

AAR rules that a non-resident shall be liable to pay FBT despite not being liable to pay income-tax

The Authority for Advance Rulings ("AAR") has ruled that liability to Fringe Benefit Tax ("FBT") would exist irrespective of whether or not there was liability to pay income-tax in India. This ruling was given pursuant to an application preferred before the AAR by a US based non-profit, non-governmental organization ("the Applicant"), having a regional office/country office in India. The Applicant had approached the AAR to give a ruling on whether it was liable to pay FBT in India on the expenses incurred by it on its employees in India. The applicant was enjoying tax exemption from Federal income-tax under the Internal Revenue Code of USA. The expenses in India were met by remittances from USA and the Applicant was not earning any income in India.

Although initially in the application, the Applicant referred to the India-USA Double Taxation Avoidance Agreement ("DTAA") to contend that it was not liable to FBT in India, during the course of the hearing before the AAR, the Applicant dropped this line of argument and referred to the FBT provisions in the Indian Income-tax Act, 1961 to contend that the FBT provisions contemplated FBT liability only where there was taxable income as well. The Applicant therefore argued that since it had no taxable income in India, it was not subject to FBT in India. The AAR rejected these arguments and held that going by the plain language used in the FBT provisions, the Applicant is liable to pay FBT in India as the FBT liability is independent of the income-tax liability. The AAR however refrained from examining the DTAA provisions as the Applicant itself had dropped this line of argument.

This ruling of the AAR may lend support to the clarification issued by the Central Board of Direct Taxes ("CBDT") (in August 2005) that the DTAA gives relief only in respect of income-tax and does not cover FBT, as FBT is a tax on certain expenses incurred by an employer and not on income.

Delhi High Court upholds 'reverse charge' levy of service tax

The Delhi High Court in the case of *M/s Orient Crafts Ltd vs Union of India & Anr*, has upheld the constitutional validity of Section 66A of the Finance Act, 1994 (which essentially provides for a levy of service tax on import of services on a "reverse charge" basis). The Court, pursuant to a writ petition filed, made an observation that the Rules framed in this regard make it clear that taxable service provided from outside India and received in India is liable to Service Tax.

However, while the validity of the levy was upheld, the High Court observed that it is still open to the Petitioner to contend that they have not received in India the services of the commission agent (situated outside India). No order was passed on the specific matter.

Circular on works contract V/s sale

The Commissioner of Sales Tax, Maharashtra has issued a circular pursuant to the Supreme Court decision in the matter of *Kone Elevators* (the SC in this case had held that supply and installation of lifts is a transaction of sale of 'goods' and cannot be regarded as a 'works contract'). *more details on page 9*

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DIRECT TAXES ▶▶▶

Case Laws

By virtue of the non-discrimination clause in the India-US treaty, deduction for expenditure cannot be denied to an Indian resident for non-deduction/remittance of tax at source

The assessee was an Indian company and was a wholly owned subsidiary of a US based multinational group. Under an Administrative Service agreement with one of the group companies based in USA, the assessee was required to make certain payments to the US company for the services rendered. The payments were made by the assessee without any tax deduction at source. In the assessment of the assessee for assessment year 2001-02, the payments made to the US company were disallowed under section 40(a)(i) of the Income-tax Act, 1961 ("Act"), *inter alia* on the ground of non-deduction of taxes at source on the payment. The Commissioner (Appeals) also confirmed the disallowance.

In its appeal before the Tribunal, the assessee argued that the payments were mere reimbursement of expenses and were not subject to tax deduction at source at the time of payment to the non-resident company. Without prejudice to this, it was also argued by the assessee that even assuming that amounts were taxable and tax deduction was required at source, by virtue of Article 26(3) of the India-USA treaty on non-discrimination, the deduction for the payment could not be denied, despite the non-deduction of tax at source. The Tribunal accepted the assessee's contention and held that for the subject assessment year, in the context of similar payments by Indian residents to other Indian residents, there was no disallowance of the expenditure for non-deduction of tax at source. It noted that Article 26(3) of Indo-US Treaty provides that a non-resident, for the purposes of section 40(a)(i), will be considered on an equal footing as that of the resident. Therefore, the assessee was being discriminated as non-deduction of taxes at source on only international payments attracted disallowance. The Tribunal therefore accepted the assessee's submission that it was eligible to take benefit of Article 26(3) of the India-USA tax treaty (on non-discrimination) and therefore held that the disallowance could not be resorted on the premise of non-deduction of taxes at source.

Herbalife International India (P) Ltd. Vs. Assistant Commissioner Of Income Tax. (103 TTJ 78) (Delhi Tribunal)

Taxes paid by the Indian subsidiary in respect of income earned by employees of foreign company deputed in India not allowable as a deduction in the absence of a formal agreement

A foreign company had deputed some of its employees to its Indian subsidiary. These deputed employees were paid salary by their parent company outside India. These salaries paid outside India were held to be taxable in India. However the foreign company had not withheld Indian taxes at source. Subsequently, under a verbal agreement with the deputed

employees, the Indian taxes were agreed to be borne by the Indian subsidiary and remitted to the Government. The same was also claimed as a deductible expenditure by the Indian company. This was however disallowed by the assessing officer, which was confirmed by the Commissioner (Appeals).

