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India Tax Konnect

Contents

Editorial

India's retail inflation reduced to a record low in July and the annual growth in industrial production hit a four-month high. The output at factories, utilities and mines expanded at an annual rate of 3.8 per cent due to a sharp rebound in the demand for consumer goods. A crash in global commodity prices has helped inflation slip below the Reserve Bank of India's (RBI's) medium-term target of 6 per cent.

Amid the volatility in the stock market and currency market across the globe due to a free fall of the Chinese stock market, the RBI Governor expressed that he is not in favour of depreciating the rupee and joining a global wave of monetary measures that have weakened currencies. Further, India needs to work on making its economy more competitive, while noting that India is now 'quite healthy' and in a better position to handle global turbulence.

The government has accepted the recommendation of A.P. Shah Committee to clarify the inapplicability of Minimum Alternate Tax (MAT) to Financial Institutional Investors (FIIs)/Foreign Portfolio Investors (FPIs) and has decided that an appropriate amendment, to the Income-tax Act, 1961 (the Act) will be carried out. Through the amendment the government proposes to clarify that MAT provisions will not be applicable to FIIs/FPIs not having a place of business/Permanent Establishment (PE) in India, for the period prior to 1 April 2015. Alternatively, the Committee has suggested that a Circular may be issued clarifying the inapplicability of MAT provisions to FIIs/FPIs. Pending such an amendment, the Central Board of Direct Taxes (CBDT) will convey to the field formations the decision of the government to accept the recommendation.

On the direct tax front, the Bangalore Tribunal in the case of Carl Zeiss India (P) Ltd. held that no disallowance under Section 40(a)(i) of the Act shall be made in case of non-deduction of tax at source on payment made to a non-resident if the taxpayer has made such a payment on the basis of a 'nil' withholding certificate obtained from the tax officer under Section 195(2) of the Act.

On the transfer pricing front, the Advance Pricing Agreement (APA) rollback rules were notified by the CBDT on 14 March 2015. The rollback rules provide for an extension of the APA terms on the pricing of international transactions for prior four years (rollback years) preceding the first year from which APA is to be applicable. In one of the cases where an APA rollback application was filed after notification of rollback rules in March 2015, the CBDT signed a unilateral rollback APA. As per a press report, the APA pertains to a U.S. multinational company and has been signed for a period of nine years, thus including protection from litigation for the past four years and future five years.

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.

International tax

No disallowance under Section 40(a)(i) of the Act if the taxpayer has not deducted tax at source based on a 'nil' withholding certificate obtained from the tax officer

The taxpayer, a company incorporated in Singapore, is a 100 per cent subsidiary of Carl Zeiss, AG Germany. The Carl Zeiss group manufactures and sells optical products. The taxpayer was mainly engaged as a front office for the Carl Zeiss group in India. The branch office of the taxpayer in India facilitates the sale of group products as well as provide sales support.

During the year under consideration, the branch of the taxpayer had made a payment of reimbursement of expenditure in respect of the services rendered by its head office through three senior management officials. The payment was made under the cost sharing arrangements and consequently claimed as a reimbursement to the head office. The branch obtained a nil withholding tax certificate from the tax officer before remitting the amount to its head office.

The Assessing Officer (AO) held that the services provided by the head office in this case, fall within the category of Fees for Technical Services (FTS) under Section 9(1)(vii) of the Act as well as the India-Singapore tax treaty. Since the taxpayer did not deduct tax at source, the said payment was disallowed under Section 40(a)(i) of the Act and added to the total income.

The Bangalore Tribunal held that the taxpayer had remitted the amount to a non-resident after obtaining a certificate from the tax officer under Section 195(2) of the Act. The tax officer while granting the certificate under Section 195(2) had duly recorded the fact that the payment in question is in connection with salaries and other cost of managerial and HR officials charged to the Indian branch which includes the cost of the MD, Chief Officer, HR quality and web administrator for IT application specialists. Thus, after considering the submissions of the taxpayer that the services provided by the non-resident from Singapore does not fall within the definition of FTS under Article 12 of India-Singapore tax treaty, the tax officer issued a 'nil' withholding certificate for making the remittance. Once the taxpayer had complied with the provisions of Section 195 of the Act and obtained a certificate from the tax officer in accordance with the requirement of Section 195(2), then the taxpayer cannot be penalised by invoking the provisions of Section 40(a)(i) of the Act during an assessment.

Accordingly, without going into the issue of the nature of payment, whether FTS or not, it was held that once the taxpayer had complied with the provisions of Section 195 by obtaining the certificate under Section 195(2) of the Act, no disallowance can be made under Section 40(a)(i) of the Act with respect to the said amount paid to the non-resident.

DCIT vs Carl Zeiss India (P) Ltd. (IT(IT)A No. 1251(B)/2014) (Bang) – Taxsutra.com

Management and procurement services do not make available any technical knowledge, skills, etc. and, therefore, are not taxable as fees for technical services under the India-U.K. tax treaty

The applicant is a company incorporated in the U.K. and is engaged in the development and supply of intrinsic safety explosion protection devices, field bus and industrial networks, etc. The applicant is a wholly owned subsidiary of MTL Instruments Group Ltd., U.K. (MTL U.K.).

MTL Instruments Private Limited (MTL India) is an Indian company, and a subsidiary of MTL U.K.. MTL India is engaged in the business of manufacturing industrial control equipment used for process control in hazardous environments. The applicant entered into two service agreements with MTL India for providing management and procurement services.

The management services were provided through one of the employees of the applicant based in the U.K. designated as Group Operations Director (GD) by means of telephone calls, e-mails and occasional visits to India. While sitting in the U.K., the GD monitors the financial and operational progress of activities of MTL India. The GD also renders services with reference to human resource matters of MTL India such as hiring new personnel, setting up individual performance targets, assisting in performance appraisal, etc. The GD was also involved in quality and design reviews. As per this agreement, MTL India shall compensate the applicant for providing management services at cost plus 5 per cent and for this purpose only 50 per cent of the cost (total remuneration of the GD) is allocated by MTL U.K..

