functionally dissimilar companies. The TPO undertook fresh search of comparables arriving at a set of 12 companies with an average PLI of 27.42 per cent before working capital adjustment. The TPO computed and allowed working capital adjustments in all the three cases. DRP confirmed the order of the TPO.

Tribunal's ruling

The taxpayers in their appeal to the Tribunal restricted their arguments to the comparables. Tribunal held:

- Infosys BPO Limited (Infosys) - to be rejected on the basis of functional dissimilarity, on account of its brand value, and huge asset base
- Genesys International Limited (Genesys) - to be rejected on functional dissimilarity
- Eclerx Services Limited (Eclerx) - to be rejected on functional dissimilarity
- Cosmic Global Limited (Cosmic) - to be rejected on turnover filter
- Acropetal Technologies Limited (Acropetal) - to be rejected on functional dissimilarity[1]
- Accentia Technologies Limited (Accentia) - to be rejected on account of extraordinary events during the year
- Crossdomain Solutions Private Limited (Crossdomain) - Due to variation between the information in the annual report and the figures adopted by the TPO, Crossdomain to be restored to the TPO/AO for fresh consideration on the PLI after considering the taxpayer's objections[2]

Further, the taxpayer in the case of Capital IQ, in addition to its contention on comparables selected by the TPO, also made its contentions on rejection of the two comparables selected by it, excluded by the TPO. Tribunal's findings on the same:

- Allsec Technologies Limited (Allsec) - to be included as comparable on the basis of the fact that Allsec is functionally comparable and cannot be rejected for a miniscule difference
- Cepha Imaging Private Limited (Cepha) - to be rejected on functional dissimilarity

On the taxpayer's[3] contention of risk adjustment of 1 per cent, the Tribunal asserted that the risk profile of each of the taxpayers differs, and therefore a standard deduction of 1 per cent cannot be adopted as a norm. The Tribunal directed the TPO/AO to examine the risk profile of the taxpayer and allow necessary deduction based on the facts of each case. The Tribunal also directed the TPO/AO to allow the working capital adjustment as already provided in the computation by the TPO.

Capital IQ Information Systems (India) Private Limited v. ACIT (ITA No.170/Hyd/2014)

Excellence Data Research Private Limited v. ITO (ITA No.159/Hyd/2014)

Hyundai Motors India Engineering Private Limited v. DCIT (ITA No.255/Hyd/2014)

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[1]In the case of Hyundai Motors, since the taxpayer is also engaged in the provision of engineering design services, the Tribunal did not reject it on functional dissimilarity at segment level. However, due to lack of information on the segmental allocation of expenditure, Acropetal has been restored to the TPO/AO for fresh consideration on the PLI

[2]No objection has been raised to the Tribunal on selection of Crossdomain in the case of Capital IQ

[3]In the case of Capital IQ, the risk adjustment has not been discussed in the ruling

Indirect tax

Service tax - Decisions

Rule empowering the department to call records for 'general audit' has been quashed

In the instant case, writ petition was filed before the Delhi High Court challenging the validity of Rule 5A (2) of the Service Tax Rules, 1994 (the Rule) requiring production of records to an audit party on demand and the CBEC circular dated 1 January 2008 (the circular) pertaining to general audit.

The Delhi High Court held that the Rule and the Circular, both are ultra vires of the Finance Act, 1994 (the Finance Act) and should be struck down. It made the following observations:

- Section 72A of the Finance Act envisages special audit of taxpayer's records only in special circumstances, for example, in case the taxpayer fails to declare the value of taxable service or when CENVAT credit utilisation is in excess. However, the said section does not intend to provide for a general audit that every taxpayer may be subjected to 'on demand'.
- Rules must conform to the provisions of the Act and be within the rule making powers of executive authority. Any notice, circular, guideline, etc. contrary to statutory laws could not be enforced.
- In the present case, the circular providing clarification on the Rule which is an attempt to widen the scope of law is contrary to the statute and hence, void.

Travelite (India) vs. Union of India and others [TS-310-HC-2014(DEL)-ST]

In case composite contract is divisible into pure supply and service contract (involving transfer of property in goods), such service contract (in isolation) may be concluded as 'works contract'

In the instant case, the issue was where composite contract for supply of goods and services can be split into two separate contracts viz pure supply of goods and for provision of services (which also includes transfer of property in goods), whether such service contract (in isolation) can be constituted as a 'works contract' and be eligible for abatement scheme for computation of service tax.

The Tribunal held as under:

- For the purpose of classification under 'works contract', the individual service contract should be examined regardless of the supply contract.
- It is not merely the nomenclature and form of the contract that should be seen.
- What is material is the form as well as substance of the contract, both have to be examined.