In its appeal before the Tribunal, it was argued by the Indian company that the Indian taxes were agreed to be borne as an incentive to the employees. Although there was no written agreement, an oral agreement would suffice. The Tribunal however observed that the requirement of payment of taxes on the salaries paid outside India became known to the assessee only much later when it was made aware of its obligations. Therefore, there was no contractual liability pre-existing on the Indian company to bear the Indian taxes. Even the oral agreement being a post-facto event cannot be said to give rise to a contractual liability. Therefore, the Tribunal held that in the absence of a contractual liability, the same could not be held as an allowable expenditure for the relevant assessment year to which the taxes pertained. However, on the alternate plea of the assessee that the expenditure was incurred on commercial expediency, the Tribunal observed that although the same may be allowable, the same could be allowed only in the year when the tax payment was made and not in the year to which the tax pertains. The Tribunal refrained itself from deciding on the same as the issue of allowability on commercial expediency pertained to a different assessment year.

Marubeni India (P) Ltd. vs JCIT (101 ITD 437) (Delhi Tribunal)

Snippets

The Finance Ministry may become more scientific in selecting cases for **transfer pricing audits**. Currently, cross-border transactions of more than Rs 15 crore in a year between related-parties are taken up for compulsory scrutiny by the tax department. Indications are that the Revenue department may go in for some qualitative trigger norms in addition to the existing quantitative criterion for deciding on the cases for transfer pricing audits. The Finance Ministry had recently hiked the threshold limit for compulsory scrutiny of cross border transactions for transfer pricing audit purposes from Rs 5 crore to Rs 15 crore. So far, the income-tax department has completed transfer-pricing audits for two years - assessment year 2002-03 and 2003-04 - and made total transfer pricing adjustments of about Rs 2,800 crore. Meanwhile, the Income-tax Department also was of the opinion that the time is not ripe for introduction of advance pricing arrangements ("APA") for transfer pricing purposes. APAs are in the nature of advance rulings that gives comfort on the pricing front to enterprises undertaking international transactions with associated enterprises.

Source: Business Line; August 31, 2006

'Field-break' is not an off-period/leave period for the purposes of section 9(1)(ii)

The assessee, a non-resident company, whose employees were on an assignment in India, had sent its employees to UK for 28 days on field break work. These employees received income in the UK as residents of UK. The field break was to enable the employees to undergo training relating to their work. In the assessment of the employees, the AO charged the salary including for the period which pertained to the 'field break', by considering it as an off-period/leave period. On appeal to the Commissioner (Appeals) by the assessee, the matter was decided in the assessee's favour.

On an appeal by the Revenue with the Tribunal, the Tribunal, on examining the facts, observed that the field break work like the one mentioned in the present contract, cannot be equated with rest or leave period. It observed that the employees were sent for training purposes and they did not proceed on leave. The Tribunal therefore held that the provisions of section 9(1) (ii) of the Act would not apply to the salary pertaining to the field break period and that the same was not taxable in India.

Deputy Commissioner of Income Tax vs. Sedco Forex International Drilling Incorporation (103 TTJ 99) (Delhi Tribunal)

Interest for default of TDS is leviable only up to the date of assessment of the payee or payment of TDS whichever is earlier

The assessee, after having deducted taxes at source ("TDS"), failed to pay the TDS amount to the credit of Central Government due to non-availability of liquid funds. It also failed to issue TDS certificates to the payees. In the meantime, the payees filed their return and either declared a loss in their return or had paid the taxes due on the return without considering the aforesaid TDS. The AO levied interest and penalty on the assessee for non-remittance of TDS. The interest was levied up to the date of the penalty order. The period up to which interest was levied was however, restricted to the date of assessment of the payees by the Commissioner (Appeals).

The Revenue preferred an appeal before the Tribunal contesting that the interest for default in TDS is to be levied up to the date of the penalty order and cannot be restricted to the date of assessment of the payees. The Tribunal observed that the payees had filed their return and their return was processed under section 143(1). By relying on another Tribunal decision on the matter, the Tribunal held that the interest could be levied only up to the date of the assessment under section 143(1) or the date of remittance of TDS, whichever is earlier.

ITO vs. Labh construction & Industries Ltd. (103 TTJ 269)(Ahmedabad Tribunal)

Whether MAT credit can be set-off from assessed tax for the purposes of levy of interest is a debatable issue

The assessee had brought forward Minimum Alternate Tax ("MAT") credit under section 115JAA of the Act. The same was set-off in calculating its advance tax liability. However, the same was not considered by the AO in the assessment order under section 143(3). The assessee thereafter preferred an application under section 154 of the Act for passing a rectification order for setting off MAT credit in the computation of interest. The AO rejected the application. The same was also confirmed by the Commissioner (Appeals).

On appeal with the Tribunal, the Tribunal observed that the Tribunal had, in a couple of other decisions, held the matter in favour of the assessee. The Tribunal however, observed that for the purposes of computation of interest under section 234B and 234C, there was no specific mention that the MAT credit could be treated on par with advance tax or TDS. In light of this matter, the Tribunal came to the conclusion that whether or not MAT credit can be set-off for calculation of interest is a debatable issue and required a thorough analysis. The Tribunal therefore held that since the matter was a debatable issue, the same could not be a matter for rectification under section 154 as only mistakes apparent from record could be rectified under section 154.

