Tax Edge

BMR Advisors

Vol. 4 Issue 11 November, 2010

Supreme Court recommends that Transfer Pricing provisions should be extended to domestic transactions

The taxpayer was engaged in the business of manufacture and sale of consumer products. The taxpayer entered into an agreement with Glaxo Smithkline Consumer Healthcare Ltd ("GSKH") for marketing, finance, human resource, secretarial services, etc and paid for these services at cost plus 5 percent. Since there was no basis for allocation of costs towards the various services, cross charges were worked out in terms of a study made by a Chartered Accountant. The Revenue rejected the claim of the taxpayer on the basis that the costs incurred were excessive. The Tribunal and High Court ruled in favour of the taxpayer. While disposing off the appeal by the Revenue, the Supreme Court declined to interfere with the ruling of the High Court on matters of facts, but it recommended that if Transfer Pricing ("TP") regulations are extended to domestic transactions, it would reduce litigation. The Apex Court observed that in the case of a domestic transaction, under-invoicing of sales and over-invoicing of expenses would ordinarily be tax neutral. However, it could also lead to situations where tax arbitrage is created. The Court recommended that the law must be amended empowering the Revenue to make adjustments to income having regard to the fair value of the domestic transactions between related parties and that extensive documentation should be maintained by the taxpayers for such transactions as well.

CIT vs Glaxo Smithkline Asia Pvt Ltd (2010 TII 2)

Supreme Court rules that Revenue authorities need not be influenced by the observations of the HC

In a significant ruling, the Supreme Court has directed the Revenue authorities before whom the proceedings are pending to decide the matter without being influenced by the decision of the Punjab and Haryana High Court ("HC"). (See BMR Tax Edge Special on HC decision). The Supreme Court noted that the taxpayer had approached the HC on a writ petition challenging the reopening of assessment and in such a writ proceeding, the HC could not have established the basic facts. It further held that if the taxpayer is aggrieved by the Revenue proceedings, it is to resort to the normal appellate proceedings before approaching the Courts.

Earlier, the HC had ruled that there was no requirement to establish transfer of profits outside India or evasion of tax before applying the transfer pricing provisions. Further, it held that there was no requirement to give a hearing at the stage of making reference to the Transfer Pricing Officer ("TPO") as the decision to make a reference did not cast any civil consequence

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Awards & Recognitions

- BMR wins India Case of the Year, and Best Use of the Internet awards at 5th International Tax Review Asia Awards, 2010.
- BMR ranked Tier 1 in ITR's "World Tax 2011" guide, to the World's leading tax firms.
- BMR rated Great Place to Work 2010; Great Place to Work Institute
- BMR ranked Tier 1 Tax Planning and Tax Transactional Firm in India, International Tax Review's online poll 2010

Contributors

on the taxpayer. It also ruled that the permission granted by the Reserve Bank of India ("RBI") in respect of the transaction under the exchange control regulations cannot be the basis to conclude that the transaction was at arm's length price.

Coca Cola Inc vs ACIT (2010 TII 03)

Tribunal decisions

License fee paid towards perpetual, non-exclusive, irrevocable and unlimited license to use software does not amount to royalty and hence not liable to tax in India

The taxpayer company entered into a licence agreement with a US company, in terms of which the taxpayer was granted perpetual, non-exclusive, irrevocable, royalty-free, unlimited, non-transferrable licence in connection with the software maintained by the US company. The software allowed internal operations including use of software as its backward infrastructure for ASP services and web hosting services. The Revenue held that licence remained a licence irrespective of the period involved and hence, the licence in perpetuity did not amount to a sale. Further, the Revenue held that the licence was merely for the use of the software and accordingly the payment was covered by section 9(1)(vi) of the Act as 'royalty' chargeable to tax in India. On appeal, the Tribunal held that computer software became goods on being put on to a media and hence, it no longer remained an intellectual property right to attract section 9(1)(vi) of the Act. It held that the term 'royalty' under the India USA Tax Treaty was even more restrictive and the taxpayer's transaction would not be 'royalty' as per the Tax Treaty. It noted that the taxpayer only purchased a copyrighted article and not the copyright itself. As the payment was not royalty, Article 7 of the Tax Treaty would apply and in the absence of a Permanent Establishment for the US company in India, the Tribunal held that the receipts of the US company would not be liable to tax in India.

DDIT vs Reliance Industries Ltd (2010 TII 154) (Mumbai)

Payment received for sale of shrink wrapped software is not in the nature of royalty within the meaning of Article 12(3) of the India USA Tax Treaty

The taxpayer, a tax resident of USA, developed and marketed 3D mechanical design solutions ("software") to customers in India. It provided the software in a packed form along with an End User License Agreement ("EULA"). The taxpayer owned and retained all copyright, trade mark, trade secrets and other proprietary rights in respect of the software. Further, the taxpayer did not give any right to the end user to modify, make derivatives, reverse engineer, decompile, etc, the source code of the software. For marketing the software, the taxpayer entered into agreement with various distributors in India who were also not given any right to disassemble, decompile or reverse engineer the software. The taxpayer contended that the payments received for supplies of software were not royalty as per the Tax Treaty. However, the Revenue rejected the claim. On appeal, the Tribunal observed that the Distributors were not authorised to enter into any contract directly or indirectly on behalf of the taxpayer and that they cannot tamper with or remove the software from the original pack and that all the products had to be distributed in the same condition. The Tribunal further observed that the customers were not entitled to sell, license, sub-license, transfer, assign, lease or rent the software and accordingly held that the end users and distributors did not have any right over the copyright of the software. It further observed that 'Royalty' as per the Tax Treaty required a transfer of copyright. Sale of software by the taxpayer to the distributor or the end user would not amount to such transfer of copyright. Accordingly, the Tribunal held that the

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Snippet

The Income-tax department is in the process of hosting a number of taxpayer related services like filing of returns, grievance redressal and matters related to vigilance on its website and will soon float a Request for Proposal ("RFP") inviting competent software solution providers to execute the proposed job. This is to reduce the taxpayers visit to the Department and help them communicate with the Department with ease.
Source: The Economic Times
November 10, 2010

consideration paid by the distributor would not be royalty as per the India USA Tax Treaty.

ADIT (International Taxation) vs Solid Works Corporation (2010 TII 130) (Mumbai)

Brand acquired on acquisition of business is an intangible asset similar to trademark and hence eligible for depreciation under section 32 of the Act

The taxpayer acquired an undertaking carrying on power transmission business from a Group entity under a scheme of arrangement under sections 391 to 394 of the Companies Act, 1956. The taxpayer paid a sum to the transferor entity towards 'brand' acquired under the arrangement and claimed depreciation under section 32(1)(ii) of the Act. The Revenue rejected the claim for depreciation on the ground that the 'brand' was nothing but 'goodwill', which was not eligible for depreciation. The taxpayer contented that 'brand', which was reflected in the books of accounts as per the valuation carried out, was nothing but 'trademark', on which depreciation was allowable under section 32(1)(ii) of the Act. On appeal, the Tribunal referred to the Trade Marks Act, 1999 and various dictionary meanings and observed that 'trademark' includes a 'mark' and 'mark' includes a 'brand'. Accordingly, the Tribunal held that the sum paid towards 'brand' was towards acquiring an intellectual property right similar to trademark, which was eligible for depreciation under the Act.