The second agreement was entered into for provision of procurement services with a view to reduce cost and avoid duplication of procurement efforts within the MTL Group. As per the agreement, the applicant had constituted a procurement team in the U.K. to look into the global sourcing requirements of raw materials within the MTL Group, including MTL India. The procurement team travels to different countries to visit suppliers and distributors to determine the best price that would be available to the group. Their services include setting up the material supply chain, logistic support and providing support to resolve technical issues with supplies from global sources. MTL U.K. was compensated for the procurement services on a cost to cost basis (without any mark up) and for this purpose only 30 per cent of the cost of the procurement term was allocated to MTL India.

The Authority for Advance Rulings (AAR) held that the consideration received by the applicant for management and procurement services is not taxable in India as per the provisions of the India-U.K. tax treaty since such services do not make available any technical knowledge, skills, etc. The AAR also observed that managerial services are not covered in the definition of FTS in the India-U.K. tax treaty and the same are routine managerial activities and hence, cannot be classified as technical or consultancy services. Further, the AAR observed that procurement services can never be classified as technical or consultancy in nature and therefore, such services are not FTS under the tax treaty.

Measurement Technology Ltd. (A.A.R. No 966 of 2010) (AAR) - Taxsutra.com

Payment for e-learning courses and online information resources is taxable as royalty under the India-Ireland tax treaty

The applicant is an Ireland based company, engaged in the business of providing on demand e-learning course offerings, online information resources, flexible learning technologies and performance support solutions (SkillSoft products). The applicant has entered into a reseller agreement with SkillSoft Software Services India Private Limited (SkillSoft India). Under this agreement, SkillSoft India is a distributor and has the right to license, market, promote, demonstrate and distribute SkillSoft products by providing online access to such products.

SkillSoft India buys the SkillSoft products from the applicant on a principal-to-principal basis and sells the same to the Indian end users/customers in its own name. According to the applicant, it has developed copyrighted products by using software and techniques, on several topics which were electronically stored on its server outside India. These products are licensed to Indian end users/customers under the master licence agreement between SkillSoft India and Indian end users. SkillSoft India grants to the Indian end users a non-exclusive, non-transferable license to use and to allow the applicable authorised audience to access and use SkillSoft products. The products consist of two components namely the course content and the software through which the course content is delivered to the end customer. Its e-learning platforms are not instructor driven and have no element of human interaction in the learning programmes. The interaction is restricted to software enabled virtual interaction through text, images and graphics that are utilised to enhance the learning experience.

The issue before the AAR was whether payments received by the applicant on account of e-learning course offerings, online information resources, etc. is taxable as 'royalty' under Article 12(3)(a) of the India-Ireland tax treaty.

The AAR held that e-learning course offerings, online information resources, etc. are software and computer databases created by the applicant, included within the ambit of 'literary work' under Article 12(3)(a) of the India-Ireland tax treaty. Irrespective of the use of words like 'non-exclusive' and 'non-transferable' in the relevant agreements, there is a transfer of certain rights owned by the applicant. In terms of the tax treaty, the consideration paid for the use or a right to use the confidential information in the form of computer software, itself constitutes as royalty. Accordingly, payment for e-learning courses and online information resources is taxable as royalty under the India-Ireland tax treaty.

SkillSoft Ireland Limited (AAR. No 985 of 2010)(AAR) – Taxsutra.com

Interest on tax refund is taxable as business income under the India-U.K. tax treaty since it is effectively connected with a PE in India. Section 44BB of the Income-tax Act dealing with the business of exploration, etc. of mineral oil is not applicable to interest on tax refund

The taxpayer, a non-resident company, is engaged in the business of oil exploration. During the year under consideration, the taxpayer received interest on income tax refund. The taxpayer computed tax on such tax refund at the rate of 15 per cent under Article 12 of the India-U.K. tax treaty relating with interest income. However, the Assessing Officer (AO) treated such interest as business income and assessed that under Article 12(6) of the tax treaty as the taxpayer was having a PE in India. The Commissioner of Income-tax (Appeal) [CIT(A)] and the Tribunal upheld the order of the AO.

The Uttarakhand High Court Court held that the interest earned on income tax refund is taxable as business income under the India-U.K. tax treaty since the debt claim in respect of which interest is paid is effectively connected with a PE in India.

The High Court has also held that Section 44BB of the Act was not applicable to interest on income tax refund since the amount of such an interest was not on account of the provision of services and facilities in connection with, or supply of plant and machinery on hire in the prospecting for, or extraction or the production of mineral oils.

B.J. Services Company Middle East Limited vs ACIT (Income Tax Appeal No. 01 of 2010)(Uttarakhand High Court) –Taxsutra.com

Corporate tax

Decisions

Wheeling charges paid for transportation of electricity cannot be characterised as FTS under the Income-tax Act

During the Assessment Year (AY) 2005-06, a survey was carried out on the business premises of the taxpayer under Section 133A of the Act. During the course of the survey, it was noticed that the taxpayer had deducted tax at source (TDS) at 2 per cent under Section 194C of the Act on the wheeling charges paid to Power Grid Corporation India Ltd. (PGCIL). The taxpayer had separately entered into a Bulk Power Transmission Agreement (BPTA) with PGCIL for transmission of electricity.

The AO held that the taxpayer was not only using the transmission system set-up of PGCIL but also availing other services which are technical in nature. Accordingly, the wheeling charges paid by the taxpayer were classified as FTS, and were liable for TDS under Section 194J of the Act. The AO treated the taxpayer as an 'assessee in default' under Section 201(1) of the Act. The CIT(A) upheld the order of the AO. However, the Tribunal agreed with the taxpayer that what it had availed from PGCIL was not a technical service.

The Delhi High Court held that technical services cannot be understood in a rigid formulaic manner. It will vary from industry to industry. There will have to be a specific line of enquiry for determining what in a particular industry would constitute as rendering of a technical service. The High Court observed that the system operated and used by PGCIL for transmission of electricity is maintained by skilled technical personnel. This also ensures that PGCIL complies with the standards and norms put in place by the statutory regulations. The High Court observed that PGCIL is operating and maintaining its own system using the service of engineers and qualified technicians. A comparison could be made with the system of distribution of some other commodity like water. It might require the operation and maintenance of a water pumping station and the maintenance of a network of pipes. However, what is conveyed through the pipes and the equipment to the ultimate consumer is water. The equipment and pipes have no doubt to be maintained by technical staff; but that does not mean that a person to whom the water is distributed through using the pipes and equipment is availing of any technical service as such.