Smruthi Organics Ltd. vs. DCIT (103 TTJ 546) (Pune Tribunal)

Interest on income-tax cannot be equated on par with income-tax and therefore need not be added back in arriving at the book profits for MAT purposes

The assessee had paid taxes on its book profits as per the MAT provisions of section 115JA. The same was summarily processed under section 143(1). However, subsequently the AO sought to rectify the summary assessment for adding back

Snippets

A brand **new income-tax law** that provides for easy reading and understanding of the provisions may become a reality from April 1, 2008. An expert group of Central Board of Direct Taxes ("CBDT") that was constituted to suggest simplification of the Income-Tax Act, 1961, recently submitted its report to the Union Finance Ministry. Christened the 'Report on simplification of the Income-tax law', the expert group has combined all the existing direct taxes such as the income-tax, wealth tax and fringe benefit tax into one code known as 'Direct Tax Code Bill 2006'. The Code seeks to ensure that the language of the law is simple and complicated legalese is done away with. Moreover, all provisos and explanations in the existing law are to be done away with and wherever necessary, suitably incorporated in the main provision.

Source: The Business Line, September 9, 2006

interest on income-tax which was reduced by the revenue in arriving at its book profits. The same was confirmed by the Commissioner (Appeals).

In its appeal before the Tribunal, it was argued by the assessee that interest on income-tax was on a different footing in comparison with income-tax. What was required to be added back in arriving at the book profits for MAT purposes was income-tax and not interest on income-tax. The Tribunal observed that income-tax was chargeable at the rates specified in the Finance Acts and was subject to change every year. Interest on income-tax was however constant (unless the rates are amended). Therefore, interest on income-tax has been recognized by the Act separately, vis-à-vis income-tax. The Tribunal noted that there was no provision in the Act which defined 'income-tax' to include 'interest' within its ambit. Therefore, it was not possible to accept that for the purposes of determining the book profits for MAT purposes, even interest on income-tax is to be included.

Salgaocar Mining Ind (P) Ltd Vs JCIT (103 TTJ 824) (Panaji Tribunal)

Advance Rulings

For computation of book profits for MAT purposes, the carry forward of book loss and unabsorbed depreciation has to be in accordance with section 115JB

The assessee, a public sector company, preferred an application before the Authority for Advance Ruling ("AAR") on specific questions pertaining to the manner of set-off of brought forward book losses and unabsorbed depreciation for the purposes of computing book profits for MAT purposes under section 115JB. The assessee sought to know from the AAR whether it had the option of setting off its current year's profit against the book loss and book depreciation brought forward, in a manner different from that adopted for computation of book profits under section 115JB. It also sought to know whether it had the discretion of setting off the profits either against loss or unabsorbed depreciation and also whether in the event it is possible whether the same can be changed on a year-on-year basis.

After hearing the applicant and the Revenue, the AAR ruled that in the context of section 115JB, the applicant did not have the option of reducing the unabsorbed depreciation and brought forward losses in its accounts in a manner different from the manner adopted for determining book profits under section 115JB. In the context of reducing book losses/unabsorbed depreciation, the AAR held that the applicant cannot be said to have the option of reducing either brought forward losses or unabsorbed depreciation, at its discretion, but that lesser of the two had to be reduced. Also, the applicant did not have the option of partially reducing from losses and partially from unabsorbed depreciation. The AAR held that the applicant was required to segregate the consolidated debit balance in the Profit and Loss Account (as

disclosed in the accounts) into brought forward losses and unabsorbed depreciation, after taking into account the losses/depreciation reduced (if any) for the purposes of section 115JB in the earlier year.

Rashtriya Ispat Nigam Ltd, In Re (285 ITR 1) (AAR)

Snippets

There's a windfall in store for employees of foreign companies' subsidiaries who are working in India. The government is likely to allow **foreign companies to give Employee Stock Options (ESOPs)** to employees of their Indian subsidiaries, through the India Depository Receipts (IDR) route. The proposal will benefit the employees of multinationals in a big way. Since subsidiaries are often not listed and cannot give out ESOPs, employees in India have at times missed out on the growth story abroad, despite contributing to the performance of the parent company in a big way. The move is also expected to increase the attractiveness of these companies in terms of employee compensation.

SEBI (Disclosure and Investor Protection) Guidelines, incorporating the IDR provisions, were issued in May this year. The guidelines do not have any specific provision for this purpose. In a bid to bring about clarity on the subject, the government may come out with additions to the guidelines, sources told ET, following representations from industry.

Source: The Economic Times, September 18, 2006

An individual leaving India for the purposes of employment outside India would be a non-resident in India if he has stayed in India for less than 182 days

The applicant, an Indian company, preferred an application with the AAR in the context of tax liability in India of one of its employees posted to one of its group companies outside India. The salary of the employee posted outside India was being paid in India for the services rendered outside India. During the subject financial year, the concerned employee was in India for a period of 88 days.

When a report was sought from the Revenue, the Revenue contended that the concerned employee would be a 'resident' in India and that the application was not maintainable, as applications before the AAR could be preferred only in respect of tax liability of a non-resident. Consequently, the AAR served a notice on the Applicant asking for explanations. It was submitted by the Applicant company that the employee would be a 'non-resident' under the Act as he left India for the purposes of employment outside India and therefore as long as the stay of such an individual is less than 182 days, such a person would be a non-resident under the Act (Section 6, which lays down the provisions for determination of residential status under the Act, has *inter alia* carved out an exception in the case

of individuals leaving India for the purposes of employment outside India and has allowed these individuals to stay on in India for a period of up to 182 days (otherwise being 60 days) to qualify as a non-resident). The contention of the Revenue was that since the employee was already in employment and is leaving India on deputation, he cannot be said to leave India for employment. Therefore, the condition of 60 days would apply and not that of 182 days. The AAR observed that for the purposes of availing the extended stay of 182 days to qualify as a non-resident, the requirement is not 'leaving India for employment abroad' but it is 'leaving India for the purpose of employment outside India' and that an individual need not be an unemployed person who leaves India for employment outside India. The AAR therefore held that for the purposes of the Application, the concerned employee is a 'non-resident' in India.