KEC International Ltd vs Addl CIT (2010 TIOL 478) (Mumbai)

On transfer of business, disallowances made in the hands of transferor entity under section 40 (a) and 43B of the Act are allowable as deduction to transferee entity on actual payment

The taxpayer acquired an undertaking carrying on power transmission business from a Group entity under a scheme of arrangement under sections 391 to 394 of the Companies Act, 1956. Certain disallowances were made in certain earlier years in the hands of the transferor entity under section 40(a) and 43B of the Act for failure to make some statutory payments and for failure to withhold taxes. Subsequent to the acquisition of the business, the taxpayer made the payments and claimed deduction under section 40(a) and 43B of the Act, of the sums earlier disallowed, on the basis of actual payments. The Revenue disallowed the claim on the ground that the expenditure related to a period when the taxpayer was not in existence and that the expenditure related to the transferor company. On appeal, the Tribunal referred to decisions of the Supreme Court and the Tax Tribunals, wherein it was held that if a business, along with its assets and liabilities was transferred by one owner to another, a debt so transferred would be entitled to the same treatment in the hands of the successor. Relying on these decisions, the Tribunal held that the taxpayer was entitled to claim deduction on the payments made under section 40(a) and 43B of the Act, which were earlier disallowed in the hands of the transferor entity.

DCIT vs KEC International Ltd (2010 TIOL 478) (Mumbai)

Offshore supply of equipment on CIF basis under a composite contract is not chargeable to tax in India

The taxpayer, an Italian company, was awarded a turnkey contract by Indian Oil Corporation Ltd for designing, construction and commissioning of a hydro-treater and hydrogen facility at one of its refineries. The taxpayer established a project office in India for executing the project. While computing its income, the taxpayer did not include the income earned from offshore supply of equipments. The Revenue held that income from offshore supply should

Snippet

The Honourable Finance Minister has launched a new website for the Department of Disinvestment. The website includes information on forthcoming, current and post public offers and would also provide information needed by market participants on disinvestment. The website would also contain details of 49 listed companies, guidelines issued by Securities and Exchange Board of India and disinvestment policy of the Government among others.
Source: The Hindu
December 1, 2010

form an integral part of the contract and should be included in the income chargeable to tax in India. It relied on the fact that the delivery of the equipment was on CIF basis and the title would not pass on despatch but on successful installation. On appeal, the Tribunal observed that the fact that the contract is a turnkey contract by itself was not conclusive for determining taxability in India. The Tribunal held that merely because the delivery was to be on a CIF basis and the supplier took responsibility for transportation was not sufficient ground to hold that title passed in India at the site of the client in India. The Tribunal relied on the decision of the Supreme Court in the case of Ishikawajima Harima Heavy Industries Co Ltd and held that income from offshore supply of equipment is not taxable in India.

Technip Italy Spa vs ACIT (2010 TII 133) (Delhi)

Discount allowed to employees under ESOPs is not allowed as business expenditure in the hands of the employer

The taxpayer had allotted shares to its employees under the Employee Stock Option Plan ("ESOP") and claimed the difference ("discount") between the market price of the share and price at which option was exercised by the employees as business expenditure. The Revenue rejected the claim of the taxpayer on the ground that shares form part of capital of the company and any loss to the capital was a capital loss and was not revenue expenditure. On appeal, the taxpayer placed reliance on Securities Exchange Board of India ("SEBI") regulations which provided that the discount should be debited to the Profit and loss account. The Tribunal relied on the decision of the Delhi Tribunal in the case of Ranbaxy Laboratories Ltd and held that the discount represented only a notional loss and not an actual loss. The Tribunal distinguished the decision of the Chennai Tribunal in the case of SSI Ltd on the basis that the decision was rendered in the context of revisionary power of the Commissioner of Income Tax and the said ruling did not deal with the question whether the discount was notional or not. Accordingly, the Tribunal disallowed the discount claimed by the taxpayer.

VIP Industries Ltd vs DCIT (2010 TIOL 654) (Mumbai)

Compensation on the cancellation of contract is not liable to tax in India in the absence of PE for the non-resident

The taxpayer, engaged in the business of export, import and trading of different commodities, entered into a contract for supply of certain seeds to an UK entity through a broker. The taxpayer subsequently repudiated the contract on the ground that the seller did not obtain the export contract duly signed by the buyer and contract was merely signed by the broker. The foreign buyer invoked the arbitration clause in the contract and claimed compensation from the taxpayer. The Arbitrator passed an award in favour of the foreign buyer, which included an interest component. The taxpayer claimed such compensation and interest as deduction under section 37 of the Income-tax Act, 1961 ("Act"). The Tax Officer rejected the deduction on the basis that the compensation was chargeable to tax in India and that taxpayer did not withhold taxes on payments to the non-resident. On appeal, the Tribunal observed that since the compensation payable was arising out of the trading contract entered into by the taxpayer with the UK entity, the income would be in the nature of business profit under Article 7 of the India UK Tax Treaty. Further, the contract was only for supply of goods in India and there was nothing on record to conclude that the agent was the dependent agent of the foreign buyer. Accordingly, the Tribunal held that the compensation awarded under arbitration award was not chargeable to tax in India and there was no obligation on the taxpayer to withhold taxes in

Snippet

Cheques cleared under the image based cheque truncation system with overwriting or cutting would not be honoured by the banks in Delhi from December 1, 2010. This is intended to prevent fraudulent withdrawal of money and expedite clearance of cheques. Under CTS, an image of cheque is sent to clearing house for transfer of funds. The Reserve Bank of India ('RBI") in its directive in June had asked banks not to accept cheques with overwriting or cutting from December 1.
Source: The Economic Times
December 1, 2010

India. Accordingly, the Tribunal held that the payment was allowable as a deduction in the hands of the taxpayer.

Goldcrest Exports vs ITO (2010 TII 124) (Mumbai)

Income of the agent of foreign artistes is not chargeable to tax in India

The taxpayer, an event organizer, entered into an agreement with a UK company ("agent"), who was to organize renowned foreign entertainers for performances in India. The taxpayer agreed to pay a fee to the entertainers and to the agent. The taxpayer accepted that the fees paid to the entertainers would be chargeable to tax in India under Article 18 of the India UK Tax Treaty and withheld taxes. However, in respect of the fee payable and expenses reimbursable to the agent, the taxpayer did not withhold tax in India. The Revenue held that the taxpayer should have withheld taxes on the basis that the nature of services rendered by the agent was such that it could not be performed without any presence in India. On appeal, the Tribunal rejected the contention of the Revenue and observed that internationally reputed performers are not easily approachable and that it required negotiation and persuasion skills. Since the agents were not performers, the fee paid was not covered under Article 18 of the India UK tax treaty, but under Article 7 of the Tax Treaty. As the agent did not have a permanent establishment ("PE") in India, the Tribunal held that the income was not chargeable to tax in India and consequently, there was no requirement to withhold taxes on the payment made to the agent.