Therefore, a service contract also, involving transfer of property in goods which is subject to VAT, would be construed

as 'works contract' and accordingly, eligible for the abatement scheme under service tax laws.

M/s Gammon India Ltd. vs. CCE, Nagpur [TS-297-Tribunal-2014-ST]

Circulars/Notifications/Press Releases

Interest rate at 6 per cent per annum notified on delayed refund of pre-deposit

Post Budget 2014, pre-deposit has been made mandatory at prescribed rates of 7.5 per cent / 10 per cent of the amount of duty/ penalty for first /second stage appellate authorities. Pursuant to that, the government had notified interest at 6 per cent per annum on refund of pre-deposit in case of a favourable appellate order for delay beyond three months from the date of communicating the order to the adjudicating authority, till the date of actual refund.

Notification No. 24/2014 – CE (NT), dated August 12, 2014

Central Excise - Decisions

Pipelines used for transportation of goods beyond factory gate, cannot be covered within the expression 'factory premises or precincts thereof'

In the instant case, the taxpayer, engaged in the manufacture of motor spirit, high speed diesel, and liquid petroleum gas, filed an application to amend their approved ground plan of central excise registration to include the pipeline laid down from Wadinar (Gujarat state) to the refinery at Bina (M.P state), on the ground that the pipelines laid down on various parts of the land and areas in India were forming an integral part of the refineries' premises.

The Delhi Tribunal held that the definition of factory covers the 'premises and precincts of a factory' and not the premises or precincts beyond the factory premises. Also, a dam / reservoir located away from the factory cannot be treated as within the factory premises. In the present case, the pipelines were laid beneath the land for transportation of crude through various states and were primarily meant for transportation of the raw material. Accordingly, the Delhi Tribunal upheld the order passed by the Revenue and denied amendment to the central excise registration.

Bharat Oman Refineries Limited v. CCE [2014-TIOL-1366-CESTAT-DEL]

CENVAT credit could be claimed with respect to the services relating to financial management

In the present case, the service provider has assisted the taxpayer for claiming rebate from department and had charged documentation processing charges along with applicable service tax. The taxpayer has claimed CENVAT credit of the service tax charged by the service provider. However, the authorities denied the said credit.

The Ahmedabad Tribunal held that the proper flow of funds is mandatory for manufacturing activity/business of a unit. Financial management indicates arranging finances from banking channels or speedy recovery of amounts due from clients or from any government department. The expression 'activity relating to business' does not form part of the definition of 'input service' with effect from 1 April 2011 however, services availed in relation to 'financing' still form part of the definition of 'input service' i.e. before and after 1 April 2011. The financial management service would be construed as a service in relation to managing the finances of the taxpayer and accordingly, eligible for CENVAT credit benefit.

Hindalco Industries Limited Vs CCE, 2014-TIOL-1313-CESTAT-AHM

Exemption to goods meant to be used as supporting structure to machineries, is available

In the instant case, the taxpayer supplied general fabrication structures and auto welded beams and boxes meant for use in power projects free of duty, under Notification No.6/2006-CE and 12/2012-CE to various contractors executing the power projects. The said Notifications exempts all the goods supplied against international competition bidding from whole of excise duty, if the goods when imported into India are fully exempt from customs duty.

However, the central excise authorities have denied the exemption on the ground that general fabrication structures and auto welded beams and boxes, are not covered by the description of the goods mentioned under the said notifications as these goods are generally used for making shades and supporting structures for capital goods.

The Delhi Tribunal held that even if the general fabrication structures, auto welded beams and boxes cleared by the taxpayer are meant to be used as supporting structure for some machinery, the same would have to be treated as component of that machinery. This is because the description of goods under said Notifications covers all components whether finished or not and raw materials for the manufacture of the items of machinery, prime movers, instruments, apparatus, appliances, control gear, transmission equipments, etc. Therefore, the exemption under the said Notifications is available to the taxpayer.

Ganges International Private Limited v. CCE [2014-TIOL-1455-CESTAT-DEL]

Customs Duty - Decisions

Refund of SAD cannot be claimed in case of 'deemed sale' of goods on payment of VAT/ CST

In the instant case, the taxpayer undertook the works contract of laying Proflex roof and in connection thereto imported certain materials, on payment of relevant special additional duty of customs under Section 3 (5) of the Customs Tariff Act, 1975. The taxpayer charged CST on the said works contract. The customs duty paid on the materials imported was claimed as refund under the provisions of Notification No. 102/2007-Cus. However, the customs authorities rejected the refund claim.