Although the wheeling charges may be fixed by the Central Electricity Regulatory Commission (CERC), that by itself is not a determinative factor. Once it is accepted that PGCIL transmits the electricity to the taxpayer through the network without any human intervention, it cannot be characterised as a provision of technical services under Section 194J of the Act. By virtue of the BPTA between the taxpayer and PGCIL, there is transportation of electricity from PGCIL to the taxpayer through the equipment and network required, statutorily to be maintained by PGCIL through its technical personnel using their technical expertise. However, this does not result in PGCIL providing technical services to the taxpayer. Therefore, the wheeling charges paid by the taxpayer to PGCIL for such transportation of electricity cannot be characterised as FTS.

CIT vs Delhi Transco Ltd (ITA No. 384/2012) (Delhi High Court) – Taxsutra.com

Conversion of interest payable into equity shares is treated as actual payment within the meaning of Section 43B of the Income-tax Act

On 1 November 2002, a rehabilitation scheme was sanctioned by the Board for Industrial and Financial Reconstruction (BIFR) in the case of the taxpayer and it was prepared by the Industrial Development Bank of India (IDBI). On the loans borrowed by the taxpayer from IDBI, there was outstanding interest as on 31 March 2001. It was decided that IDBI could be allotted 14,30,000 equity shares of INR10 each, valued at INR14.3 million and the interest to the extent would be taken as having been paid as on 31 March 2002.

During the AY 2002-03, the taxpayer filed a return of income on 31 October 2002 declaring a loss of INR20 million. In computing the returned loss, the unpaid interest to the IDBI of INR34.5 million was added back to the net loss as per the profit and loss account. Thereafter, a deduction of interest paid to IDBI to the extent of INR14.3 million was claimed. The basis for this claim was the allotment of shares in the above manner to IDBI on 30 March 2002.

The case of the taxpayer was reopened under Section 147 of the Act. The reasons for the reopening, as stated by the AO, was that the taxpayer had claimed and was allowed a deduction of INR14.3 million towards the allotment of shares to IDBI on conversion of 30 per cent of the simple interest in equity share capital. It was noted that since the rehabilitation scheme was sanctioned by the BIFR on 1 November 2002, the said deduction was not allowable during the AY 2002-03. The AO was of the view that in terms of Section 43B of the Act, deduction is allowable on actual payment basis and an allotment of equity shares in lieu of interest liability cannot be construed as actually paid as required under Section 43B of the Act.

The High Court held that the mere fact that the return of allotment was filed with the Registrars of Companies (ROC) only on 29 April 2002 or that the BIFR may have sanctioned the scheme only on 1 November 2002, would not change the actual date on which the shares stood allotted i.e. 30 March 2002. When pursuant to a settlement the creditor agrees to convert a portion of interest into shares, it must be treated as an extinguishment of liability to pay interest to that extent. In essence, there will be no further outstanding interest.

Consequently, the situation where an interest payable on a loan is converted into shares in the name of the lender/creditor is different from the situation envisaged in Explanation 3C to Section 43B of the Act viz., conversion of interest into 'a loan or borrowing'. In the latter instance, the liability continues, although in a different form. However, where the interest or a part thereof is converted into equity shares, the said interest amount for which the conversion is taking place is no longer a liability. Accordingly, the High Court accepted the plea of the taxpayer that the said conversion of a portion of interest into equity shares should be taken to be 'actual payment' within the meaning of Section 43B of the Act.

CIT vs Rathi Graphics Technologies Ltd. (ITA 780/2014) (Delhi High Court) – Taxsutra.com

Landing and parking charges of international aircrafts cannot be treated as 'rent' for the purpose of deduction of tax at source under Section 194-I of the Act

The taxpayer is a foreign company incorporated in Japan. It is engaged in the business of international air traffic. It transports passengers and cargo by air across the globe and provides related services. The taxpayer is a member of the International Air Transport Agreement (IATA). The International Civil Aviation Organisation (ICAO) has framed certain guidelines and rules on charges for airports and air navigation services. The Airport Authority of India (AAI) has levied certain charges on the taxpayer for landing and parking its aircrafts. On the basis of the letter of AAI, the taxpayer deducted tax on landing and parking charges at 2 per cent under Section 194C of the Act. The AO held that the payments for landing and parking charges were covered by the provisions of Section 194-I and not under Section 194C of the Act and, therefore, the taxpayer ought to have deducted tax at 20 per cent instead of 2 per cent.

The Supreme Court observed that under Section 194-I of the Act, the expression 'rent' is given a much wider meaning than what is normally known in common parlance. In the first instance, once the payment is made under lease, sub-lease or tenancy, the nomenclature given in the section is inconsequential and such payment would be treated as 'rent'. In the second place, such payment made even under any other 'agreement or arrangement for the use of any land or any building' would also be treated as 'rent'. Whether or not such building is owned by the payee is not relevant. The expressions 'any payment', by whatever name called and 'any other agreement or arrangement' have the widest import. Likewise, payment made for the use of any land or any building, widens the scope of the proviso. In the present case, the airlines are allowed to land and take off their aircrafts from the Delhi Airport, for which a landing fee is charged. They are also allowed to park their aircrafts at the airport upon payment of a parking fee. The Madras High Court in the case of CIT v. Singapore Airlines Ltd. [2012] 24 taxmann.com 200 (Madras) held that the landing and parking facility was not of 'use of land' per se but in respect of a number of facilities provided by the AAI which were to be necessarily provided in compliance with various international protocols. Therefore, the charges were levied not for land usage or area allotted, simpliciter. The substance of these charges was ingrained in the various facilities offered to meet the requirement of passengers' safety and on safe landing and parking of the aircraft and these were the considerations that governed the fixation of the charges. The aforesaid conclusion of the Madras High Court is justified based on sound rationale and reasoning.