British Gas India (P) Ltd., In Re (204 CTR 177)(AAR)

Notifications

Cost of Inflation Index for financial year 2006-07 notified

For the purposes of capital gains computation under the Income-tax Act, 1961, the Central Board of Direct Taxes ("CBDT") has notified the Cost of Inflation Index ("CII") for the financial year 2006-07 to be 519.

CBDT Notification 270 dated September 19, 2006

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INDIRECT TAXES ▶▶▶

Case Laws

Service Tax

Service tax on mandap keeper

The appellant provided halls on hire for official, social and business functions with exclusive rights to a caterer for rendering catering and decorating services to the hirer, if so required. Such exclusive rights were granted to the caterer under a separate contract and the appellant recovered a sum for the same. Service tax was demanded on such sum under the category of 'mandap keeper'.

The High Court held that the services were not rendered by the appellant, directly or indirectly, to the hirer and that giving exclusive rights to the caterer for supply of food, beverages, etc would not cast a liability on the appellant to discharge service tax.

C K P Mandal V CCE, Mumbai-IV – 2006 6 STJ 131 (High Court – Bombay)

Service tax on inter-unit services

The appellant, a corporate entity, had independent units, which performed spinning, dyeing, doubling, weaving activities. For the purpose of evaluating the performances of these units, inter-unit debit notes were raised to account for the cost of goods and services supplied by one unit to the other. The Revenue demanded service tax on the amounts of such debit notes.

On behalf of the appellant, it was contended that the service provider and service receiver belonged to the same corporate entity with a single certificate of incorporation. There was single consolidated balance sheet for the legal entity and for each separate unit. In the absence of a 'service provider' and 'client' relationship between two units of the same corporate entity, the services were infact being rendered by the appellant to it. On the basis of these facts, the Tribunal held that service tax could not be levied.

Precot Mills Limited V CCE, Tirupati – 2006 6 STJ 140 (Tribunal – Bangalore)

Note: This decision re-affirms a long established principle under other tax laws that intra-entity transactions cannot be taxes, and treated on par with transactions between two separate legal entities.

Snippets

After Special Economic Zones ("SEZs") and auto hubs, it is now the turn of **industrial parks** to provide India Inc with additional tax breaks and quality infrastructure. The Commerce & Industry Ministry has designed a new Industrial Parks Scheme which will entitle developers to a 10-year income tax holiday. The income tax benefit can be availed for a 10 years block anytime in a period of 15 years. Christened 'Industrial Park Scheme '06', the new window has now been submitted to the finance ministry. If the new scheme is approved, developers will have to move fast to file applications as tax holiday is available only till '09. In the '06 Budget, the government had extended tax holiday for industrial parks till '09. This effectively means that new projects in industrial parks should be started before '09.

Source: The Economic Times; September 20, 2006

Service tax on clearing and forwarding agents

The question before the Principal Bench was whether, carrying out either clearing, or forwarding operations, or both, gets categorised as 'clearing and forwarding operations'. The Tribunal held that when one segment of activity is not performed, it cannot be stated that there is no taxable service which is rendered and the clearing and forwarding operations cannot be dissected into 'clearing' and 'forwarding' as they fall under the common category. Accordingly, all or any of the services

rendered by a clearing and forwarding agent and connected with clearing and forwarding operations would attract service tax.

Medpro Pharma Private Limited V CCE, Chennai – 2006 6 STJ 163 (Tribunal – New Delhi)

Service tax on clearing and forwarding agents

The appellant procured purchase orders for vendors on commission basis on which Revenue sought to levy service tax under the category of 'clearing and forwarding agent'. The Tribunal, however, held that appellant is not carrying out any activity in relation to clearing and forwarding operations and hence service tax could not be levied under this category.

Larsen and Toubro V CCE, Chennai; Voltas Limited V CCE, Coimbatore; Amrit Varsha Ispat (Private) Limited V CCE, Meerut-I; Kotdwar Steels Limited V CCE, Meerut – 2006 6 STJ 102 (Tribunal – New Delhi)

Service tax on port service

The appellant collected railway siding charges from the railway authorities for utilizing port railway yard. On demand of service tax on such charges, the appellant contended that these are different from railway haulage, local haulage or storage charges which are taxable as per the Board's clarification issued in 2001. It was held that railway sidings is a service rendered by appellant for goods transported to and from port by railways and are services rendered by a port in relation to goods and vessel; hence, liable to service tax under the taxable category 'port services'.

New Mangalore Port Trust, IN Re – 2006 6 STJ 175 (Commissioner (Appeals) – Mangalore)

Service tax on security service

Appellant rendered services in relation to providing manpower for security, gardening, maintenance, general office work and invoiced a consolidated amount. Service tax was demanded under the category on 'security agency services'. The appellant contended that service tax may be demanded on the manpower supplied but not on the house keeping services. It was held that as there was no separation of amounts charged in relation to security and other services rendered, service tax was correctly levied on the whole amount.

