



India Tax Konnect

February 2016

Contents

International tax	2
Corporate tax	4
Indirect tax	7
Personal tax	11

Editorial



In its recent policy, the Reserve Bank of India (RBI) left the repo rate unchanged at 6.75 per cent, as widely expected, ahead of the Union Budget as the central bank will wait for a fiscal road map from the government. It kept its growth projections for Indian economy unchanged at 7.4 per cent for the current fiscal year. The International Monetary Fund (IMF) also retained its projections for the Indian economy at 7.3 per cent in 2015-16 and 7.5 per cent in 2016-17¹.

Recently, the Prime Minister of India, launched the 'Startup India' scheme, which is aimed at facilitating growth of entrepreneurship in the country. The scheme offers various benefits for potential entrepreneurs, such as, registering a company in one day, doing away with inspections for the first three years, relaxed taxation norms and a simplified procedure for exiting a business. The scheme also contains the provision of a fund, worth INR10,000 crore, to be distributed over a period of four years.

The Easwar Committee issued its report containing recommendations on simplification of various provisions

of Income-tax Act, 1961 (the Act). The Committee dealt with recommendations on issues which are simple and need immediate attention. The Committee has clarified that the more complex issues which require an exhaustive and deeper review will be dealt with in the next batch of recommendations. The Committee has divided its recommendations broadly into two parts i.e. those requiring amendments to the Act and those which can be implemented through the issue of circulars/administrative instructions, etc.

The Central Board of Direct Taxes (CBDT) has issued draft guideline principles (draft guidelines) for determination of the Place of Effective Management (POEM) of a company. The draft guidelines are primarily based on the fact as to whether or not the company is engaged in 'active business outside India'. For determination of 'active business outside India' factors such as passive income, total asset base, number of employees, payroll expenses in India and outside, etc. are considered. The draft guidelines state that the concept of POEM is one of substance over form. It further states that the POEM in the case of a company engaged in active business outside India shall be presumed to be outside India, if majority of the meetings of the board of directors of the company are held outside India. The guidelines also deal with the impact of modern communication technology in POEM determination.

On the international tax front, the Mumbai Tribunal in the case of NGC Network Asia LLC held that the Indian group company of a foreign company has been habitually exercising in India an authority to conclude contracts on behalf of the foreign company which are binding on the foreign company. Therefore, the Indian company is to be treated as a Dependent Agent Permanent Establishment (DAPE) in India under Article 5(4)(a) of the India-U.S. tax treaty

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

1. Economic Times - 2 February 2016



Decisions

An Indian company constitutes as a DAPE of a U.S. television company

The taxpayer is a U.S. based company. It holds 100 per cent shares in NGC Network (Mauritius), which in turn, holds 99 per cent shares in NGC Network (India) Private Limited (NGC India). All these companies are subsidiaries/affiliate companies of News Corporation, USA. The taxpayer is the owner of two television channels viz., the National Geographical Channel and Fox International Channel, engaged in the business of broadcasting its own channels in various countries including the Indian sub-continent. The taxpayer is eligible for the India-USA tax treaty benefit. The taxpayer has appointed NGC India as its distributor to distribute its television channels and also to procure advertisements for telecasting in the channels. Hence, the taxpayer generates two streams of revenues from India i.e. (a) fee for giving distribution rights for telecasting of its channels and (b) advertisement revenues.

The taxpayer claimed that both the types of income are not taxable in India and accordingly did not offer them in the return of income filed for Assessment Year (AY) 2007-08. The Assessing Officer (AO) held that the advertisement as well as distribution revenues are taxable in India, since NGC India constituted a DAPE of the taxpayer under the tax treaty. The AO accordingly assessed 25.34 per cent of the advertisement revenues as income of the taxpayer attributable to India i.e. in the ratio of worldwide profits to worldwide revenue, in accordance with Rule 10B(ii) of the Income-tax Rules, 1962 (the Rules).

The Mumbai Tribunal held that the Indian group company of the taxpayer has been habitually exercising in India an authority to conclude contracts on behalf of the foreign company which are binding on the foreign company. Therefore, the Indian company is to be treated as a DAPE in India under Article 5(4)(a) of the India-U.S. tax treaty.

The Tribunal observed that the AO correctly held that 'advertisement air time' does not fall under the category of 'goods'. It is only a right given to NGC India to procure advertisements. The Tribunal while establishing the inherent nexus of the telecasting channel and the airtime sold, observed that the right to procure advertisements for particular airtime, though capable of being transferred, cannot be consumed/used by the buyer of the right, in the absence of any assistance from the taxpayer by way of telecasting the same on television channels.