The Supreme Court observed that perusal of IATA documents on the charges for airport and air navigation services, it indicates that there are various international protocols which mandate all such authorities manning and managing these airports to construct the airports of desired standards which are stipulated in the protocols. The services which are required to be provided by these authorities, like the AAI, are aimed at passengers' safety as well as on safe landing and parking of the aircrafts. Therefore, it is not mere 'use of the land'.

The Supreme Court emphasised the technological aspects of the runways in detail to highlight the precision with which designing and engineering go into making the runways full proof for safety purposes. The objective is to show that the AAI is providing all these facilities for landing and take-off of an aircraft and in this whole process, 'use of the land' pails into insignificance. The charges which are taken from the aircrafts for landing and parking of the aircrafts are not dependent upon the use of the land. On the contrary, protocol prescribes a detailed methodology of fixing these charges. On a perusal of the charges on air-traffic which includes charges for landing, lighting, approach and aerodrome control, etc. it indicates that a cost analysis needs to be done for fixing these charges. When the airlines pay for these charges, and treating such charges as charges for 'use of land' would be adopting a totally naive and simplistic approach which is far away from reality.

Accordingly, it was held that landing and parking charges of international aircrafts cannot be treated as 'rent' for the purpose of deduction of tax at source under Section 194-I of the Act

Japan Airlines Co. Ltd. vs CIT [2015] 60 taxmann.com 71 (SC)

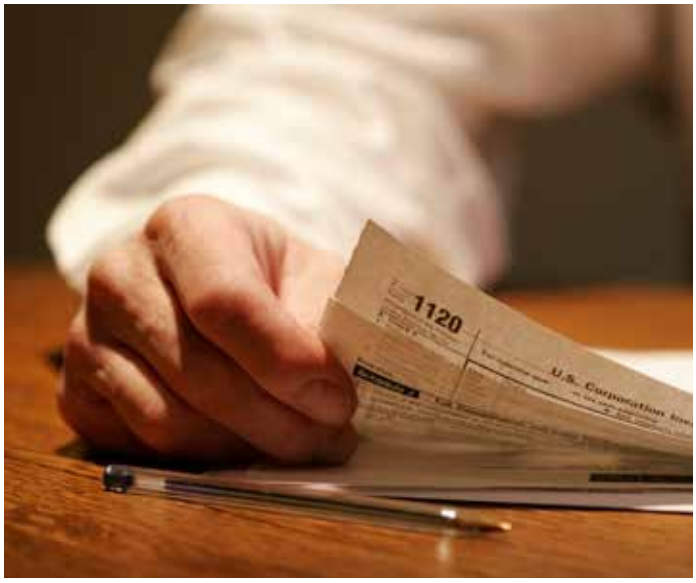
Notification/Circulars/Press Releases

The income-tax department releases undisclosed foreign income and assets challan

Recently, the Income-tax department released undisclosed foreign income and assets challan in the form of ITNS 284, for payment of tax under the Undisclosed Foreign Income and Assets and Imposition of Tax Act, 2015.

The undisclosed foreign income and assets challan seeks details of PAN, AY, name and address, etc. An appropriate box needs to be ticked if the tax is being paid by the company (0020) or other than companies (0021). The challan also seeks bifurcation of the amount into income-tax, interest, penalty and others.

Source: www.taxsutra.com



Transfer pricing

Decisions

Interest adjustment on advances made to an associated enterprise is upheld and the meaning of quasi capital elucidated

During the assessment proceedings, it was noticed that the taxpayer had invested INR2.17 million in the share capital of its Wholly Owned Subsidiary (WOS) in the United Arab Emirates (UAE) and had also advanced INR167.5 million to its WOS. The taxpayer contended that the entire amount advanced to the WOS was out of the proceeds of the taxpayer's Global Depository Receipts (GDRs) issue and that the advance was in nature of a 'contribution towards the quasi capital of the said company'. The taxpayer argued on the basis of commercial expediency of an interest free loan. The Transfer Pricing Officer (TPO) argued that commercial expediency of the transaction was not relevant while ascertaining the Arm's Length Price (ALP) and the test should be made on the price at which such transactions would have been entered into by independent parties. The TPO proceeded to treat LIBOR plus 2 per cent as the ALP and made an adjustment. The CIT(A) confirmed the actions of the AO.

The Ahmedabad Tribunal held as follows:

- While determining the ALP, the transaction in the nature of 'quasi capital' has to be reviewed as a borrowing transaction between the AEs.
- Loan/commercial borrowing transactions are benchmarked on the basis of interest rate applicable on loan transactions, which under Transfer Pricing (TP) regulations, cannot be compared with a transaction which is something materially different than a loan transaction. Loans, which are in the nature of quasi capital, are treated differently than normal loan transactions.
- The expression 'quasi capital' loan or advance was not a routine loan transaction and the substantive reward for such an advance would not be 'interest' but an opportunity to own capital. Therefore, the comparison of quasi capital loans should not be done with commercial borrowings but with loans or advances which are given in same or similar situations.
- The Tribunal pointed out that in all the other Tribunal decisions, where references have been made to advances in the nature of quasi capital, the following situations were referred:
  - Advances were made as capital which could not be subscribed to due to regulatory issues and the advancing of loans was only for the period and till the same could be converted into equity, and
  - Advances were made for subscribing to the capital but the issuance of shares was delayed.
- The comparable uncontrolled price of a quasi capital loan cannot be nil, unless such a loan is only for a transitory period and the reward for the value of money advanced is the opportunity for capital investment or such other benefit.
- The relevance of quasi capital for ALP determination, should be from the comparability perspective of the borrowing transaction between the AEs and the source of funds shall be immaterial.
- Based on the above, the Tribunal upheld the decision of CIT(A) and confirmed the adjustment

Soma Textile & Industries Limited vs. ACIT [ITA No. 262 (Ahd) of 2012]

Deduction under Section 10A (for export of software services) is allowable in respect of a suo-moto transfer pricing adjustment carried out by the taxpayer in the income tax return

The taxpayer is engaged in the export of software and Information Technology enabled Services (ITeS). For the year under consideration, the taxpayer filed its Return of Income (ROI) declaring nil income. In the ROI, the taxpayer claimed a deduction under Section 10A of the Act, in respect of the entire business income including the amount of the suo-moto TP adjustment and arrived at nil total income. The AO, for the purpose of computing the deduction under Section 10A, disallowed the suo-moto TP adjustment carried out by the taxpayer. The taxpayer placed reliance on the decision of Bangalore Tribunal in the case of iGate Global Solutions vs ACIT [2008] 24 SOT 3 (Bang). However, the AO referred to the provisions of the second proviso to Section 92C(4) of the Act and held that the taxpayer's claim defeated the purpose for which Section 92C of the Act was legislated.