ADIT (International Taxation) vs Wizcraft International Entertainment Pvt. Ltd (Unreported) (Mumbai)

Foreign taxes are not eligible for deduction under section 37(1) of the Act, when the credit for the same is available to the taxpayer

The taxpayer, an investment company held investments in the Tata Group of companies and also had software and consultancy divisions. The taxpayer paid Federal and State taxes abroad, which it claimed as a deduction under section 37(1) of the Act. It contended section 40 (a)(ii) of the Act, which restricted deduction for taxes on profits, did not apply to foreign taxes as the word 'tax' had to be read with the definition of 'income-tax' under the Act. The Revenue rejected the claim and disallowed the claim for deduction of taxes. On appeal, the Tribunal took note of the explanation inserted in 2006 under section 40(a)(ii) of the Act, which declared for removal of doubts that the taxes paid abroad and eligible for relief under section 90 or 91 of the Act would also be covered within the ambit of section 40(a)(ii) of the Act. It also noted that the Bombay High Court had ruled in other cases that the term 'tax' as used under section 40(a)(ii) of the Act cannot be limited to income-tax under the Act, but included foreign taxes as well. It also noted that the provisions of the Act were more beneficial and did not discriminate between Federal and State taxes while granting the tax credit unlike the provisions of the relevant Tax Treaty, which restricted the credit only to Federal taxes. Accordingly, as the benefit of the tax credit was available, the Tribunal ruled that the taxpayer cannot claim a double benefit by claiming a deduction also under section 37(1) of the Act.

DCIT vs Tata Sons Ltd (Unreported) (Mumbai)

If Tax Officer does not assess an income, which was the reason for reopening an assessment, he cannot assess any other income under section 147 of the Act

The Tax Officer issued a notice under section 148 of the Act to the taxpayer after recording

Snippet

Apart from the acquisition of Hutchinson Essar by British telecom giant Vodafone, the Government is examining several other cross-border merger and acquisition deals including Intelnet Global Services acquisition by Barclays Mauritius, and transfer of Genpact India stake in GE Capital International for possible tax evasion. Source:[The Economic Times]
December 03, 2010

reasons that he has reason to believe that a certain income has escaped assessment. However, ultimately in the assessment proceedings, the Tax Officer did not assess the said item of income, but assessed certain other items under section 147 of the Act. On appeal, the High Court observed that section 147 of the Act was amended by the Finance Act of 2009, wherein an explanation (3) was inserted which empowered the Tax Officer to assess the income, in respect of which he had reason to believe that it escaped assessment 'and also' such other income which came to the notice of the Tax Officer subsequently in the course of proceedings. The High Court held that the words 'and also' in the new explanation should be understood cumulatively. Accordingly, it held that if the item of income on account of which the assessment was reopened was not ultimately assessed, then no other item of income can be subject to reassessment.

CIT vs Jet Airways India Ltd (Unreported) (Bombay)

Discount allowed to intermediaries on sale of airline tickets would not be liable to withholding of taxes in the absence of a contract of agency between the parties

The taxpayer was engaged in the business of booking passenger tickets on domestic and international airlines. Apart from booking tickets for customers who approached the taxpayer directly, the taxpayer also booked tickets for passengers as requested by intermediaries. The taxpayer provided a discount to the intermediaries and certain direct customers as well. The taxpayer made addition under section 40(a)(ia) of the Act, to the extent of discount given to the intermediaries for the reason that discount was in fact commission paid to intermediaries and that the taxpayer had failed to withhold taxes on the same under section 194H of the Act. On appeal, the Tribunal observed that the intermediaries did not act as agents of the taxpayer. Instead the intermediaries only acted on behalf of the passengers and brought businesses to the taxpayer. The intermediaries received a portion of handling charges passed on by the taxpayer in the form of discount. The Tribunal noted that an element of agency must be present to attract section 194H of the Act. Further, mere withholding of taxes by the taxpayer in certain instances of discounts granted to the intermediaries would not alter the nature of transaction and the relation between the taxpayer and the intermediaries. It also noted that the taxpayer recorded the transaction in its books of account for the invoice amount net of discount. Accordingly, the Tribunal held that the taxpayer was not required to withhold taxes on the discount allowed to the intermediaries.

ITL Tours and Travels Pvt Ltd vs ITO (2010 TIOL 577) (Mumbai)

Interest has to be imputed on the receivables due from associated enterprise beyond a reasonable period

The taxpayer carried large amounts as receivables from its Associated Enterprise ("AE") for a period of more than six months. The Transfer Pricing Officer ("TPO") held that the taxpayer had deprived itself of the funds available by allowing the AE to accumulate funds abroad. The TPO made an adjustment on account of interest receivable from the AE on account of the outstanding amounts by adopting the Prime lending rate ("PLR") in India as the benchmark under the Comparable Uncontrolled Price ("CUP") method. On appeal, the Tribunal held that there was a potential loss of revenue to the taxpayer on account of the funds being parked with the AE and accordingly, interest had to be imputed on the outstanding receivables after allowing a reasonable interest free period. On the issue of the rate to be adopted, the Tribunal held that LIBOR/US-FED rate was not the appropriate benchmark rate. It also held that PLR

Snippet

All mutual fund investors would need to mandatorily furnish their Permanent Account Number ("PAN") from next year irrespective of the size of their investment. Currently, individual investors are required to quote PAN only for investments of `50,000 or more, although non-individual investors are required to quote their PAN for all amounts. All the funds have been asked to comply with new Know Your Customer norms, which would include collecting details like PAN, address proof and photograph of all their new and existing investors, with effect from January 1, 2011.
Source: Business Standard
December 5, 2010

was also not appropriate because if the funds were brought into India and deployed by the taxpayer, it would have earned interest at the maximum rate applicable to deposits and not at the rate applicable to loans. Hence considering the interest-free period and piece-meal remittances made, the Tribunal fixed the arm's length interest rate at 5 percent as against the PLR of 10.25 percent adopted by the TPO.

Logix Micro Systems Ltd vs ACIT (unreported) (Bangalore)

Management services fees paid to regional headquarters not deductible if the taxpayer did not prove that commensurate benefits accrued to it

The taxpayer, an Indian company, entered into a Management Services Agreement ("MSA") with its regional headquarters in Singapore. As per the MSA, the Associated Enterprise ("AE") would provide need-based services with respect to marketing and sales support, customer service support, finance, accounting, administration and legal support. According to the taxpayer, the compensation was on the basis of time spent for the services rendered with an overall cap on the service cost. The Taxpayer benchmarked the transaction under Transactional Net Margin Method ("TNMM"). The Transfer pricing Officer ("TPO") held that the taxpayer did not derive any specific benefit from the management services and hence the payment towards management services was not justified and disallowed the expenses claimed. On appeal before the Tribunal, the taxpayer contended that the taxpayer had achieved commendable turnover during the year which would not have been possible without the services rendered by the AE. Further the taxpayer had employed only few persons in India as the technical expertise was provided by the AE from Singapore on a need basis. The Tribunal noted that the TPO had found that the payment terms under the MSA were independent of the nature or volume of services. Further the AE was apportioning its expenses amongst various country centres on the basis of inter-corporate agreements and not on the basis of actual services rendered. The Tribunal held that the onus was on the taxpayer to establish that the payments were made commensurate to the volume and quality of services and that the costs were comparable to an uncontrolled transaction. The Tribunal held that since the taxpayer failed to prove these aspects, the management service fee was not at arm's length and hence not allowable.