Accordingly, the Tribunal held that the question whether payment received by the taxpayer for giving distribution rights in the television channels falls under the category of 'royalty' and the attribution of advertisement revenues in India needs to be examined afresh at the end of the AO.

NGC Network Asia LLC vs JDIT (ITA No. 7994/Mum/2011) – Taxsutra.com

Capital gains arising to a foreign company on transfer of shares held in an Indian company under the court approved buy-back scheme is taxable in India under the India-Netherlands tax treaty

The taxpayer is a resident of Netherlands. It held 38.24 per cent of shares comprising of 1,09,52,280 shares in the paid-up capital of Century Enka Ltd, an Indian public listed company. During the year under consideration, the taxpayer tendered 85,93,109 equity shares having face value of INR10 each to Century Enka Ltd at INR122 per share under a scheme of arrangement, by way of a buy-back of shares, as per the approval given by the Calcutta High Court under Section 391 of the Companies Act, 1956. The said tendering of shares resulted in a capital gain of INR58.64 crore.

The taxpayer, relying on Article 13(5) of the tax treaty, claimed that the capital gain referred above is not taxable in India. The Article 13(5) of the tax treaty provides that gains shall be taxable in Netherlands if such gains are realised in the course of corporate organisation, reorganisation, amalgamation, division or similar transaction. The AO observed that the taxpayer did not pay tax on the impugned capital gains in Netherlands, since the same was exempt under the tax provisions of that country. The basic purpose of the tax treaty, as well as Section 90 of the Act, is that the taxpayer should not be liable for double taxation, whereas in the present case, the taxpayer is trying to claim double benefit by taking recourse of the tax treaty. Accordingly, the AO held that the aforesaid capital gains are taxable in India under Article 13(5) of the tax treaty. With regard to the rate at which capital gain is taxable, the AO held that the concessional rate of taxation at 10 per cent, provided in Section 112 of the Act, is not applicable to the taxpayer. Accordingly, the AO levied tax at 20 per cent.

The Mumbai Tribunal held that capital gains arising to a foreign company on transfer of shares held in an Indian company, under the court approved buy-back scheme, is taxable in India under the India-Netherlands tax treaty. The Tribunal held that the arrangement entered into by the taxpayer for selling a part of its shareholding to the company in the scheme of buy-back does not fall under the definition of 'reorganisation'. The Tribunal also held that the taxpayer is entitled to a concessional rate of tax at 10 per cent on the said capital gains.

Accordis Beheer B. V. vs DIT (ITA No.4688/Mum/2010) – Taxsutra.com

Income attributable to the taxpayer's foreign branches having a permanent establishment outside India is not taxable in India

The taxpayer, an Indian bank, had sought relief in respect of the profit earned by its foreign branches on the basis of respective tax treaties. The AO granted a benefit in respect of the branches at Singapore and Japan, but denied the benefit to the taxpayer in respect of the other branches.

The Bombay High Court held that income attributable to the taxpayer's foreign branches having a Permanent Establishment (PE) outside India shall not be taxable in India. If the taxpayer has a PE abroad, then, the taxpayer would be required to produce evidence regarding payment of taxes pertaining to the income of these establishments abroad. On production of such evidence, the taxpayer would be entitled to the tax treaty benefit. Accordingly, income attributable to the taxpayer's foreign branches having a PE outside India is not taxable in India.

CIT vs Bank of India [2015] 64 taxmann.com 215 (Bombay)

Notifications/Circulars/Press Releases

CBDT issues draft guiding principles for determination of POEM of a company

The Finance Act, 2015 amended the provisions of Section 6(3) of the Act to provide that a company is resident in India in any previous year, if it is an Indian company or its POEM in that

year is in India. POEM means a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance, made.

The CBDT has issued draft guiding principles for the determination of POEM of a company. The draft guidelines are primarily based on the fact as to whether or not the company is engaged in 'active business outside India'. For determination of 'active business outside India' factors such as passive income, total asset base, the number of employees, payroll expenses in India and outside, etc. are considered. The draft guidelines state that the concept of POEM is one of substance over form. It further states that the POEM in the case of a company engaged in active business outside India shall be presumed to be outside India, if majority of the meetings of the board of directors of the company are held outside India. The guidelines also deal with the impact of modern communication technology in POEM determination.