The Ahmedabad Tribunal observed that the quantity of imported goods used or sold is unknown till the completion of the contracted work (laying roof). Also, in the final invoices how much quantity of imported goods have been sold to the clients, has not been separately specified. Unused quantity of material/wastage also remains the property of the taxpayer. The rate of laying of 'Proflex Roof' is charged per square meter including the value of the materials used in laying the roof. When the deemed sale of the material takes place, the imported goods do not exist as such but what exists is the 'Proflex Roof'. Further, it is also not made clear whether CST paid in the final invoices is only with respect to imported goods or also represent other materials/consumables. Accordingly, the refund claim was rejected.

Proflex Systems v. Com of Customs [2014-TIOL-1315-CESTAT-AHM]

VAT - Decisions

Equipment provided on BOOT basis for use not 'sale' hence VAT not applicable

In the instant case, the issue involved was whether the activities carried out for the government under Build, Own, Operate and Transfer basis would be treated as a project involving only service or as project for sale of equipments under 'works contract'.

The taxpayer had entered into an agreement with Meghalaya Information Technology Society (MITS) for providing network services throughout Meghalaya on Build, Own, Operate, Transfer (BOOT) basis which was to be implemented in five years on payment of minimum guaranteed amount by the State Government. As per the agreement, the taxpayer was required to transfer the entire system with equipments to the State Government on nominal payment of INR1, at the end of five years. Subsequently, the taxpayer submitted an application for no deduction certificate before the Commissioner on the ground that no transfer of right to use goods was involved as personnel of taxpayer was still controlling the entire operation. But the application was rejected by the Commissioner. Hence, the taxpayer filed a writ before the High Court.

The High Court observed that since under the BOOT basis, the taxpayer was not only in control and possession of equipment imported, but also was the owner of the same, neither sale / supply of material nor transfer of right to goods could be said to have taken place. Therefore, the above transaction does not fall within the ambit of 'tax on sale or purchase of goods' and taxpayer not liable to pay tax under Meghalaya VAT Act in respect of goods which taxpayer still owned and is in possession thereof.

Tata Consultancy Services Ltd. & Anr. v. State of Meghalaya & Ors. [TS-288-HC-2014(MEGH)-VAT]

Trade discount through credit notes after completion of sale remains taxable

In the instant case, the issue before Karnataka High Court pertained to eligibility of trade discount by way of credit notes, as deduction under the Karnataka VAT Act.

The taxpayer engaged in the business of trading in electronic goods and IT products issued credit notes at the end of the month for the purpose of discount to the dealers and claimed deduction of the same from taxable turnover. However, the same was disallowed by the AO on the ground that the said discounts were not mentioned at the time of issue of tax invoices. Being aggrieved, the taxpayer filed appeals before the Appellate Authority, which was dismissed. Subsequently, second appeal was filed before the Tribunal, which was allowed with a direction to assessing authority to allow claim of deduction in respect of trade discount as per the credit notes for the impugned period. Hence, revenue filed revision petition before the High Court.

The HC referred to the earlier decision in Southern Motors vs. State of Karnataka & Ors (W.A. Nos. 57695-785/2012). In Southern Motors case, it was held, once the sale invoice is issued and the sale price is collected along with tax, the aggregate of such sale constitutes the total turnover and the tax is payable on taxable turnover. The amount paid by way of discount can be deducted provided that the discount is reflected in the sale invoice. Accordingly, the Hon'ble HC held that the Tribunal's order excluding the discount from taxable income was erroneous. However, the HC noted that the Southern Motor's judgment was under challenge before the SC, hence it observed that the taxpayer would be entitled to the benefit in the event apex court ruled in favour of the tax-payer therein.

The State of Karnataka v. Samsung India Electronics Ltd. (TS-274-HC-2014(KAR)-VAT)

Notifications/Circulars/Press Release

Haryana

It has been clarified that when any dealer is aggrieved by an order passed by an assessing authority or revisional authority and consequently prefers an appeal before the appellate authority then:

- The assessing authority shall ensure/secure the recovery of additional demand from the appellant in the form of an irrevocable bank guarantee equivalent to the additional demand created as a result of assessment or revisional proceedings; or
- Securities in the form of surety bonds can be accepted with an undertaking by the tenderer of surety bond that the property/assets are free from all encumbrances.

Circular Memo No. 1179 /ST-1, dated 25 July 2014

Himachal Pradesh

With effect from 1 August 2014, the rate of tax on notified industrial inputs and packing materials has been reduced from 5 per cent to 4 per cent. Further, plant and machinery when sold to hydro power units for use in generation of hydro-power shall be taxable at 2 per cent subject to furnishing of a certificate in duplicate by the registered hydro-power unit to the registered selling dealer in form HD.