Gemplus India Pvt Ltd vs ACIT (Unreported) (Bangalore)

A facilitator of clinical trial services is justified in having a lower margin and cannot be compared with the entities involved in actually rendering clinical trial services

The taxpayer was an export oriented unit engaged in the manufacture of pharmaceutical intermediates exclusively for its Associated Enterprise ("AE"). It also provided certain co-ordination services for carrying out clinical research in India which were benchmarked using Transactional Net Margin Method ("TNMM"). During the audit proceedings, the Transfer pricing Officer ("TPO") held that the fees charged by the taxpayer in respect of clinical trial services at cost with a mark-up of 5 percent was not comparable to the rates charged by independent research organizations. Accordingly, he carried out upward adjustments to the reported income of the taxpayer. The taxpayer contended that it did not undertake any clinical trials but only acted as facilitator between AE and the research organizations which actually provided the services. Accordingly, it claimed that the services could not be compared with the agencies that undertook clinical trails in India. On appeal, the Tribunal observed that the taxpayer's infrastructure was only in the form of furniture, vehicle, office equipments and

Snippet

The Reserve Bank of India ("RBI") is to release the draft guidelines for new bank licences by the end of January after considering the feedback it has received from the public.
Source: The Economic Times
December 09, 2010

computers, which were used for general administration as against the comparables chosen by the TPO which had significant laboratory equipments. The facilities with the taxpayer were not sufficient for carrying out the whole research activity and that the taxpayer was solely dependent on the data provided by the doctors in various hospitals. Accordingly, the Tribunal concluded that the taxpayer's role was only to facilitate rather than performing the clinical trial itself for which it was adequately compensated at a mark up of 5% over the cost. Further, since the taxpayer was enjoying tax holiday in India and the profits of the AEs were subjected to tax in the respective overseas jurisdictions, the Tribunal observed that there was no necessity for the taxpayer to transfer the profits outside India. Accordingly, the Tribunal deleted the upward adjustment made to the reported income and ruled in favour of the taxpayer.

ITO vs Zydus Altana Healthcare Pvt Ltd (2010 TII 29) (Mumbai)

Functionally similar business divisions can be aggregated for the purpose of Transfer Pricing benchmarking

The taxpayer was an Indian subsidiary of an overseas consumer electronic product manufacturer. It acted as sales agent and provided marketing and warranty support for industrial products sold by associated enterprises ("AE") in India. It also received reimbursements from AEs towards advertisement expenses. Further, it acted as retail distributor of branded products imported from AEs. While the distribution activity pertained to Consumer home products and Office automation products, it aggregated both the divisions and considered the combined profit margin for the purpose of benchmarking analysis under the Transaction Net Margin Method ("TNMM"). In the audit, the Transfer Pricing Officer ("TPO") accepted the arm's length price ("ALP") as determined by the taxpayer for the distribution activity. However, the TPO noted that the gross margin and selling expense ratio widely varied between the two divisions as per the segmental financial information forming part of the taxpayer's annual report. He concluded that the activities could not be considered to be closely linked and cannot be aggregated during benchmarking. Accordingly, he made adjustments to the taxpayer's income after comparing the margin of each division separately with the ALP. Further, the TPO rejected the taxpayer's claim of treating the reimbursement of advertisement expenses as an operating income pertaining to the trading activity. On appeal, the Tribunal noted that the activities of the two divisions were similar in terms of functions, nature of products etc except for the fact that the end customers were different. It further noted that when the TPO held that the two divisions had to be benchmarked separately, he could not have proceeded with a common set of comparables and a single ALP for both the divisions. Accordingly, it upheld the taxpayer's approach of computing the margins after aggregating the data of the two divisions. On the reimbursement of advertisement expenses, the Tribunal noted that the expenses were a vital component of the taxpayer's business and held that the reimbursement had to be either treated as operating income or reduced from the operating cost.

Panasonic India Pvt Ltd vs ACIT (2010 TII 47) (Delhi)

Adjustments to depreciation and fixed overheads are necessary to adjust differences in capacity utilisation

The taxpayer, a car manufacturer, had imported components and spare parts from its AEs,

Snippet

Exim Bank, the leading export finance institution to promote exports, would actively provide finance for R & D activity, quality enhancement and product development by companies with a view to boost hi-tech exports. Source:The Economic Times
December 10, 2010

which were benchmarked under the TNMM. It had a capacity utilisation of about 14 percent as against the industry average of 61 percent. The taxpayer adopted the Profit before Interest and Tax ("PBIT") as the Profit level indicator ("PLI") and carried out adjustments in respect of depreciation and fixed overheads towards the differences in capacity utilisation. However, the TPO rejected the adjustments as claimed by the taxpayer. On appeal, the Tribunal observed that in an asset intensive industry where assets were key value drivers, depreciation could not be excluded and that PBIT was the appropriate PLI. Further, it allowed the adjustments for differences in capacity utilisation as the differences were established on the basis of facts.

ACIT vs Fiat India Pvt Ltd (2010 TII 30) (Mumbai)

Benchmarking under TNMM is to be done on the basis of segmental margins of distinct activities and not entity wide margins

The taxpayer, a manufacturer and exporter of cut diamonds, adopted Cost Plus Method ("CPM") to benchmark its purchase and sale transactions with AEs. The TPO held that the data on gross margins were not available and for that reason adopted the TNMM for benchmarking. The TPO carried out adjustments on the basis of entity wide margins. On appeal, the Tribunal held that segmental margins pertaining to the relevant activities had to be adopted instead of entity wide margins. In view of the peculiar facts of the case, the Tribunal sent the case back to the Tax Officer permitting the taxpayer to file the accountant's report and the documentation afresh in the remanded assessment proceedings.

ACIT vs Twinkle Diamond (2010 TII 9) (Mumbai)

Onus to prove that the international transactions are at arm's length is on the taxpayer

The taxpayer was a partnership firm engaged in textile exports. The Tax Officer observed that the firm's ratio of gross profit to sales decreased year after year and that the registers were manipulated. Accordingly, he rejected the books of account maintained by the taxpayer and worked out the profits on the basis of average profits for the three preceding years. On appeal, the Commissioner (Appeals) made an enhancement to income assessed on account of a Transfer Pricing adjustment resulting from the sales made by the taxpayer to its AE, on the basis of Profit Split Method. On further appeal before the Tribunal, the taxpayer submitted that the Commissioner (Appeals) failed to exclude foreign exchange losses, while determining the arm's length price under the Profit Split Method. Further, the taxpayer further claimed that the Comparable Uncontrolled Price ("CUP") method was the most appropriate method. The Tribunal noted that the onus of proving that the transactions were at arm's length was on the taxpayer. For this purpose, the Tribunal restored the case to the Tax Officer with a direction to provide an opportunity for furnishing requisite evidence to establish the arm's length nature of the transaction

Jyoti International vs ACIT (2010 TII 33) (Delhi)

Notifications and Circulars

India Mexico Double Taxation Avoidance Agreement notified

The Government of India has entered into an agreement for avoidance of double taxation with the Government of United Mexican States on September 10, 2007. The Central Government has notified that the above agreement will come into effect from April 1, 2011.