The AO is required to seek prior approval of the Principal Commissioner or the Commissioner to hold a company incorporated outside India as being resident in India on the basis of POEM.

Source: www.incometaxindia.gov.in





Decisions

Claim of depreciation is not allowed on account of 'sham' sale and lease back transaction

The taxpayer claimed depreciation on certain machinery purchased from the Andhra Pradesh State Electricity Board (APSEB). The taxpayer claimed that the said machinery was given to APSEB on lease. The lower authorities held that there was no such purchase of machinery and that the transaction in question is a sham.

The Supreme Court held that since the machinery was not purchased by the taxpayer, it never became the owner of the machinery and therefore, could not claim any depreciation thereof. These are pure findings of facts recorded by the lower authorities. Accordingly, the appeal of the taxpayer is dismissed.

Avasarala Technologies Ltd vs JCIT (Civil Appeal No. 2996 of 2004) – Taxsutra.com

Penalty under Section 271C of the Act cannot be levied if the tax department is unable to establish a contumacious conduct on the part of the taxpayer

The AO vide its order has levied a penalty under Section 271C of the Act against the taxpayer. Against the order of the AO, the taxpayer preferred an appeal before the Commissioner of Income-tax (Appeals) [CIT(A)], which deleted the levy of penalty. The Tribunal held that the present case was not with respect to collection of tax under Section 201(1) of the Act or compensatory interest under Section 201(1A) of the Act. For the levy of penalty, it is necessary to establish that there was contumacious conduct on the part of the taxpayer. The Tribunal relying on the decision of the Delhi High Court in the case of Itochu Corporation [2004] 268 ITR 172 (Del) and the Tribunal decision in the case of CIT vs Mitsui & Company Ltd. [2005] 272 ITR 545 (Del) deleted the penalty. The High Court rejected the appeal only on the ground that no substantial question of law arises in the matter.

The Supreme Court held that there is no substantial question of law arisen in the appeal. The facts and law were correctly assessed and approached by the CIT(A) as well as by the Tribunal. Accordingly, the Supreme Court dismissed the appeal of the tax department.

CIT vs Bank of Nova Scotia (Civil Appeal No. 1704 of 2008) – itatonline.org

Radio programme production for broadcasting is 'manufacture' and hence eligible to claim additional depreciation

The taxpayer is engaged in the business of FM radio broadcasting and was granted permission for operating FM radio broadcasting channels at various places in India, against the payment of a prescribed one time entry fee. On the

advice of the marketing team, the taxpayer started taking trial runs by running radio programmes within the office premises at Jodhpur, Patiala and Amritsar in AY 2008-09.

During the year under consideration, the taxpayer filed its return of income and claimed additional depreciation under Section 32(1)(iia) of the Act in respect of programme production expenditure. However, the AO held that the production of radio programmes cannot be considered as 'production of an article or thing' and therefore, the additional depreciation was disallowed.

High Court's ruling

Additional depreciation

The production of radio programmes, involved the processes of recording, editing and making copies prior to broadcasting. When a radio programme is made there comes into existence a 'thing' which is intangible, and which can be transmitted and even sold by making copies. Therefore, radio programmes produced by the taxpayer is a 'thing', if not an 'article.' This satisfies the understood definition of 'thing' in terms of the Black's Law Dictionary. 'Thing' could, therefore, have an intangible characteristic. The word 'manufacture' envisages subjecting any material or thing to certain processes in order to produce something which has a distinct characteristic. Although the definition of 'manufacture' was inserted with effect from 1 April 2009 in the form of Section 2(29BA) of the Act, it must be understood as being clarificatory in nature given the common parlance understanding of the term 'manufacture'.

In the context of 'broadcast', manufacture could encompass the processes of producing, recording, editing and making copies of the radio programme followed by its broadcasting. The activity of broadcasting, in the above context, would necessarily envisage all the above incidental activities which are nevertheless integral to the business of broadcasting. Accordingly, the taxpayer has used the plant and machinery acquired and installed by it after 31 March 2005 for manufacture/production of an 'article or thing.' Since the taxpayer has satisfied the requirements of Section 32(1)(iia) of the Act, it is entitled to additional depreciation as claimed by it.