The CIT(A) upheld the action of the AO and relied upon the Karnataka High Court ruling in the case of Yokogawa India Ltd. [2012] 341 ITR 385 (Kar) and distinguished the decision of the coordinate bench in the case of iGate Global Solutions Ltd., holding that the methodology of computation of deduction under Section 10A of the Act was not brought to the notice of the Tribunal in the case of iGate Global Solutions Ltd.

The Bangalore Tribunal held as follows:

- The Tribunal referred to the ruling of the coordinate bench in the case of iGate Global Solutions Ltd., wherein the bench had allowed the deduction under Section 10A of the Act in respect of a suo-moto TP adjustment carried out by the taxpayer.
- The Tribunal also referred to the Hon'ble Karnataka High Court ruling in the same case of iGate Global Solutions where the High Court upheld the judgment of the coordinate bench and ruled that the AO erred in relying upon Section 92C(4) in a case where the ALP was determined by the taxpayer itself, whereas the said provision applies to a case where the ALP was determined by the AO.
- Following the above referred judgement, the Tribunal held that the taxpayer be allowed a deduction under Section 10A of the Act, in respect of the suo-moto TP adjustment carried out in the ROI.
- The Tribunal also held that judgement of the Karnataka High Court in the case of Yokogawa India Ltd. relied upon by the CIT(A) does not apply to the present case.

Austin Medical Solutions Pvt. Ltd. vs ITO [I.T.(TP)A. No. 542/Bang/2012]

Notification/Circulars/Press Releases

India signs its first rollback agreement

The APA rollback rules were notified by the CBDT on 14 March 2015. The rules provide for an extension of the APA terms on the pricing of international transactions for prior four years (rollback years) preceding the first year from which the APA is to be applicable.

In one of the cases where an APA rollback application was filed after notification of the rollback rules in March 2015, the CBDT signed a unilateral rollback APA. As per press report, the APA pertains to a U.S. multinational company and has been signed for a period of nine years, thus including protection from litigation for the past four years and future five years.

Source: www.economictimes.com

The CBDT discloses only limited information on APAs – Identity of taxpayers cannot be disclosed

In May 2014, an application was filed under the Right to Information Act, 2005 (RTI Act) by an RTI activist (the appellant) seeking information from the Central Public Information Officer (CPIO), Ministry of Finance (the respondent), on 10 issues relating to APAs signed by the government. In reply to this application, the CPIO denied the required information to the appellant by taking a plea under Section 8(1)(d) of the RTI Act which provides for non-disclosure of information which could harm the competitive position of a third party, unless the competent authority is satisfied that a larger public interest warrants the disclosure of such information. The first Appellate Authority upheld the decision of the CPIO and therefore, the appellant filed a second appeal.

Central Information Commission (CIC) order

In the second appeal before the CIC, it was observed that out of the 10 issues on which information was sought, three issues or information points were not covered under Section 8(1)(d) of the RTI Act. Accordingly, it directed the CBDT to provide complete and categorical information against the following three points to the appellant:

i. The estimated amount of transactions pertaining to APAs signed in India;

ii. The functional currency that is to be recognised for the proposed transactions under these APAs;

iii. The annual tax revenue likely to be earned by the CBDT as a result of entering into these APAs.

Information provided by the CBDT pursuant to the CIC order

In response to the aforesaid CIC order, the CBDT provided the following information in April 2015:

- The estimated total amount of transactions of the five APAs signed (as on date of receipt of RTI application in May 2014) was INR210.75 billion.
- The financial currency recognised is Euro and Indian Rupee for one APA each, U.S. dollar for two APAs and two currencies viz. U.S. dollar and Euro for the fifth APA case.
- Regarding the annual tax revenue likely to be earned from each APA, the CBDT replied that it cannot be forecasted by determining the profit margin of a particular transaction. The CBDT observed that determination of a profit margin in a certain transaction will not give any foresight of the total profits of the company, as other transactions will also impact the nature of profit/loss of a company.

Source:www.taxsutra.com

Indirect tax

Central Excise - Decisions

Unsecured loans do not create mutuality of interest

In the present case, 'RPG SATL' and 'Goodyear' entered into a joint venture agreement to form a third company viz SATL (taxpayer). The primary objective of the taxpayer was to manufacture tyres exclusively for CEAT and Goodyear under their brand names. The promoters were holding 50:50 equity each and were exclusive buyers of the goods. The taxpayer received an unsecured interest free loan of INR856.6 million from CEAT and Goodyear. They also received moulds and other equipments worth INR 100 million free of cost and on a loan basis.

This kind of an arrangement led to the issuance of Show Cause Notice (SCN) alleging that the selling price of CEAT and Goodyear should be the assessable value of the goods manufactured by the taxpayer.

The taxpayer replied to the SCN stating that there was no mutuality of interest and that no extra commercial considerations were pointed out regarding price fixation. It was also submitted that the sale of goods was on a Principal -to-Principal (P2P) basis and at an arm's length. The Tribunal allowed the appeals in favour of the taxpayer.

Against the order of the Tribunal, the revenue preferred an appeal before the Supreme Court. The Supreme Court while dismissing the appeal filed by the department, observed that there is no mutuality principle in the instant case i.e. the parties did not have an interest, whether direct or indirect, in the each other's business of each other. Accordingly, it was held that there was no indirect flow back of consideration and that duty was paid appropriately.