Snippet

The expected growth of the Country's shipping tonnage is likely to slowdown due to a recent circular issued by Central of the Board of Excise & Customs ("CBEC"). The recent circular has intimated owners and shipping companies to file bill of entry when they import ships. CBEC has instructed Revenue not only to review the situation but also to take appropriate action for past cases, including appointment of a common adjudication authority, if so desired. The stipulation to file bill of entry and its after effects could further harm the industry at a time when the industry is frantically looking for funds to acquire vessels.
Source: Time of India
November 1, 2010

Notification No 86 dated November 26, 2010

ndia Bermuda sign Tax Information Exchange Agreement

The Government of India has signed a Tax Information Exchange Agreement ("TIEA") with Bermuda.

PIB Press Release dated 7 October 2010

Exemption limit increased for employees working in transport system

Allowances received by employees of any transport system to meet their personal expenditure during his duty in the course of running such transport from one place to another place are exempt to the extend of Rs 6,000 per month under section 10(14) read with rule 2BB of the Income-tax Rules, 1962 ("Rules"). The Central Board of Direct Taxes ("CBDT") has now increased the amount of exemption from Rs 6,000 to Rs 10,000 per month with retrospective effect from September 1, 2008.

Notification No 85 dated November 22, 2010

New Director Identification Number ("DIN") Form 1 and 3

The Ministry of Corporate Affairs ("MCA") has amended the Companies (Director Identification Number) Rules, 2006. In form DIN -1 and DIN -3 additional declarations are inserted. The new declarations require the new director to confirm that he is not restrained/ disqualified/removed of, for being appointed as Director of a company under the provisions of the Companies Act, 1956 and that he is not declared a proclaimed offender by any Economic Offence Court or any Court in India. The new forms are applicable from December 5, 2010.

Notification no. GSR 849 (E) dated October 15, 2010

India signs social security agreement with Norway

India has signed its 11th social security agreement, this time with Norway. In the past, India has signed similar agreements with Belgium, Germany, France, Switzerland, Netherlands, Luxembourg, Hungary, Denmark, Czech Republic and the Republic of Korea.

INDIRECT TAX

Excise

Supreme Court Decision

Cenvat credit cannot be restricted only to goods specified in the definition of "inputs" – Decision of Maruti Suzuki referred to a Larger Bench

The taxpayer availed Cenvat credit on welding electrodes used in the maintenance of plant and machinery. The Revenue denied the credit on welding electrodes on the ground that they were neither inputs nor capital goods. The taxpayer relied on the decisions of the Supreme Court in the case of Maruti Suzuki Limited and Vikram Cement and contended that welding electrodes are "inputs" used in relation to the manufacture of the final product.

Interestingly, the Supreme Court in the case of Maruti Suzuki Limited had observed that all the three parts of the definition of inputs viz (i) the specific part, (ii) the inclusive part (covering six categories of inputs) and (iii) place of use had to be satisfied.

Without delving into the issue of whether electrodes would be eligible for credit, the Supreme Court referred to the decision in the case of Maruti Suzuki Limited and observed that it would

Snippet

The Empowered Committee of State Finance Ministers ("EC") has asked the Centre to exclude coal from the list of proposed Goods and Services Tax ("GST"), so that the tax rate does not increase on such an important fuel. Further, the EC has also said that opium, Indian hemp and other narcotics drugs could be kept out of GST net.
Source:Financial Express
November 7, 2010

not be appropriate to confine the goods only to the inclusive part of the definition (the six categories). The Court further observed that the word "include" should be given a wide interpretation, as by employing the said word, the legislature intends to bring in, by legal fiction, something within the accepted connotation of the substantive part. The Court also observed that in order to determine whether the word "includes" has an enlarging effect, regard must be had to the context in which the said word appears.

The Court thus held that the legislature did not intend to impart a restricted meaning to the definition of "inputs" to the six categories and therefore, referred the decision of Maruti Suzuki Limited to a larger bench.

Ramala Sahkari Chini Mills Ltd vs CCE, Meerut (2010 TIOL 102)(SC)

High Court decisions

All services integrally connected with the business of manufacturing are eligible for Cenvat credit

The issue raised before the Court was whether the Tribunal was right in holding that the taxpayer was entitled to Cenvat credit on outdoor catering service provided in the factory for employees since the services are neither used in or in relation to manufacture or clearance of final product nor are they activities relating to business . The Court held that the Credit is eligible and observed as follows:

- While the substantive part of the definition "input service" covers services used directly or indirectly in or in relation to the manufacture of final products, the inclusive part of the definition covers various services used prior to/during the course of/after the manufacture of the final products.
- In the light of the judgment of the Apex Court in the case of Maruti Suzuki Ltd. (supra), the services having nexus or integral connection with the manufacture of final products as well as the business of manufacture of final product would qualify to be input service.
- The definition of input service seeks to cover every conceivable service used in the business of manufacturing the final products and the expression 'such as' in the inclusive part of the definition is only illustrative and not exhaustive.
- CBEC Circular No. 97 dated August 23, 2007 clarifies that credit is available on mobile phone service though it is neither used in the manufacture of final product nor specifically included in the definition of input service.
- The observation of the decision In the case of Coco Cola India Pvt. Ltd has to be construed to mean that where the input service used is integrally connected with the business of manufacturing the final product and the cost of that input service forms part of the cost of the final product, then credit of service tax paid on such input service would be allowable.
- The taxpayer is mandatorily required under the provisions of the Factories Act, 1948 to provide canteen facilities to the workers and thus outdoor catering service has nexus or integral connection with the business of manufacturing the final product and is entitled to Credit. However, credit would not be allowable in

Snippet

Stock brokers will now have to pay more service tax as the CBEC has clarified that turnover charges, exchange transaction charges, dematerialisation charges and regulator fees recovered from clients will be added to the brokerage amount while calculating the tax. However, the stamp duty and securities transaction tax would be kept out of the taxable amount. The CBEC circular is a clarification and, hence, silent on the effective date. Hence, the Revenue could demand arrears for the past five years.
Source:Business Standard
November 16, 2010

cases where the cost of the food is borne by the employee.

CCE vs Ultratech Cement Ltd (2010 TIOL 745) (Mumbai)

To qualify as an input service, the service must have nexus with the business of the taxpayer

The issue before the Court was whether Cenvat Credit is eligible on service tax paid on services of repair, maintenance and civil constructions ("input services") used in the residential colony of the employees. The Revenue contended that that credit is not eligible in light of the decision of the Supreme Court in the case of Maruti Suzuki Limited.

The Court observed that rendering taxable services at the residential colony of the employees is not an activity integrally connected with the business of the taxpayer, though it may be a welfare activity and allowable as an expenditure under the Income Tax Act. The Court relied on the decision of the Supreme Court in the case of Maruti Suzuki Limited and held that unless nexus is established between the services rendered and the business carried on by the taxpayer, the benefit of Cenvat credit is not allowable. The Court thus held that Cenvat credit was not eligible on the services rendered at the residential colony of the employees.

CCE vs Manikgarh Cement (2010 TIOL 720) (Mumbai)

Cenvat Credit eligible if payment of duty and use of goods in manufacture is not disputed

The issue which arose for consideration was whether Cenvat credit is eligible if the invoice issued by the input supplier did not contain all the prescribed particulars required to be contained therein and where the input supplier had not submitted the invoices with their return or maintained proper records of goods sold. The Court observed that the procedural lapse was attributable to the supplier and that there was no dispute regarding the duty payment or the use of goods in manufacture of final product. The Court considered the statutory provisions and held that if the invoices contain details of payment of duty, description of goods, assessable value and name and address of the factory or the warehouse,and if the officer having jurisdiction is satisfied that duty on the input has been paid and such input has actually been used or are to be used in the manufacture of final product, credit of duty cannot be denied.