CIT vs Radio Today Broadcasting Ltd (ITA No. 190/2015, dated 9 December 2015) – Taxsutra.com

Notifications/Circulars/Press Releases

CBDT instruction on scrutiny assessment limiting the scope in CASS assessments involving AIR/CIB/26AS cases

The CBDT issued an instruction which prescribes the extent of an enquiry in scrutiny cases selected through Computer Assisted Scrutiny Selection (CASS). The said instruction is applicable only to cases selected for scrutiny under CASS and only on the parameter(s) of Annual Information Reporting (AIR)/Central Information Branch (CIB)/26AS data. The instruction provides that the scope of an enquiry to be 'specific issue based' and should direct the AO to confine the questionnaire only to the specific issues pertaining to AIR/CIB/26AS data after giving reason for selection of the case for scrutiny to the taxpayer.

The instruction also outlines the procedure for handling 'limited scrutiny' and 'complete scrutiny' cases in relation to cases selected through CASS-2015. The instruction prescribes that during the course of assessment proceedings in 'limited scrutiny' cases, if 'potential escapement of income' is found to be exceeding INR5 lakh (INR10 lakh for metro charges) requiring substantial verification of other issues, the case may be taken up for 'complete scrutiny', subject to a written approval of the Principal CIT/CIT.

In all cases where the AO proposes to make additions or disallowances, the CBDT directs the AO to (i) give a fair opportunity of hearing to the taxpayer, (ii) issue a show-cause notice duly indicating reasons for proposed additions/disallowances along with necessary evidences/reasons forming its basis and (iii) consider the taxpayer's submissions in response to the show-cause notice before passing the final order.

CBDT Instruction No. 7/2014, dated 26 September 2014

CBDT clarifies that no penalty shall be levied where a disallowance is made under normal provisions of the Act but tax is levied under MAT provisions

The CBDT vide its circular clarifies that where Minimum Alternate Tax (MAT) is applicable, no penalty under Section 271(1)(c) of the Act shall be levied with reference to additions/disallowances made under normal provisions of the Act for cases prior to AY 2016-17.

The CBDT referred the Delhi High Court ruling in the case of *Nalwa Sons* [2010] 327 ITR 543 (Del) where the High Court held that when tax is payable under MAT provisions,

penalty under Section 271(1)(c) of the Act cannot be imposed with reference to additions/disallowances made under normal provisions. The CBDT also referred to the amended Explanation 4 to Section 271(1)(c) of the Act which has been substituted prospectively by the Finance Act, 2015 with effect from 1 April 2016. The amended Explanation provides for the methodology of calculating 'the amount of tax sought to be evaded' even in situations where MAT is applicable for the purpose of computing concealment penalty.

Accordingly, in view of the Delhi High Court ruling and substitution of Explanation 4 to Section 271(1)(c) of the Act with prospective effect, the CBDT clarifies that prior to 1 April 2016 where income-tax payable on the total income as computed under the normal provisions of the Act is less than the tax payable on the book profits under Section 115JB of the Act, then a penalty under Section 271(1)(c) of the Act, is not attracted with reference to a disallowance made under normal provisions. The CBDT clarifies that in the cases prior to 1 April 2016, if any adjustment is made in the income computed for the purpose of MAT, then the levy of penalty under Section 271(1)(c) of the Act, will depend upon the nature of adjustment. The CBDT directs that no appeals may be filed on this ground and appeals already filed, if any, may be withdrawn/not pressed upon.

CBDT Circular No. 25/2015, dated 31 December 2015

CBDT issues a questionnaire in the cases selected for scrutiny

In the cases selected under scrutiny, while issuing the first notice, the AO does not convey the specific compliance requirements like production of accounts, furnishing of documents, information, evidences, submission of other requisite particulars, etc. This causes undue hardship to the taxpayers and unnecessary wastage of their time.

In view of the above, the CBDT has issued an instruction for issuing a questionnaire in the cases selected for scrutiny. The CBDT prescribes that it should be the endeavour of the AO that the initial notice issued under Section 143(2) of the Act is accompanied with a notice under Section 142(1) the Act along with a questionnaire containing details of specific documents, evidences, etc. that are required to be furnished by the taxpayer in connection with the scrutiny assessment proceedings in the respective case.

CBDT Circular No. 19/2015, dated 29 December 2015

CBDT notifies amended forms and Rules regarding mandatory quoting of PAN for specified transactions

The CBDT has amended Rules 114B, 114C, 114D, 114E of the Rules and amended Form No. 60, 61 and 61A, wherein, inter alia, quoting of a Permanent Account Number (PAN) was made mandatory for transactions exceeding INR2 lakh irrespective of payment mode.