Tiger service Bureau, IN Re – 2006 6 STJ 178 (Commissioner (Appeals) – Mangalore)

Service tax on advertising agency

The appellant manufactured signboards as per customer requirements which Revenue sought to tax under the category of services rendered by an 'advertising agency'. The Tribunal held that writing/ preparation of signboards as per instructions of customers would not be a service in connection with mail, preparation, display or exhibition and advertising, and hence service tax could not be levied.

Star Neon Sign V CCE, Chandigarh – 2006 6 STJ 205 (Tribunal – New Delhi)

Service tax on advertising agency

The appellant rendered services under the category of advertising agency and also printed advertisements on yellow pages of telephone directory. A refund of the service tax paid was claimed on the services in relation to printing of advertisements. It was held that service tax could not be refunded as the invoices did not include separate charges for the various activities and that the incidence of the duty collected was already passed on to the customer by the appellant.

Synergy info-sers V Commissioner of Central Excise, Nagpur – 2006 4 STT 277 (Tribunal – Mumbai)

Snippets

The **Supreme Court** recently entertained a petition challenging an order by the **Authority for Advance Rulings (AAR)** to tax a foreign company operating in the country. This was the first such petition that the apex court admitted. The court, however, reserved its judgement on the petition by Japan's **Ishikawajima-Harima Heavy Industries**, challenging the ruling of AAR, which is the final arbiter on tax liability of foreign companies in India. In January 2001, Petronet LNG Ltd awarded the Japanese company, and five others, a \$65.2 million contract to set up a liquefied natural gas (LNG) facility in Dahej, Gujarat. In October 2004, the AAR ruled that the amount received/receivable by the Japanese company from Petronet LNG for offshore services and supply of equipment & material was also liable to be taxed in India as it is connected to the company's permanent establishment in India. The AAR said certain operations of the offshore supply were inextricably linked with its permanent establishment in India. This includes the signing of contract in India, which imposes liability on the Japanese company to procure equipment and machinery in India. The income accrued to the company was from offshore supply through business connection in India and therefore could be taxed, the AAR ruled.

Source: Financial Express, September 14, 2006

Every firm that employs an engineer is not an engineering firm

The Tribunal, in this case, held that mere employment of an engineer cannot make an organization an engineering organization. The Tribunal observed that unless the service provider was a professionally qualified engineer (natural person) or engineering firm (juristic person) employing such qualified engineer (s) such a provider would not come within the scope of the definition of "consulting engineer".

In the present case, the appellant, a sugar manufacturer, provided technical services and service tax was demanded under the category "Consulting Engineer Services" on the ground that engineering consultancy services were provided. The appellant contended that it would not fall within the meaning of "consulting engineer" as the definition (at the

relevant time) of “consulting engineer” covered professionally qualified engineer or an engineering firm only and appellant being a sugar manufacturer (non-engineering firm) cannot be brought to tax under this category.

The Tribunal held that many commercial and non-commercial organizations employ engineers whether for engineering related work or in management positions. The mere employment of an engineer cannot make an organization an engineering organization and therefore the assessee not being an engineering firm would not be liable to service tax.

M/S Shakumbari Sugar & Allied Ind Ltd Vs Cce, Meerut-I & Vice-Versa, (Tribunal – Delhi)

Sales Tax

Petroleum products: Sales tax not chargeable on retention price charged by the Oil Coordination Committee

The question for consideration in this case was whether the appellants were entitled to charge sales tax on the retention price fixed by the Oil Coordination Committee.

Affirming the High Court’s decision, the Supreme Court held sales tax is leviable on the price as fixed between the buyer and seller (in accordance with their agreement). Retention price is merely a compensation or subsidy given to the oil producing companies as the Government does not permit them to sell oil beyond the price fixed by it. Such compensation/ subsidies do not form part of sale price and are therefore not liable to sales tax.

Commissioner of Taxes, Guwahati v Bongaigaon Refinery and Petroleum Chemicals Limited [2006] 147 STC 358 (Supreme Court)

Commissioner’s power to issue circulars and instructions for reassessment

The appellants were dealers in parts and accessories of computers and computer peripherals. During assessment, the assessing authorities allowed an exemption from levy of tax in view of notifications issued under the Karnataka Sales Tax Act, 1957 (‘Act’). Subsequently, the Commissioner issued a clarification stating that only sale of computers and computer peripherals were exempt from tax under the notification. Pursuant to this, the assessing authorities issued a notice proposing to levy tax on parts of computers and computer peripherals.

The High Court held that the definition of computers and peripherals by means of legal fiction, embraces parts of computers and computer peripherals and thus they would also be exempt from levy of tax.

Further, the Commissioner’s power to issue instructions/ clarifications does not imply the power to give directions/ instructions for finalizing assessment orders in a particular manner. The assessing authorities are required to independently verify whether any turnover has escaped

assessment. In the present case, the assessing authorities were compelled to initiate proceedings and issue proposition notices on account of the instructions issued by the Commissioner. Hence, the proposition notice was liable to be quashed.

Balaji Computers v State of Karnataka [2006] 147 STC 269 (Karnataka High Court)

Meaning of exempted goods

The question that arose for consideration in this case was whether goods that were granted conditional exemption vide a notification issued under the Rajasthan Sales Tax Act, 1994 (‘Act’) would be covered under the definition of ‘exempted goods’ given in the Act.