UOI vs Bharat Aluminum Co Ltd (2010 TIOL 744) (Chhattisgarh)

Tribunal bound to follow the decision of a High Court of different jurisdiction, if no other High Court decision taking a contrary view

The issue which arose for consideration was whether the Mumbai Tribunal was right in holding a Notification as ultra vires the provisions of the Act relying on a judgment of the Madras High Court. The taxpayer contended that there was no other judgment of the jurisdictional High Court or any other High Court taking a contrary view.

The Court relied on the decision in the case of Smt.Godavaridevi Saraf and held that the decision of the Madras High Court was binding on the Mumbai Tribunal. The Court further observed that the Tribunal did not independently examine the issue relating to the validity of the Notification (since it had no jurisdiction to examine such issue) but merely followed the Madras High Court judgment and that the Tribunal had no option but to follow the High Court judgment.

CCE vs Valson Dyeing Bleaching & Printing Works (2010 TIOL 710) (Mumbai)

Snippet

The Labour and Employment Ministry has requested the Finance Ministry to keep Employees' State Insurance ("ESI") and Employees' Provident Fund (EPF) schemes out of the ambit of service tax as they are social security schemes. This has been triggered upon the Revenue's demand-cum-show cause notice to treat ESI schemes at par with general insurance business within the ambit of Insurance Act, 1938 and to levy service tax on the activities of ESI Corporation.
Source:[The Hindu]
November 22, 2010

Tribunal Decisions

Goods supplied to SEZ units is not export for the purpose of claiming refund of Cenvat Credit

The taxpayer cleared excisable goods to a unit located in a Special Economic Zone ("SEZ") under Letter of Undertaking without payment of duty in terms of Rule 19 of the Central Excise Rules, 2002. The taxpayer claimed refund of Cenvat credit under Rule 5 of the CENVAT Credit Rules, 2004 ("Cenvat Rules") treating the clearances to the SEZ units as "exports". Revenue contended that Rule 5 of the Cenvat Rules is not applicable since the goods were not physically exported out of India. The taxpayer contended that the term 'export' used in the Cenvat Rules is not defined under the Central Excise Act, 1944 ("Excise Act") or the Rules framed thereunder and therefore supplies to SEZ unit should be treated as export as defined under the Special Economic Zones Act, 2005 ("SEZ Act"). The Tribunal observed as follows:

- All the deeming provisions of the SEZ Act and the Rules framed thereunder cumulatively aim at granting benefits to SEZ units and none of these provisions can be construed as having been enacted to confer benefits on any domestic unit.
- Benefits not expressly provided for under the Excise Act or any Rules issued thereunder cannot be claimed by the suppliers to SEZ units.
- For the purpose of Cenvat Rules, the definition of 'export' under the Customs Act has to be adopted and not the fictionalized definition of 'export' under the SEZ Act.
- The Gujarat High Court held in the case of Essar Steel that export duty can be levied only on goods exported physically out of India and that export duty was not applicable on supplies to SEZ Units.

The Tribunal thus held that the taxpayer is not entitled to claim the refund under Rule 5 of the Cenvat Rules.

CCE vs The Tiger Steel Engineering (I) Pvt Ltd (2010 TIOL 1256) (Mumbai)

Cenvat credit relating to period prior to registration is eligible

The taxpayer took Cenvat credit on inputs basis invoices issued in the name of another unit of the taxpayer. The Cenvat credit also related to the period prior to registration with Central Excise. In the first monthly return the taxpayer disclosed that they have taken the Cenvat credit on invoices issued during the period prior to registration. Revenue denied the Cenvat credit on the ground that registration was mandatory and also demanded interest and penalty. The Tribunal observed that the Revenue had not contended the taxpayer's eligibility to register and has granted the registration and that the substantive benefit of Cenvat credit cannot be denied on technical infirmities. The Tribunal held that the Cenvat credit cannot be denied only on this ground of availing credit prior to obtaining registration and remanded the issue for verification of the genuineness of the claim. The Tribunal also observed that levy of penalty may be decided if the duty paid character and receipt of the goods was in doubt.

Amar Remedies vs CCE (257 ELT 552) (Ahmedabad)

Separate maintenance of records not required if all goods manufactured are excisable though

Snippet

The Point of Taxation rules, which would determine the point of taxation of the service, may not be introduced in financial year 2010-11. The Finance Ministry is considering some changes in the rules and may introduce them next year to provide relief to small service providers. A few big service providers have sought for postponing the rules and align them with the introduction of the GST.
Source:Business Standard
November 22, 2010

clearances are exempt under a Notification

The taxpayer cleared goods on payment of duty as well as claimed exemption under a Notification on supplies to specified Research Institutes. The issue which arose for consideration was whether the taxpayer was liable to pay excise duty at the rate of 10 percent on the value of clearances under the exemption Notification under Rule 6 of the CENVAT Credit Rules, 2004 ("Cenvat Rules") since the taxpayer did not maintain separate records. The Tribunal observed that all the products manufactured by the taxpayer were excisable except that there was no duty liability on clearances to certain categories of customers. The Tribunal held that Rule 6 of the Cenvat Rules would apply only if the taxpayer manufactures two categories of products, namely, one excisable and the other exempted. The Tribunal relied on the decisions of the Tribunal in the case of Greaves Ltd and DCW Ltd rendered in the context of Rule 57CC of the Central Excise Rules, 1944 ("Excise Rules").

CCE vs Tanfac Industries Ltd (2010 TIOL 1299) (Chennai)

No requirement to segregate Cenvat credit utilized for manufacture and output services

The taxpayer was a manufacturer of excisable goods as well as provider of output service. The taxpayer availed and utilized Cenvat credit on service tax paid on input services consumed during the course of business. The Revenue denied the credit on the primary ground that the taxpayer did not segregate the input service tax credit in relation to manufacturing activity or providing of output services.

The Tribunal observed that the burden to prove the eligibility to credit lies on the taxpayer who has to maintain proper records for the receipt and consumption of the input services recording relevant information regarding value, tax paid and Cenvat credit taken and utilized. However, the Tribunal held that segregation of credit availed which is utilized for manufacture and to provide output service is not required. The case was remanded to the original authority to allow the credit of input service based on the purpose of input services without segregating the amount.