Key aspects of the new Rules are as follows:

- List of PAN reportable transactions and monetary threshold for such reporting transactions.
- List of specified persons responsible to ensure that a PAN is duly quoted or in the absence of PAN, a declaration in Form 60 with complete details is furnished.
- Mode and manner of furnishing by certain specified persons of half yearly statements containing particulars of declarations received in Form 60.

Further, the new Rules have modified the AIR furnishing requirements connected with PAN reportable transactions. Apart from PAN reportable transactions, scope of AIR obligation also extends to certain additional financial transactions like cash withdrawals from bank accounts, credit card transactions, etc.

The time limit for furnishing AIR has been preponed to 31 May (instead of 31 August) immediately following the relevant financial year.

The amended Rule 114B (transactions in relation to which PAN is to be quoted), 114C (verification of PAN), 114D (furnishing of statements containing particulars of Form No. 60) has come into force from 1 January 2016 and Rule 114E (furnishing the statement of financial transactions) will come into force from 1 April 2016.

Revised Form No. 60 [declaration to be filed by an individual or a person (not being a company or firm) who does not have a PAN provides details regarding the mode of transaction, number of persons involved in the transaction (in case the transaction is in joint names), Aadhaar number, estimated total income in case PAN is not available, etc.

The new Rules have modified the category of persons exempt from quoting their PAN (or giving no-PAN declaration):

- The erstwhile Rules provide an exemption to the following categories of persons from quoting PAN in the reportable transactions :
 - Non-Residents (NR);
 - Central government, state government and consular offices in transactions where they are the payers.
 - Persons who have agricultural income and are not in receipt of any other taxable income.
- Significant changes effected in the new Rules in this regard are:

- Scope of exemption to NRs is curtailed. NRs need to furnish PAN (or no-PAN declaration) for specified PAN reportable transactions.
- Government (central as well as state) and consular offices continue to be exempt from all PAN reportable transactions whether they are payers or otherwise.
- Persons earning agricultural income (without any other taxable income) are now required to file a declaration in the new Form 60 (instead of the old Form 61).

The amended Form No. 61A (statement of specified financial transactions) requires reporting of additional details regarding aggregated financial transactions, bank/post office account and immovable property transactions.

The new Rule 114C provides an obligation to verify compliance of reporting as follows:

- A list of specified persons who are cast with responsibility of ensuring that PAN of the taxpayers is properly quoted on the documents received by them relating to a PAN reportable transaction. The list has been duly modified to align with the expanded scope of PAN reportable transactions.
- It clarifies the obligation to obtain a no-PAN declaration in Form 60 with complete details, if PAN is not furnished.

CBDT Notification 95/2015, dated 30 December 2015



Service tax

Decisions

Car lease scheme of providing vehicles to the employees is not liable to service tax

In the present case, the issue was whether the amount charged by the taxpayer from its employees for the use of vehicles under a car lease scheme would be regarded as a 'service' and be liable to service tax.

The Authority for Advance Rulings (AAR) held that the car lease scheme does not constitute as a 'service' since the cars were made available to the employee during the 'course of employment' and 'in relation to employment'. Accordingly, both the conditions stipulated in the definition of a 'service' i.e. firstly, provision of service by an employee to the employer and secondly, provision of service in the course of or in relation to his/her employment, were satisfied. The AAR also held that the question of whether the car was used for official/personal purpose would not make any difference.

Advance Ruling No. AAR/ST/16/2015 in Application No. AAR/44/ST/13/2014 dated 4 December 2015

Central excise

Decisions

Duty cannot be recovered again on duty deposited under an incorrect Excise Control Code due to oversight

In the present case, the taxpayer incurred duty liability, which was discharged in cash through the personal ledger account. In the month of August 2014, the taxpayer, while paying such duty, due to oversight mentioned the wrong assessee code. The taxpayer immediately thereupon pointed out this issue to the Audit Officer in detail explaining the background leading to such a mistake. However, the Department wrote back to the taxpayer stating that the assessee code now cannot be changed and the only remedy would be to seek a refund. Further, it was conveyed that the duty paid in the wrong assessee code cannot be treated as payment of excise duty for the month of July 2014 and the taxpayer should therefore make a payment of the said amount again with interest and penalty.

This letter was challenged by the taxpayer before the High Court. The High Court observed that, it is undisputed that the taxpayer did pay the excise duty; merely mentioning a wrong code in the process, cannot result into such a harsh consequence of the entire payment not being recognised as valid, incurring further liability of repayment of the basic duty with interest and penalties.