The High Court held that ‘exempted goods’ were defined in the Act as goods exempted from tax in accordance with provisions of the Act. A notification issued under the Act would naturally mean that those goods are exempt in accordance with provisions of the Act. Merely because the exemption is conditional, it does not mean that such goods will fall outside the definition of ‘exempted goods’.

ACTO v Suncity Trade Agency [2006] 147 STC 405 (Rajasthan High Court)

Snippets

The government has deferred the **Central Sales Tax (CST) phase-out** from October 1, 2006 to April 1, 2007. The Empowered Committee has postponed the proposed phase out of CST from 4% to 3% with effect from October 1, 2006. The Empowered Committee has decided that the rate would be reduced directly to 2% (from 4%) with effect from **April 1, 2007**. This is because the finance ministry and state governments are yet to iron out their differences over the question of compensating states for the resultant revenue loss. A finance ministry official said that though the start of the phase-out was being deferred, the deadline for eliminating the CST by April 1, 2009 would be met. States are learnt to have told the finance ministry that a phased increase in value-added tax (VAT) rates, starting next fiscal, which it had proposed, could not be considered a component of the CST compensation package. According to states, any hike in their VAT rates should be seen as an additional resource mobilisation effort at the state level, separate from the CST package.

Source: Financial Express, September 7, 2006, Business Standard, September 25, 2006

Exemption on stock transfers

The assessing authority disallowed an exemption claim of the petitioner under section 6A of the Central Sales Tax Act, 1956 (‘Act’) based on Esab India Limited v State of Kerala [2006] 147 STC 417 (‘Judgment’), in which the court did not permit an exemption claim in the absence of check-post seals on transit papers.

The High Court held that the Judgment could not be treated as having laid down a law to the effect that in all cases where check-post cleared documents are not completely available, the decision under section 6A ought to be against an assessee. The assessing authority has to hold an enquiry as to the genuineness of the particulars furnished by an assessee and he can ask the assessee to produce relevant documents, other papers or materials during the enquiry. However, it is not possible to lay down the exact documents or materials that may be required in such enquiries. The petitioner produced Form-F declaration and different supporting documents during the enquiry, but the assessing authority failed to exercise the jurisdiction vested with it under section 6A. Hence, the matter was remanded for fresh consideration.

Carborundum Universal Limited v State of Kerala [2006] 147 STC 408 (Kerala High Court)

Whether an excavator is a motor vehicle for entry tax purposes

The question that arose for consideration in this case was whether an excavator not running on inflated tyres, but on iron chain plates would be a 'motor vehicle' under the definition of the term in the Motor Vehicles Act, 1988 ('Act') and thus be liable to entry tax. The High Court held that an excavator on iron chain plates is used for excavating earth and loading in lorries. It is used only at work sites and is not suitable or adapted for use on public roads. Further, an excavator can gain a maximum speed of only 1.5 km per hour. Therefore, such an excavator would not be covered under the definition of 'motor vehicle' given in the Act.

Intelligence Officer, Kozhikode v Ray Constructions Limited [2006] 147 STC 438 ('Kerala High Court')

Excise

Assessable value of stock transferred goods

The Tribunal has held that where a wholesale price is available, the goods stock transferred to a sister unit by an assessee should be assessed on such value. For such cases, section 4(1)(b) of the Central Excise Act, 1944 should not be invoked.

U.T. Ltd. v CCE, Allahabad, 2006 (199) ELT 658 (Tri)

Processes not amounting to manufacture

The Appellants were engaged in undertaking job work activity that entailed welding, bending and sand blasting. The issue in this case pertained to demand of duty on the job work so carried out by the Appellants.

The Tribunal held that none of the processes being carried out by the Appellant led to emergence of a new product and hence there was no manufacturing activity and duty demand was not sustainable.

Super Mix (India) Pvt. Ltd. v CCE, Rohtak, 2006 (199) ELT 674 (Tribunal)

Availability of Cenvat credit

The issue in the case pertained to admissibility of cenvat credit on inputs where the duty on the same was paid by the input manufacturer and not by the input purchaser.

The Tribunal held that cenvat credit is not conditional upon the buyer of the inputs paying for the inputs or the excise duty due. The only condition is that the manufacturer should have discharged the duty liability. Thus, the Tribunal held that the credit would be admissible.

Suntech Glass Pvt. Ltd. v CCE, Noida, 2006 (199) ELT 517 (Tribunal)

Transportation charges not included in assessable value

The appellants were engaged in installation of air-conditioning and refrigerating equipments against Works Contracts at various sites. The issue in this case pertained to the inclusion of transportation charges in the assessable value under Rule 6 (b) (ii) of the Central Excise Valuation Rules, 1975.

The Tribunal held that transportation charges from the factory are excluded from the assessable value computed under Rule 6 (b) (ii). Further, the amount deposited under protest on adhoc basis is required to be refunded in accordance with the principles of unjust enrichment.

Blue Star Ltd. v CCE, Mumbai - VI, 2006 (200) E.L.T. 108 (Tribunal)

Loading charges included in assessable value

The issue in this case pertained to the inclusion of loading charges in the assessable value of the goods cleared from the depot.