Notification No. EXN-F(10)-8/2013 Dated 25 July 2014

Kerala

The Kerala Finance Bill, 2014 received assent of the Governor on 23 July 2014, *inter alia* made the following amendments:

- Tax on sale / purchase of cigars, cheroots, cigarillos, and cigarettes of tobacco or of tobacco substitutes has been increased from 20 per cent to 22 per cent.
- 5 per cent tax has been prescribed on sale of furnace oil to coastal cargo vessel as fuel, subject to certain conditions and restrictions as may be prescribed.
- Every dealer shall pay turnover tax at 2 per cent on turnover of sale of textile articles. However, dealers whose sale turnover of such textiles in the state for the previous year does not exceed INR10 million are not liable to turnover tax. Further, such levy would be applicable even if, the constitution of business has changed in the current year to proprietorship, firm or association of persons.
- Works contractor registered under the Central Sales Tax Act, 1956 have the option to pay tax at a compounded rate of 6 per cent of the whole contract amount (previously 3 per cent) on imports of goods into the state.
- The date for remittance of tax deducted at source by works contractors to the government has been extended from 5th to the 20th of the succeeding month in which tax has been deducted.

Notification No. 2500/Leg. A2/2014/Law, dated, 23 July 2014

Maharashtra

Effective from 3 March 2014, the limitation period for making assessment order for any period which has been extended from 31 March 2014 to 30 September 2015 for dealers who are engaged in construction of flats, dwellings or building or premises, and transfer them in pursuance of an agreement along with land or interest underlying the land.

The Maharashtra (Value Added Tax) Amendment Ordinance, 2014

Rajasthan

Rajasthan state budget received assent of the Governor and the key amended VAT provisions are listed below:

- The threshold limit for registration as a manufacturer has been enhanced from INR2 lakh to INR5 lakh
- ITC will be allowed only after verification of the deposit of the tax payable by the seller;
- TDS provision on government purchases has been abolished. Further, the upper limit for deduction of TDS on value of works contract has been enhanced from 6 per cent to 20 per cent;
- The scope of self-assessment under section 23 has been enlarged to cover those dealers who have filed belated returns provided they file the same before issuance of notice for assessment under section 24.

Notification No. F. 2 (33) Vidhi/2/2014.- Dated 31 July 2014

Personal tax

Notifications/Circulars/Press Releases

Employees' Provident Fund Organisation issues circular to its field officers to implement the proposed enhancement in statutory wage ceiling from INR6,500 to INR15,000

Under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act) the statutory wage ceiling for enrolling employees, as well as for making contributions, is INR6,500 per month (except for some special classes of employees).

In the Union Budget 2014, this statutory wage ceiling is proposed to be revised to INR15,000 per month. In this context, the Employees' Provident Fund Organisation (EPFO) has issued a circular to its field officials for undertaking preparatory activities to implement this proposed changes.

The proposed enhancement of statutory wage ceiling is expected to have significant implications for the industry. All establishments covered under the EPF Act will need to revise their compliances. Employers will have to enroll new employees who become eligible because of this revision of statutory wage ceiling. Secondly, they will have to contribute mandatorily upto the monthly pay of INR15,000 (as defined under the EPF Act) for the eligible employees. This will result in increase in the cost of compliances under the EPF Act. For the employees, this may mean increased contributions under the EPF Act which may impact their net take home salary. The employees will also be eligible for corresponding higher benefits.

Source - www.epfindia.com

India's social security agreements with Finland and Sweden come into effect

India had signed Social Security Agreements (SSAs) with the Republic of Finland (Finland) and the Kingdom of Sweden (Sweden) on 12 June 2012 and 26 November 2012, respectively. The Indian Provident Fund authorities have now issued a circular notifying that these SSAs with Finland and Sweden will be effective from 1 August 2014.

The SSAs aim at achieving equality on the principle of reciprocity to benefit the employees and employers having cross-border operations by avoiding double payment of social security contributions.

The SSAs between India - Finland and India - Sweden envisage the following benefits:

- Exemption from social security contribution in the host country (detachment)
  - The employees from one country deputed by their employers to the other country on short-term assignments are exempted from social security contribution in that country. The period for detachment under the respective SSAs is as follows:

SSA	Period of detachment
India – Finland	Up to a period of 60 months
India – Sweden	Up to a period of 2 years

- Totalisation of contributory periods
- Export of benefits

The signing of the India – Finland and India - Sweden SSAs is a welcome step as it may help in cost savings and the social protection of international assignees in respect of deputation arrangement for employees, which in turn could lead to increase in economic activity between the countries.

Source - www.epfindia.com

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