The Court further observed and directed the respondents to give credit of the duty paid by the taxpayer by making necessary accounting entries.

Devang Paper Mills Pvt. Ltd. vs UOI & others (2016-TIOL-37-HC-AHM-CX)

Notifications/Circulars/Press Releases

Goods imported through an authorised courier - certificate issued by an Appraiser of Customs is a valid document for CENVAT credit

Rule 9 of the Cenvat Credit Rules have been amended to allow a 'Certificate issued by the Appraiser of Customs' as a valid document for the availment of Cenvat Credit, when the goods are imported through an authorised courier, registered with the Principal Commissioner of Customs or the Commissioner of Customs in-charge of the Customs Airport.

Notification no. 27/2015- CX (N.T) dated December 31, 2015

Customs

Decisions

Advance Ruling on classification of imported components/parts/sub-assemblies under Customs Tariff Act, 1975

The applicant proposed a new business model i.e. the localisation model, whereby six critical parts/components/sub-assemblies of the car would be locally sourced from approved third party vendors in India while the applicant would be importing the balance parts/components/sub-assemblies from group companies located outside India.

The applicant has raised the following questions before the Advance Ruling Authority:

- Whether the import of components, etc. by the applicant will be classified as 'Motor Vehicle' under Tariff heading 87.03 or as a Completely Knocked Down (CKD) kit under Sl. No. 437 of Notification No. 12/2012 Cus dated 17 March 2012 as amended, when six essential and critical components, etc. are locally manufactured/assembled by third party vendors?
- If the imports of components, etc. are not classified as above, whether the imports will be classified under respective headings/sub-headings of the Customs Tariff Act (CTA), 1975 or under Tariff Heading 87.08 of the CTA, 1975 (i.e. parts and accessories of the motor vehicle)?

The applicant submits that Rule 2(a) of the Interpretative Rules under the CTA, 1975 would not come into play for classification, as the imports proposed will not reflect the essential characteristics of the motor vehicle and hence the imported goods will be liable to be classified as per the respective classification. The above analogy is also drawn from Circular No. 666/57/2002-CX dated 25 September 2002, wherein it was clarified that sub-assembly or assembly of air conditioning machines not having an essential character of complete air-conditioning machines is to be considered as parts.

The authority considering the arguments of the Revenue ruled as below:

- The import of components/parts/sub-assemblies by the applicant will not be classified as motor vehicle under Tariff Heading 87.03 or as CKD kit under Sr. No. 437 of Notification No. 12/2012-Cus., dated 17 March 2012, as amended, when six essential and critical components / parts/sub-assemblies, namely; (i) engine (along with engine and transmission unit) (ii) axle assembly (iii) exhaust systems (iv) cooling module (v) heating, ventilation and air conditioning unit and (vi) door panels are to be locally assembled / manufactured by approved third party vendors.
- The import of components/parts/sub-assemblies by the applicant will be classified under their respective headings/ sub-headings of the CTA.

BMW India Pvt. Ltd. vs Commissioner of Customs (2015-TIOL-09-ARA-Cus)

Whether 'royalty/licence fee' paid is to be added to the value of imported goods

The taxpayer was importing packaged software (media packs) from its related group company and were cleared on the basis of invoices sent. These consignments were delivered to the home of the customers on the basis of the invoices issued by the taxpayer. On scrutiny of the said invoices, it was revealed that these invoices were issued by adding a 'licence fee' to the value of the media pack. Licence fee in relation to the software supplied was paid by the taxpayer to Oracle, USA, if and only if the software supplied was under 'commercial transactions'. Licence fee was neither collected from the Indian customer nor paid to Oracle, USA on non-commercial transactions. Thus, while importing and clearing the goods through the customs, the taxpayer declared the value of the imported goods (media pack) without adding the licence fee paid, whereas while delivering goods to the buyers, separate invoices reflecting the value of the media pack and license fee were issued. Thus, the taxpayer was allegedly indulging in duty evasion because the said licence fee was includible in the assessable value in terms of Rule 9/10 of the Customs Valuation Rules, on the ground that such a licence fee was a condition of sale.

Further, even in respect of such media packs where no licence fee was actually paid, the value of the licence fee notionally payable was computed for the purpose of computing the duty evaded. The Show Cause Notice (SCN) was issued and the adjudicating authority observed that the licence fee paid or payable by the taxpayer was includible in the assessable value and that the taxpayer had deliberately mis-stated/suppressed the

facts and passed the adjudication order demanding the duty, imposing fines and penalties.