CCE vs Goodyear South Asia Tyres Private Limited (2015–TIOL–165–SC–CX)

Notifications/Circulars/Press Releases

Instructions regarding a detailed scrutiny of central Excise returns

Earlier, a circular was issued providing a manner for preliminary scrutiny of return. In this regard, Board has now issued guidelines for the detailed scrutiny of central excise returns. The preliminary scrutiny system covers the returns filed online, whereas, the detailed scrutiny system covers a few returns selected on the basis of identified risk parameters.

Circular No. 1004/11/2015-CX dated 21 July 2015

Clarification relating to Notifications No.30/2004-CE, No.1/2011-CE and No.12/2012-CE

The judgment of the Supreme Court in the case of SRF Ltd and ITC Ltd was examined by Central Board of Excise and Customs (CBEC) wherein, due to certain errors apparent on record/interpretational issues, a review petition/revision application have been filed against the same.

The opinion of the Ministry of Law & Justice was sought and Notifications No.34/2015-CE, No.35/2015-CE and No.36/2015-CE all dated 17 July 2015, were issued amending the conditions mentioned in the Notifications 30/2004-CE, No.1/2011-CE and No.12/2012-CE.

The amended conditions for claiming an exemption on manufacture of finished goods mentioned in Notification 30/2004-CE (as amended 34/2015) were viz (1) excisable goods are manufactured from inputs on which appropriate excise duty is paid and (2) no credit can be taken on the duty paid on these inputs by the manufacturer (not the buyer). This meant that the exemption on manufacture was available only when 'appropriate duty of excise' was paid on the inputs.

In the above context, apprehensions were raised about the use of the phrase of 'appropriate duty'. In this regard, explanations have been inserted in the Notifications No.30/2004-CE, No.1/2011-CE and No.12/2012-CE, so as to clarify that the appropriate duty or appropriate additional duty for the purposes of the said notifications/entries includes nil duty or concessional duty, whether or not read with any relevant exemption notification for the time being in force.

It may, therefore, be noted that the domestically manufactured goods covered under these notifications/ entries continue to be exempt from excise duty or subject to concessional rate of excise duty, as the case may be as they were prior to 17 July 2015, if nil duty or concessional duty has been paid on the inputs.

Circular No. 1005/12/2015-CX dated 21 July 2015

Service tax - Decisions

Service portion in a composite contract cannot be vivisected and made taxable before the introduction of erstwhile taxable category of works contract services

In the instant case, the issue was whether components of a composite transaction including rendition of service under a works contract can be vivisected, prior to introduction of erstwhile taxable category of works contract service and made liable to service tax under the erstwhile taxable categories such as 'commercial or industrial construction', 'construction of complex service', etc. (for the period prior to introduction of works contract category, i.e. 1 June 2007).

The larger bench of the Tribunal had earlier held that service elements in a works contract if fairly classifiable under any of the erstwhile taxable categories such as 'commercial or industrial construction', 'construction of commercial complex', etc. would be taxable under such a category even prior to the introduction of a works contract service category (i.e. 1 June 2007).

The Supreme Court has overturned the said Tribunal decision and held that indivisible/composite turnkey contracts cannot be vivisected and the service component cannot be subjected to tax by classification, under erstwhile taxable categories prior to 2007, on the basis of the following:

- Works contract is a separate kind of contract distinct from contracts of services recognised under the aforementioned erstwhile taxable service categories;

- Service tax law provides that the value of a taxable service is the gross amount charged for such services, refers to valuation of simple service contracts only and not of composite works contract; and
- There is no charge or machinery to levy and assess service tax on indivisible works contract prior to the introduction of works contract service category in 2007.

Commissioner and others vs M/s Larsen & Tourbo Ltd. and others (TS-437-SC-2015-ST)

Special Leave Petition challenging the levy of service tax on advocates admitted and the High Court decision stayed by the Supreme Court

In the present case, the constitutional validity of a levy of service tax on services such as advice, consultancy and appearance before courts/tribunals rendered to business entities as an individual or a firm of advocates was challenged.

The Bombay High Court had earlier rejected the petition and held that service tax legislature had neither interfered with the role and function of an advocate nor had made any inroad and interference in constitutional guarantee of justice to all. Accordingly, a levy of service tax on advocates under erstwhile taxable category of 'legal consultancy services' was upheld by the High Court.

In the Special Leave Petition filed against the said decision of the Bombay High Court, the Supreme Court granted an interim stay on the operation and implementation of the said High Court judgment dated 15 December 2014.

Bombay Bar Association vs Union of India & Ors. (TS-411-SC-2015-ST)

Notifications/Circulars/Press Releases

Circular regarding issuance of Show Cause Notice (SCN) and competency of thr authority to conclude departmental proceedings

With respect to detections made during audit, investigation or scrutiny, the Central Board of Excise and Customs has clarified:

- Request for waiver of a written SCN can be made where the taxpayer pays service tax, interest and penalty (equal to 15 per cent of the tax) prior to issuance of a SCN;
- The service tax officers have the power to conclude departmental proceedings and such conclusion of proceedings should be intimated to the taxpayer in writing.

Circular F. No. 137/46/2015-ST dated 18 August 2015

Foreign Trade Policy – Public Notice

Amendment in 'Transitional Arrangement'

With effect from 1 July 2015, amendments have been made in Para 3.05 of the Handbook of Procedures, to provide the facility for exporters to continue filing applications for benefits under Chapter 3 schemes of the earlier Foreign Trade Policy (FPS/MLFPS/FMS/VKGUY/SFIS), as per procedures prescribed in the corresponding Handbook of Procedures.

Public Notice No. 29/2015-20 dated 04 August 2015

VAT - Decisions

CST exemption on packing material not available in absence of inextricable link with export goods

In the instant case, the taxpayer had claimed an exemption under the Central Sales Tax Act (CST Act) on inter-state sales of paper cartons to various exporters without levying sales tax on the same, against the declaration in Form H. However, the AO rejected the exemption and held that the said sales of paper cartons is liable to tax at 1 per cent against the declarations in Form C or Form D as against the normal tax rate of 4 per cent. Hence, the taxpayer had filed a writ petition before the Kerala High Court.

The High Court noted that there must be an intention on part of the buyer and seller to export the goods. Further, there must be an obligation to export which may arise by reason of a contract, statute or mutual understanding between the parties; More importantly, there must exist a link between the contract of sale and actual exportation, to occasion an export, in the absence of which a transaction cannot be termed as sale in the course of export of goods out of India.