Forbes Marshall Pvt. Ltd. Vs CCE (258 ELT 571) (Mumbai)

Customs

Supreme Court decision

Price actually paid is the transaction value of import in case of genuine price reduction

The taxpayer imported old vessels for demolition purpose at an agreed price under a Memorandum of Agreement ("MOA"). The buyer was given an option to seek proportionate reduction in purchase price if the vessel suffered any partial damage. On inspection of the vessels, basis fresh negotiations, the price was reduced. The revenue demanded duty on the original value. The Tribunal dismissed the taxpayer's appeal since the price was revised after import and there was no provision in the MOA for reduction of price. On appeal, the Supreme Court considered the valuation provisions and observed that the adjudicating authority is bound to accept the price actually paid or payable for the goods in the ordinary course of commerce as the transaction value, except in case of specified exceptions. The Court referred to the decision in the case of Atam Manohar where, while considering the price reduction the Court laid emphasis on the genuineness of the price reduction and not on the factum of absence of a provision in the original agreement for such price reduction. The Court

Snippet

The Central Government has said that it is not possible to fix a time-frame for the introduction of the constitution amendment bill, which would facilitate rolling out the proposed GST. The Union Finance Minister said that the process requires consensus among various States and such an exercise would require time. Further, he said that a draft constitution amendment bill has been prepared and sent to the EC for obtaining their views.
Source:Business Standard
November 23, 2010

thus held that the actual price paid on negotiation has to be considered as the transaction value but remitted the issue to the Tribunal for fresh consideration, particularly in relation to the genuineness of the price reduction.

Chaudhary Ship Breakers Vs CC (2010 TIOL 86)(SC)

Service tax

Supreme Court decision

Constitutional validity of levy of service tax on financial leasing services including equipment leasing and hire purchase upheld

The taxpayer, an association of leasing and financial companies, challenged the constitutional validity of service tax imposed on the financial leasing services including equipment leasing and hire purchase (“leasing transactions”) since the power to tax leasing transactions was exclusive to the States. The taxpayer contended that sales tax/ VAT is charged by the States on the entire consideration including interest received on the leasing transactions and thus levy of service tax by the Parliament is beyond their legislative competence.

The Supreme Court upheld the constitutional validity after observing as follows:

- The taxable event under service tax law is rendition of service by the service provider to its customer. Sales tax/VAT is levied on material or sale. While State Legislature is competent to impose tax on "sale" by legislation relatable to Entry 54 of the State List, tax on the aspect of the "services" would be within the legislative competence of the Parliament under Article 248 read with Entry 97 of the Union List of the Constitution.
- Leasing transactions are activities of long term financing and they fall within the ambit of "banking and other financial services". Leasing transactions are considered by the Reserve Bank of India as financial services provided to customers. Accounting Standards issued by the Institute of Chartered Accountants of India treat the leasing transactions as financial facilities.
- Finance activity is different and distinct from operating lease/hire-purchase agreements. There are two independent transactions and service tax is a levy on the financial facilities extended by the taxpayer to its customers. "The finance lease" and "hire-purchase finance" are liable to service tax.
- Merely because service tax is imposed on financial services with reference to "hiring/ interest" charges, it does not cease to be service tax , nor does it become tax on hire- purchase/ leasing transactions under Article 366(29A) read with Entry 54, List II.
- The amount received as principal is not the consideration for services rendered. Interest or finance charges together with the lease management fee/ processing fee/ documentation charges are treated as consideration for the services rendered and accordingly they constitute the value of taxable services on which service tax is payable.

Association of Leasing & Financial Service Companies Vs Union Of India And Others (2009 TIOL 87) (SC-LB)

Snippet

The EC would meet to discuss the structure of the proposed GST. The issue of compensation to States due to reduction in Central Sales Tax would also be discussed. With the GST structure back on the agenda and the Constitutional amendment taking a back seat, the Government may fail to table the Bill in the next Budget session as well.
Source:Business Standard
November 26, 2010

High Court Decisions

Rebate cannot be denied for procedural lapse of late filing of declaration

The taxpayer, an exporter of "Business Auxiliary Services" claimed rebate of service tax paid on input services under Notification 12/2005. The Revenue denied the refund on the ground that the taxpayer did not file the declaration prior to the date of export as prescribed under the notification granting rebate. The declaration was filed late since the rebate provisions were new and the taxpayer had to consider the various options and obtain the management's approval. The Tribunal held that late filing of the declaration is only a procedural lapse of technical nature and therefore the substantive concession of benefit for export should not be denied.

The Court observed that the services were certainly "input services, that filing of the declaration before export was not mandatory and that the condition of filing the declaration was complied within a reasonable period. The Court relied on the decision of the Supreme Court in the case of Mangalore Fertilizers and Chemicals and held that the rebate was eligible.
CST vs Convergys India Pvt Ltd (2010 TIOL 711) (Punjab & Haryana)

Tribunal Decisions

Split contracts for execution of a turnkey project qualify as a works contract and are liable to service tax from June 1, 2007

The taxpayer was engaged in the execution of turnkey contracts relating to power transmission and distribution systems. In pursuance of a bid, a turnkey contract was awarded to the taxpayer's foreign counterpart for setting up a power transmission system. The customer entered into separate contracts for off shore supplies (with foreign counterpart) and onshore supplies and onshore services (with the taxpayer). The contracts had a cross fall breach clause, were interlinked and the overall responsibility for the successful performance of the entire project was on the foreign counterpart. The Tribunal considered the issue as to whether the onshore service contract (for erection and related civil works to be performed in India) is an independent works contract by itself and whether the said contract would fall under the category of erection, commissioning and installation services as contended by revenue or works contract as claimed by the taxpayer. The Tribunal observed as follows:

- The entire turnkey project had been divided into three contracts and the mention of all the three contracts is found in the agreement entered by the customer. Therefore, all the three contracts are interlinked to each other.
- Turnkey projects including engineering and procurement and construction or commissioning projects were considered as works contract under service tax law with effect from June 1, 2007.
- The contracting parties and the State Government construed the contract as a works contract for VAT/sales tax purposes. The Central Board of Excise and Customs clarified that a contract which is treated as a works contract for the purpose of levy of VAT/Sales Tax shall be treated as works contract for the purpose of levy of service tax.
- Works contracts are liable to service tax only from June 1,2007 as held by the

Snippet

Union Railway Minister has sought an extension for the waiver on service tax on railway freight till March 31, 2011. Railways were earlier granted a tax holiday till December 31, 2010. The request was made on the ground that the Railways' finances are in a bad shape and imposition would harm the consumers as it will have to be passed on.
Source:Business Standard
November 26, 2010

Karnataka High Court in Turbotech Precision Engineering Pvt Ltd.

The Tribunal thus held that the contracts satisfied the definition of “works contract” as defined under the service tax law and were liable to service tax only from June 1, 2007.

ABB Ltd vs CST (2010 TIOL 1462)(Bangalore)

Services provided by one branch to another is a self service and not taxable

The taxpayer, an Indian branch of a foreign bank, effected funds transfer on behalf of a foreign branch and issued a debit note for the service charges along with service tax. The service tax was duly deposited. However the debit note was subsequently reversed and the taxpayer claimed refund of the service tax paid. The Revenue rejected the claim on the ground of unjust enrichment.

The Tribunal observed that the taxpayer is only a branch of the foreign bank and the entities are only parts of the same legal entity though located in two different countries. The Tribunal further observed that a branch of same legal entity cannot be said to be rendering services to another branch of same legal entity and that the service is in the nature of a self service. The Tribunal held that as the transfer entries have been reversed, there would not be any unjust enrichment and thus the tax paid is refundable.

The Bank of Tokyo & Mitsubishi Ufj Ltd Vs CST (2010 VIL 14) (Delhi)

Procurement of orders in India for foreign suppliers is export of service

The taxpayer, an Indian company, had received commission in convertible foreign exchange for procuring orders in India for the suppliers of goods located outside India. The taxpayer claimed refund of service tax paid (under protest) under Rule 5 of the Export of Services Rules, 2005. The Revenue rejected the refund on the ground that the service has been delivered outside India but used in India.