In response to the above, the taxpayer submitted that the media packs are imported from Ireland, whereas the licence fees are paid to the group company in the U.S. and therefore, such payments are outside the purview of Rule 10. It was further submitted that the licence fees were paid for the grant of the right to distribute software and not for the purchase of a media pack. Thus, licence fee was not a condition of sale.

The taxpayer further submitted that customs duty and service tax cannot be demanded on the same transaction. Reliance was placed on the Supreme Court decision in the case of Imagic Creative Pvt. Ltd. Further, submissions were also made on limitations and on the demand relating to interest and penalty.

The CESTAT considering the arguments put forth by the Revenue as well as by the taxpayer, held that in every case of commercial imports, Oracle, USA and Oracle, Ireland were fully aware that the purchase order was uploaded/ scanned into the Oracle Order Management System only after the customer agreed to pay the licence fee for software and this information was available to both the entities before shipment was made. Thus, every software shipped was in knowledge of Oracle, USA and each shipment came for a particular Indian customer identified by a unique order number generated post signing of an agreement.

Accordingly, in case of commercial imports of media packs, payment of licence fee was a condition of sale and would be included in the assessable value for the purpose of payment of customs duty while CESTAT held that the extended period of limitation is not invocable and no customs duty is chargeable on electronic download of the software. Also, licence fee on a notional basis is not includible in the assessable value, where no license fee was actually paid or was required to be paid.

Oracle India Pvt. Ltd. 2015 vs CC (TIOL-1766-CESTAT-DEL)

Notifications/Circulars/Press Releases

Withdrawal of cases pending before the High Court/CESTAT on the basis of the Supreme Court's decision on identical matters

The matter relating to the large number of appeals pending/filed in the CESTAT/High Court has been a matter of concern and therefore, it has been decided to withdraw the cases pending before High Court/CESTAT, where the Supreme Court has decided on an identical matter and the decision has been accepted by the Department.

This shall however be subject to:

- Wherever there is more than one issue involved in an appeal and the Supreme Court's decision pertains to

only one of these, then these appeals will not be covered by this instruction; and

- b. Wherever there are substantial questions of law and the Supreme Court decision has not been passed on to these, those appeals will not be covered by this instruction.

Instruction FNo.390/Misc./67/2014-JC dated 18 December 2015

VAT

Decisions

Contractor cannot claim higher land cost deduction than reported in original returns in the absence of revised returns

The taxpayer, in the present case, a builder and civil works contractor, carrying on the business of construction and sale of apartments. The taxpayer had sold some apartments for which they had disclosed the sale consideration, out of which the cost of land was disclosed in the returns at 45 per cent and consequently paid tax on the sale consideration minus the land cost. However, the assessing authority did not accept the land cost at 45 per cent and assessed it at 40 per cent. Aggrieved, the taxpayer filed an appeal claiming the land cost to be 50 per cent of the sale consideration, instead of 45 per cent as claimed in the returns.

The appellate authority on consideration, came to the conclusion that though the land cost was over 50 per cent but since the claim made in the returns filed by the assessee was 45 per cent of the sales consideration, the land cost for calculation of tax was taken at only 45 per cent. Aggrieved by the said order of the appellate authority, the taxpayer filed an appeal before the Tribunal claiming the land cost be allowed at 50 per cent of sale consideration. The appeal was dismissed and petitions were filed before the Karnataka High Court.

The High Court observed that the taxpayer never filed any revised returns. The High Court was of the view that nothing more than what is claimed by the taxpayer in the return can be granted by the authorities. It also stated that there is a provision in the Karnataka VAT Act that provides for filing of revised returns and if the taxpayer fails to file a revised return then the original return filed shall be considered by the assessing authorities.

In view of the above, the High Court dismissed the petitions of the taxpayer.

Nandi Constructions vs State of Karnataka [TS-725-HC-2015(KAR)-VAT]



Pure labour contracts do not fall within the ambit of 'works contract tax' and are not liable to composition tax

The taxpayer, in the present case, is engaged in the business of executing pure labour contracts under which the taxpayer supplies skilled and unskilled labour for excavation work. The taxpayer also accomplishes contracts which involves transfer of property in goods which are eligible to tax under The Delhi Sales Tax on Works Contract Act, 1999. The taxpayer had submitted its revised sales tax return for the AY 2004-05 declaring two distinct amounts i.e. one amount represented basic civil works that was taxable under the works contract and the other was with respect to supply of labour, excavation works and the same was not liable to tax under the act.