The High Court observed that packing materials as such were not meant for export but they were used only for wrapping the goods which were exported. The sale of packing materials by the taxpayer and the goods exported by the exporters were different. However, the High Court stated that both the goods should be the same goods. As per the provisions of the CST Act, the transaction should first be between the exporter and foreign party and the next between the exporter and the penultimate seller like the taxpayer. The High Court observed that in the present case, such a link was absent as far as sale of packing cartons to the exporters was concerned. It noted that the word 'occasion' under the CST Act means 'to cause' or "to be the immediate cause of". Hence, it could not be said that packing materials as such were meant for export but they were used only for wrapping the 'goods which were exported'. Moreover, the intention on the part of both the buyer and seller to export, was absent. Therefore, the High Court rejected the contention of the taxpayer and denied the benefit of exemption under the CST Act to the taxpayer.

Super Packaging Industries vs Sales Tax Officer & Anr. (TS-408-HC-2015(KER)-VAT)

Insistence for online declaration onerous in the absence of any provisions in the Statute

In the present case, the issue before Madras High Court was whether revenue at the time of completing an assessment, could insist on uploading of declaration forms electronically, when the taxpayer has submitted the same in physical form, as presented by its buyers.

The taxpayer has been filing monthly VAT and CST returns under the Puducherry VAT Act and Puducherry CST Rules. The CTO issued a notice stating that the concessions/exemptions claimed in the returns were subject to production of declarations in Form C/F/H, as the case maybe and since the declaration forms were not filed by the taxpayer electronically, despite the lapse of time, the claim of concessions/ exemptions shall be rejected and the turnover shall be assessed at a higher rate of duty. The taxpayer claimed that it has already submitted manual declaration forms as required by the CTO. However, the CTO passed an order stating that the dealer had not submitted declaration forms other than

C Forms for a certain value. Aggrieved by the said order, the taxpayer filed writ petitions before the Madras High Court.

On perusal of the CST Act, the High Court noted that the taxpayer was required to furnish the declaration within the prescribed time. The High Court further noted that the Act also provides that if the prescribed authority is satisfied with the sufficient cause shown, the taxpayer may be allowed to furnish the declaration within such further time. Also, the High Court noted that CST Rules provide that the taxpayer can submit all the declaration forms relating to the year at any time, before the final assessment of the accounts for that year.

Further, the High Court elucidated that presently, there is no provision under the Puducherry VAT Rules to submit the declaration forms in the electronic mode as has been suggested by Revenue. The High Court observed that the taxpayer could not be compelled to upload the declaration forms online in the absence of a facility for such purposes. The High Court observed that Revenue's insistence that declarations should be uploaded online was not in consonance with any of the Rules either under the CST Rules or Puducherry VAT Rules. Further, the High Court directed Revenue to take the declarations for completing the assessment without insisting on uploading the declaration forms in an electronic format. The High Court further held that the approach of Revenue should be to ensure that what the taxpayer is rightfully entitled to, should be extended without harping on technicalities. Accordingly, the writ petitions filed by the taxpayer were allowed.

MRF Limited vs Commercial Tax Officer (TS-412-HC-2015(MAD)-VAT)

Notifications/Circulars/Press Releases

Andhra Pradesh

With effect from 15 August 2015, all the registered dealers are required to compulsorily include all commodities (including sensitive commodities) in the CST registration certificate for smooth issue of e-way bills, failing which they will not be able to generate CST e-way bills and also, VAT e-way bills. Further, the use of manual way bills for sensitive commodities is prohibited unless the sensitive commodity is registered by the dealer.

Circular No. CCTs Ref. No. CCW/152/2015, dated 6 August 2015

Tamil Nadu

As per TNVAT provisions, if the sale price is lesser than the purchase price, then the amount of Input Tax Credit (ITC) in excess of output tax should be reversed. Where required, the assessing authorities may verify a random sample of sale invoices and the corresponding purchase invoices for a certain period, i.e. for a week, month, quarter depending upon the size of business. If the random verification revealed that the dealer has sold goods at a value lesser than the purchase value, a thorough scrutiny for the whole year shall be made and based on which reversal of the ITC and tax payable will be determined under the appropriate provisions. It has been further clarified that, the above provisions will extend only to reversal of excess ITC.

Circular No.29/2015 D3/22678/2015 dated 11 August 2015

Kerala

Currently, a dealer, who sells any building materials, industrial inputs, plant and machinery including components, spares, tools and consumables in relation thereto, to any developer or industrial unit or establishment situated in any Special Economic Zone (SEZ) in the state, for setting up the unit or use in the manufacture of other goods, has to obtain a declaration in Form No.43 duly signed and sealed by the purchaser in the SEZ unit in order to avail the benefit of an exemption from tax. Such a benefit is also available to the sub-contractor.

However, thetrade has pointed out that certain assessing authorities are declining an exemption to the registered sub-contractors, due to the requisite of Form No.43, which they are not in a position to obtain. To resolve the difficulty faced by such sub-contractors, a Declaration form has been prescribed for the purpose of producing the same before the assessing authority of the registered sub-contractor for availing an exemption.

Circular No. 22/2015 No.C1-1/15/CT dated 7 August 2015

Maharashtra

It has been provided that for any period starting on or after 1 April 2015, the dealer whose turnover of sales or turnover of purchases, during any year, is at least INR0.5 billion, shall only be liable for registration under LBT. Further, it has been provided that, in case of registered dealers whose turnover of sales or purchases does not exceed INR0.5 billion during the year prior to the year starting on 1 April 2015, the certificate of registration shall be deemed to have been cancelled with effect from 1 August 2015.

Notification No. LBT. 2015/C.R. 47/UD-32 dated 1 August 2015

Personal tax

Decision/Notification/Circulars/Press Releases

A fraction of a day stayed in India cannot be counted as one complete day while determining residential status in India

As per Section 6 of the Act, an individual would qualify as a resident of India in case his/her physical stay in India is 182 days or more during the year.