The Tribunal relying on the decision in M/ s Modi Rubber Ltd. v CCE cited as 2005 (188) E.L.T. 328 (Tribunal) held that loading charges incurred for loading the goods within the depot are includible in the assessable value of goods cleared from the depot

CCE, Meerut v Auto Tubes Ltd., 2006 (200) E.L.T. 112 (Tribunal - Del)

Snippets

This is a ring tone which the industry would enjoy. Companies can now claim the **service tax they pay on cell phones** as Central value-added tax (Cenvat) credit. The Mumbai Customs, Excise and Service Tax Appellate Tribunal has ruled that service tax paid on mobile phones is available as credit to eligible service providers of output service and manufacturers. The tribunal held that the term 'cellular phone' would include all kinds of phones which work on cellular technology. The Revenue department has been insisting that the credit was applicable only on fixed line phone. Now, the Industry can claim credit against the Cenvat it pays and use the credit to offset against the tax it is liable to pay on its inputs.

Source: The Economic Times, September 14, 2006

Customs

Jurisdiction of settlement commission under Customs Act on fraud cases

The Bombay High Court has held that there is a clear distinction between the provisions under the Income Tax Act and the Customs Act in relation to jurisdiction of the settlement commission. Under the former any application must be made before the investigation has started or before the authority has collected any evidence or any notice is issued to the applicant. On the contrary the Customs Act makes it mandatory that the applicant can file an application only after a show cause notice has been issued. Such show cause notice, in the opinion of the court, can pertain to confiscation as well. In reaching this decision, the Bombay High Court differed with the opinion of the Madras High Court in Commissioner of Customs v. Customs and Excise Settlement Commission 2002 (139) ELT 512 **Union of India v. Hognas India Ltd. 2006 (199) ELT 8 (Bom)**

Meaning of the term "as such"

The Tribunal has held that the meaning of the term "as such" used in the customs notification no. 56/98 should be construed to mean that the goods should not have undergone any process of change. In light of this, the Tribunal has held that repacking does not result in any material change in the nature of the goods. In this case, the authorities had relied on the Chapter Note under Chapter 28 of the Excise Tariff to contend that the goods had not been sold as such, but after a process of repacking for retail sale, which amounts to manufacture. The Tribunal held that Chapter Note of the Excise Tariff cannot be invoked to interpret a notification under the Customs Tariff Act. **Vijirom Chem. Pvt. Ltd. v. Commr. of Cus., Bangalore 2006 (199) ELT 751 (Tribunal – Bang)**

Notifications and Circulars

Service tax

Service tax on roaming services provided to in-bound subscribers of foreign telecom networks

The CBEC has issued a Draft Circular on whether the roaming services utilized in India by international roaming subscribers of foreign telecom networks would attract service tax in India.

The draft circular states that during international roaming, the visiting network provides service to a person treating it as a subscriber on a temporary basis for the period in which service is availed by such person from visited network. Therefore, during this period, the Indian telecom service provider provides telephone service to the international roamer. The circular further states that the service to in-bound roamers is delivered and consumed in India and therefore cannot be treated as export of service.

While this circular is in draft stage, should the same be passed

in the same form, it could have significant implications on telecom service providers and in understanding the interpretation of the "Export of Services Rules, 2005" by the CBEC.

Service Tax Draft Circular No. 149-4-2005 dated September 15, 2006

Sales tax

Circular on manufacture, supply, installation and commissioning of elevators

The Commissioner of Sales Tax, Maharashtra has issued circular no 24 of 2006, dated September 12, 2006 pursuant to the Supreme Court decision in the matter of Kone Elevators (140 STC 22) (the SC in this case had held that supply and installation of lifts is a transaction of sale of 'goods' and cannot be regarded as a 'works contract').

The Circular is issued in order to avoid any hardships that may be caused to any dealer due to re-opening of the assessment (on the basis of the SC ruling). The following are the salient features of the Circular:

- For all the periods ending upto March 31, 2006, the activity of manufacture, supply, installation and commissioning of elevators shall be treated as a works contract
- No cases pertaining to the periods as above shall be re-opened only on the basis of the Supreme Court judgment in the case of Kone Elevators
- For the periods from April 1, 2006 onwards all cases wherein facts are similar to the facts in the case before the Supreme Court, the transactions will be treated as "sale"
- However, if the facts are materially different, ie, if the goods to be delivered do not have any individual existence before the delivery and also the manufacturer is required to carry substantial obligations for installation and commissioning such as civil construction work etc, which are more than mere incidental works, then such contract will continue to be treated as a works contract.

Circular No. no.24 of 2006, dated September 12, 2006

Excise

Excise exemption to Uttranchal and Himachal Pradesh extended to 2010

CBEC has amended the Notifications No 49/2003 and 50/2003 Central Excise, dated June 10, 2003 by extending the date for the excise exemption in Uttranchal and Himachal Pradesh from March 31, 2007 to March 31, 2010.

Notification No 38/2006-Central Excise, dated: August 2, 2006

Exemption from filing of Annual Financial Information Statement

Exemption has been given to the assessee who paid duty of excise less than INR 100,000 in a financial year from submitting an Annual Financial Information Statement for the preceding financial year, to the Superintendent of Central Excise

(Rule 12 (2) (a) of Central Excise Rules, 2002). This notification is in supersession of the notification No. 35/2004-Central Excise (NT) dated November 1, 2004.