The taxpayer under the composition scheme paid tax at 4 per cent on civil works. The assessing authority held that the taxpayer cannot opt out of the obligation with respect to any one contract and was supposed to pay tax at 4 per cent on the entire turnover. Aggrieved by the said order and dismissal of the appeal by the first appellate authority, the taxpayer approached the Tribunal who supported the view of the assessing authority. Thus, the taxpayer filed an appeal before the Delhi High Court.

The High Court observed that the stand of the assessing authorities that once a dealer opts for composition, he/she is required to pay tax on the aggregate amount of all contracts including pure labour contracts does not appear to be based on a correct understanding of provisions of the Act. Further, the High Court stated that pure labour contracts would not be levy to tax. The High Court contended that since the taxpayer had not produced copies of composite works contracts on which it had paid composite tax before the assessing authority, it deemed it expedient to grant an opportunity to the taxpayer.

In view of the above, the High Court set aside the assessment order and remanded the matter back to the assessing authority to examine the issue in light of the works contract copies and pure labour contract copies to be produced by the taxpayer.

HS Power Projects Pvt. Ltd. vs Commissioner of Trade & Taxes [TS-2-HC-2016(DEL)-VAT]

Notifications/Circulars/Press Releases

Gujarat

E-payment of taxes has been made mandatory for dealers where the total tax liability (including interest and penalty) exceeds INR50,000. Earlier, e-payment of taxes was mandatory for the dealers whose tax payment or tax payable amount exceeded INR10 lakh in any financial year. The said amendment is applicable from December 2015 onwards (i.e. including the payment for the month/quarter ending December).

Circular No. Gujka/vat-86/2015-16/JA. 178/153 dated 6 January 2016

Goa

All registered dealers whose turnover for the previous financial year 2014-15 has exceeded INR25 lakh, shall file their quarterly returns, commencing from the quarter 1 October 2015 to 31

December 2015, online, within a period of 30 days from the end of the quarter.

Notification No. 4/5/2005-Fin (R&C)(130) dated 29 December 2015

Maharashtra

In view of the delay in the delivery of TIN registration certificates to new dealers, the sales tax department has provided that the dealers to whom TIN registration certificates have been granted on or after 22 December 2015, can now download the digitally signed TIN Registration certificate from the website. The Registration Officer shall continue to send a physical copy of the TIN registration certificate to the applicant on the address mentioned in the application through India Post.

Trade circular No. 19T of 2015 dated 21 December 2015

Jharkhand

With a view to reduce the arrears of tax, interest and penalty, the Jharkhand Government has extended the last date for filing an application under the Karasamadhana Scheme 2015 to 15 March 2016 and the last date for making payment under the Karasamadhana Scheme 2015 to 31 March 2016.

Government order No. 98 dated 7 January 2016

Nagaland

The issuance of online road permits has been made mandatory with effect from 26 January 2016 for importing goods into the state for personal use/consumption, setting up of an industrial unit, for use as raw materials directly in the manufacture of goods in an industrial unit, for use in operation of an industrial unit and for other purposes (to be compulsorily specified). Further, the tax authorities may at any time verify the e-road permit while the goods are in transit.

Notification No. CT/M/5/69(Pt) dated 15 January 2016





Decision

Ex-gratia payment made voluntarily by an employer is not taxable as 'profits in lieu of salary'

Section 17(3) of the Act brings certain payments such as profits in lieu of salary within the ambit of 'income from salaries'. Such payments include compensation due or received from an employer or a former employer at or in connection with the termination of employment or modification of the terms and conditions relating thereto and payment due or received under a Keyman insurance policy.

The Gujarat High Court held that a voluntary payment made by the employer without there being an obligation on the part of the employer to pay any further amount, would not amount to compensation in terms of Section 17(3) of the Act.

Arunbhai R. Naik vs Income-tax Officer [2015] 64 taxmann.com 216 (Gujarat)



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 (1st 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

KPMG in India contact:

Girish Vanvari

Partner and Head
Tax

T: +91 (22) 3090 1910

E: gvanvari@kpmg.com

Follow us on:

kpmg.com/in/socialmedia



Download the KPMG in India application:



The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

© 2016 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.

The KPMG name and logo are registered trademarks or trademarks of KPMG International.

Printed in India. (060_NEW0216)