The Lucknow Tribunal held that while determining the residential status of an individual under Section 6(1)(a) of the Act, a small fraction of a day stayed in India cannot be counted as one complete day of stay.

Shri Sharad Mishra vs ITO (AY 2009-10, IT Appeal No.-599 of 2012) (Lucknow) – Taxsutra.com

India's Social Security Agreement with Canada comes into effect

India signed a Social Security Agreement (SSA) with Canada on 6 November 2012. The Employees' Provident Fund Organisation (EPFO) had issued a circular notifying that the SSA between India and Canada has come into effect from 1 August 2015.

This SSA aims at achieving equality on the principle of reciprocity to benefit the employees posted in another country, by their employers.

India has also signed other SSAs with Japan, Portugal and Australia; however, these are yet to come into effect. The India-Canada SSA is the fifteenth SSA that has come into effect.

Key benefits under the SSA:

- Exemption from social security contribution in the host country
- Totalisation of contributory periods
- Export of benefits

The implementation of the SSA between India and Canada is a welcome step as it can help save costs in international assignments between the two nations as well as take into account the social protection of international assignees. This could lead to increased economic activity between the two countries.

Source: www.epfindia.com

Taxpayers can now submit their ITR-V forms for the tax year 2012-13 and 2013-14 by 31 October 2015

Taxpayers who electronically file their income-tax returns without attesting it with a digital signature are required to send the physically signed return verification form (ITR-V) to the Centralised Processing Centre (CPC) in Bengaluru. The ITR-V form is required to be signed and sent via post (either speed or ordinary) within 120 days of e-filing the return.

Recently, the Director General of Income-tax (System) vide its notification has extended the time limit for sending the signed ITR-V form as follows:

- Return for the tax year 2012-13 (electronically filed during 1 April 2014 to 31 March 2015) – Upto 31 October 2015
- Return for the tax year 2013-14 (electronically filed during 1 April 2014 to 30 June 2015) – Upto 31 October 2015

Source: www.incometaxindia.com

RBI amends provisions governing the issue of shares under an ESOP scheme to a person resident outside India

The RBI has amended the regulations governing the issue of shares under an Employee Stock Option Scheme (ESOP) and/or sweat equity shares to a person resident outside India. The RBI has also issued directions in this regard to the authorised dealer banks via a circular (A.P. (DIR Series) Circular No 4 dated 16 July 2015).

The amendment has been effective from 11 June 2015 and brought about the following changes:

- The definition of sweat equity and ESOP has been added via the amendment dated 11 June 2015.
- A company can now issue sweat equity shares apart from ESOP to its employees/directors who are resident outside India.
- A company can also issue shares/options to non- resident employees/directors of its holding company.
- A company can issue sweat equity shares/ESOP to non-resident directors of its joint venture or wholly owned overseas subsidiary/subsidiaries.
- Unlisted companies with ESOP schemes that are compliant with the Companies Act, 2013 and allied rules are eligible to issue shares to its non-resident employees/directors
- The amended regulation does not specify the mode of issue of shares/options i.e. either directly or through a trust.
- The threshold limit of five per cent of the paid up capital of the issuing company has been done away with.
- Issue of options/shares by a company, under a scheme by a company where foreign investment is under an approval route, shall require prior approval of the Foreign Investment Promotion Board (FIPB) of the Government of India.
- The issue should be in compliance with the Foreign Direct Investment (FDI) sectorial cap applicable to the company.
- Issue of options/shares to a citizen of Bangladesh/Pakistan under the ESOP scheme of the company, shall require prior approval from the FIPB.

The amendments so made bring about homogeneity in the RBI regulations with reference to the provisions governing the issue of options/sweat equity shares by listed and unlisted companies under the Companies Act, 2013 and the SEBI Guidelines.

Source: www.rbi.org.in

KPMG in India

Ahmedabad
Commerce House V
9th Floor, 902 and 903,
Near Vodafone House,
Corporate Road, Prahlad Nagar
Ahmedabad - 380 051.
Tel: +91 79 4040 2200
Fax: +91 79 4040 2244

Bengaluru
Maruthi Info-Tech Centre
11-12/1, Inner Ring Road
Koramangala, Bengaluru 560 071
Tel: +91 80 3980 6000
Fax: +91 80 3980 6999

Chandigarh
SCO 22-23 (Ist Floor)
Sector 8C, Madhya Marg
Chandigarh 160 009
Tel: +91 172 393 5777/781
Fax: +91 172 393 5780

Chennai
No.10, Mahatma Gandhi Road
Nungambakkam
Chennai 600 034
Tel: +91 44 3914 5000
Fax: +91 44 3914 5999

Delhi
Building No.10, 8th Floor
DLF Cyber City, Phase II
Gurgaon, Haryana 122 002
Tel: +91 124 307 4000
Fax: +91 124 254 9101

Hyderabad
8-2-618/2
Reliance Humsafar,
4th Floor, Road No.11,
Banjara Hills
Hyderabad 500 034
Tel: +91 40 3046 5000
Fax: +91 40 3046 5299

Kochi
Syama Business Center
3rd Floor, NH By Pass Road,
Vytilla, Kochi 682 019
Tel: +91 0484 3027000
Fax: +91 0484 3027001

Kolkata
Unit No. 603 – 604, 6th Floor,
Tower – 1, Godrej Waterside, Sector - V,
Salt Lake, Kolkata - 700 091
Tel: +91 33 4403 4000
Fax: +91 33 4403 4199

Mumbai
Lodha Excelus, Apollo Mills
N. M. Joshi Marg
Mahalaxmi, Mumbai 400 011
Tel: +91 22 3989 6000
Fax: +91 22 3983 6000

Noida
6th Floor, Tower A
Advant Navis Business Park
Plot No. 07, Sector 142
Noida Express Way
Noida 201 305
Tel: +91 0120 386 8000
Fax: +91 0120 386 8999

Pune
703, Godrej Castlemaine
Bund Garden
Pune 411 001
Tel: +91 20 3058 5764/65
Fax: +91 20 3058 5775

Contact :

Girish Vanvari
Partner and Head
Tax
T: +91 (22) 3090 1910
E: gvanvari@kpmg.com

www.kpmg.com/in

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