Notification No 17/2006-Central Excise (N.T.), dated August 1, 2006

Customs

Exemption under Target Plus Scheme

The Customs Act, 1962 has exempted goods when imported into India against a duty credit certificate issued under the Target Plus Scheme. This is subject to conditions, inter alia that:

- Benefit would be available in respect of duty credit certificate issued to a Star Export House on the basis of incremental growth in FOB value of exports made during the financial year 2005-06 over the exports made during the financial year 2004-05
- The certificate and goods imported against it should not be transferred or sold
- In case, where the goods are imported by a merchant exporter having supporting manufacturer(s) whose name and address is specified on the said certificate, the said goods may be utilised by the said supporting manufacturer(s).

Customs Notification No 73 dated July 10, 2006

Levy of special CVD @ 4% under Duty Free Credit Entitlement (DFCE) Scheme

This circular clarifies that the importer is required to pay special additional duty of customs (CVD) of 4% under the Duty Free Credit Entitlement (DFCE) scheme, as provided in Notifications No 53/2003-Customs and Notification No 54/2003-Customs, dated April 1, 2003 governing imports under DFCE Scheme which provides that exemption from the additional duty is restricted to the duty leviable under Section 3 (1) of the Customs Tariff Act, 1975.

Circular No 20/2006-Customs, dated July 21, 2006

DGFT

Fulfillment of positive Net Foreign Exchange

Paragraph 6.9 of the Foreign Trade Policy, 2004-2009 has been amended to notify that supplies effected from EOU/ EHTP/ STP/ BTP Units into Domestic Tariff Area to holders of DFIA will be counted for the fulfillment of positive Net Foreign Exchange.

DGFT Notification No. 23 (RE-2006)/ 2004-2009, dated June 25, 2006

Import of PVC floorings scrap

Schedule-I of the ITC (HS) Classification of Export and Import Items, 2004-09 has been amended to notify that import of PVC floorings scrap is permitted, subject to the conditions given in the this notification for importing such goods.

Notification No. 24 (RE-2006) / 2004-2009, dated July 26, 2006

Issuance of new IEC application form

A new format has been prescribed for the IEC Application contained in the Sub section I of the AAYAAT- NIRYAAT Form. Further, the format of bank certificate for issue of IEC as contained in the Appendix 18 A has been replaced by the format given in part B of the new IEC application form.

It has been clarified that the application in the old format will be accepted till August 14, 2006.

Public Notice No 37-(RE-2006)/ 2004-2009, Dated: July 27, 2006

Amendments to the Standard Input Output Norms

Several amendments / deletions / corrections / additions have been notified in the Standard Input Output Norms as contained in the Handbook of Procedures, Vol 2, 2004-2009.

The changes notified in the entries in the statement of Standard Input Output Norms are in the categories of chemical, engineering and food products.

Public Notice No 32, (RE-2006)/2004-2009, dated July 13, 2006

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OTHER ALLIED LAWS

Notifications and Circulars

Company Law

The Companies (Electronic Filing and Authentication of Documents) Rules, 2006 notified

E-filing Rules have been notified by the Department of Company Affairs to regularize the requirement of e-filing of all returns and forms required to be filed under the Companies Act, 1956. The e-filing Rules provide for requirement of obtaining digital signatures by the authorized signatories of the companies, e-filing of documents in Portable Document Format (PDF), maintenance of Electronic Registry of the e-documents by the Central Government and issue of certificates, approvals, etc by the Registrars in e-form. These Rules have come into effect from September 16, 2006.

Company Affairs Notification No GSR 557(E) dated September 14, 2006

Amendment of Companies Regulations, 1956 pertaining to inspection of documents filed with the Registrar

The Companies Regulations, 1956, in relation to inspection of documents filed with the Registrar, has been amended. As per the amended Regulations, any document/form forming part of the Electronic Registry shall be available for inspection only in an electronic manner on payment of the prescribed fee. The inspection of documents/forms which do not form part of the Electronic Registry shall be allowed to be inspected only in the

presence of the Registrar or any person authorized by the Registrar.

Company Affairs Notification No GSR 556(E) dated September 14, 2006

SEBI

Enhancement of fees payable at the time of filing offer document for buy-back of securities and substantial acquisition of shares

The Securities and Exchange Board of India (Buy-back of Securities) Regulations, 1998 and the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 1997 have been amended to enhance the fees payable at the time of filing of the Offer Document by the Merchant Bankers with the SEBI.

The revised schedule of fees is as follows:

Offer Size (Rupees)	Fees (Rupees)
Less than or equal to one crore rupees	100,000
More than one crore rupees, but less than or equal to five crore rupees	200,000
More than five crore rupees, but less than or equal to ten crore rupees	300,000
More than ten crore rupees	0.5% of the offer size

SEBI Notification SO No 1330(E) and 1331(E) dated August 21, 2006

Enhancement of application fees and registration fees payable by domestic venture capital funds and foreign venture capital investors

The SEBI (Venture Capital Fund) Regulations, 1996 and the SEBI (Foreign Venture Capital Investors) Rules, 2000 have been amended to enhance the application fees and registration fees payable at the time of application/registration as follows:

Description	Application Fee	Registration Fee
Domestic Funds	Rs 100,000 (from Rs 25,000)	Rs 1,000,000 (from Rs 500,000)
Foreign VC Investors	US\$ 5,000 (from US\$ 1,000)	US\$ 20,000 (from US\$ 10,000)

SEBI Notification SO No 1443(E) and SO 1444(E) dated September 4, 2006

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