The Tribunal observed that the taxpayer procured purchase orders in India and transmitted the same by electronic means/courier, that these purchase orders were acted upon by the foreign suppliers who supplied the goods directly to the Indian buyer. The Tribunal observed that the rendering of service was complete when the purchase orders were received by the foreign companies outside India and thus held that the benefit of the service accrued outside India. The Tribunal relied on the decision of the Mumbai Tribunal in KSH International Private Limited and also observed that the decision of the Delhi High Court in the case of Microsoft Corporation (India) Private Limited was not relevant since it was a prima facie view and not the final view.

EM JAY Engineers vs CCE (34 VST 171) (Mumbai)

Buyer of goods cannot be treated as recipient of goods transport agency service merely because transport charges are reimbursed to the supplier

The taxpayers were manufacturers of fabrics and purchased yarn from the manufacturers in Nepal. The suppliers issued two separate invoices, one for value of the goods and the other for the expenses including excise duty, transportation from Nepal to factory premises, etc. The Revenue contended that the taxpayers were liable to pay service tax on the freight charges as a recipient of goods transport agency services since the freight charges were paid by the taxpayer (to the transporters) through the Nepalese suppliers as their agents. The

Snippet

The Centre is awaiting a unified view of States to arrive at a consensus, on constitutional amendment to implement the GST. The EC would be meeting on December 6, 2010 to discuss the GST model received from the Central Government to arrive at a consensus and may suggest their own alternative proposal.
Source:Business Standard
November 27, 2010

Tribunal observed as follows:

- To determine the person liable for paying service tax the question to be answered is as to who had engaged the transporter and who was liable to pay freight to the transporter.
- The suppliers had engaged the transporters and paid the transportation charges. The taxpayers had not instructed the suppliers to engage the transporters on their behalf. The suppliers had not acted as the taxpayer's agents for arranging the transportation.
- The taxpayers cannot be held liable only on the ground that they had reimbursed the freight charges to the suppliers.

The Tribunal thus held that the taxpayer was not liable to pay service tax as a recipient of good transport agency services.

Sumangalam Suitings Private Limited and others vs CCE, Jaipur (2010 TIOL 1284) (Delhi)

Cenvat credit is not available to a taxpayer who is not registered with the tax authorities

The taxpayer, a 'STPI' Unit engaged in development and export of software claimed refund of accumulated Cenvat credit on various input services received. The Revenue denied the refund claim since the software service provided by the taxpayer was not taxable during the relevant period. The Revenue also contended that the taxapayer was not registered as a provider of taxable services and that the refund was beyond the limitation as per Section 11B of the Central Excise Act, 1944 ("Act"). The Tribunal observed as follows:

- The policy (Foreign Trade Policy) of the Government is to allow Cenvat credit to STPI units and the benefit cannot be limited by provisions of the Cenvat Rules.
- The 'relevant date' specified in Section 11B of the Act does not mention anything as regards refund of cenvat credit and therefore, the limitation u/s 11B does not apply for refund of accumulated cenvat credit.

However, the Tribunal rejected the claim on the ground that Cenvat scheme is available only to a taxpayer registered with the department and that a person not registered with the department cannot obtain refund under Rule 5 of Cenvat Rules.

mPortal (India) Wireless Solutions Private Limited vs CST,Bangalore (2010 TIOL 1486) (Bangalore)

Refund eligible even if Cenvat credit is not taken in the month of export

The taxpayer availed Cenvat credit of service tax paid on input services received and claimed refund under Rule 5 of the Cenvat Credit Rules, 2004 ("Cenvat Rules"). The Revenue denied the refund since the credit was not taken on the goods in the month in which the export was made. The Tribunal observed that there was no dispute on the use of input services for export of goods and that if the credit is admissible in a particular month, it would be admissible either in the preceding or subsequent month.

The Tribunal further observed that there will be a natural time lag between the date of

availment of credit and the refund claim since the Board prescribed a time limit of one year for filing refund claim and the refund is to be filed on a quarterly basis. The Tribunal thus held that the refund was eligible.

CCE vs Chamundi Textiles (Silk Mills) Ltd (20 STR 219) (Bangalore)

VAT / CST

High Court Decision

Whether a contract is a sale or a works contract has to be determined basis contract terms

The taxpayer preferred a writ petition against inclusion in the schedule of goods, all printed materials (like account books, registers, greeting cards, trade mark labels etc) including materials manufactured according to specification of customers. The taxpayer apprehended that all transactions which are works contract would be brought to tax as a sale of goods. The High Court observed as under:

- It is not a rule that any product which is supplied by a person to another which cannot be sold in the open market must be works contract. The mere fact of bearing the logo or name up to the specification of the customer will not make it a works contract.
- Even after inclusion of the entry in the schedule, it is necessary to examine whether a given transaction is a works contract or it involves sale of goods. If the order for printing materials is only a works contract, it can never be brought to tax as a sale of goods, merely by inclusion of printing materials in the schedule of goods.
- The question whether a particular contract is one for sale or is a works contract cannot be decided in the abstract and the authorities have to examine each transaction with reference to the contract terms and conditions.

The High Court thus dismissed the writ petition of the taxpayer and held that the inclusion of the entry in the schedule of goods is constitutionally valid.

Bharat Offset vs Tamil Nadu Taxation Special Tribunal (34 VST 342) (Chennai)

Tribunal Decision

Mobile recharge coupon vouchers are actionable claims and hence not goods for sales tax purposes

The taxpayer was engaged in the business of providing cellular mobile telephone service to various subscribers in India. The issue which arose for consideration was whether supply of recharge coupon vouchers (“RCVs”) to the taxpayer’s distributors/agents was liable to sales tax. The taxpayer contended that the RCVs were actionable claims and hence not covered with the meaning of “goods” under the West Bengal Sales Tax Act, 1994 (“Sales tax law”). The Revenue contended that the RCVs are not actionable claims since they are neither in the nature of a debt nor in the nature of a beneficial interest in a movable property, not in possession of the claimant.

The Tribunal observed as under:

- RCVs allow the subscriber to avail the telephone services guaranteed by the taxpayer for an equivalent amount of money paid by the subscriber to its distributors/agents.
- The distributors/agents cannot transfer the RCVs for any purpose other than availing telephone services.
- The subscriber cannot avail the services offered by any other service provider by using the RCVs.
- RCVs are acknowledgement of receipt of money in advance for rendering telecom services in future. As the money has been received in advance it would constitute as 'debt' for the service provider.
- By purchasing the RCVs the subscriber gets two rights (i) a right to enjoy mobile services and (ii) a right to receive back the amount if the required telecom services cannot be provided.
- When the right to participate in a draw of lottery is an actionable claim, the right to get telecom services also qualifies as a beneficial right in movable property.

Relying on the principles laid down by the Supreme Court in the case of Sunrise Associates, the Tribunal held that RCVs fall within the meaning of 'actionable claims' and hence are not taxable..

Bharti Airtel Limited vs ACST (34 VST 202) (West Bengal)

Circular and Notifications

Excise

Quantity discount, bonuses etc. are not applicable for the valuation of goods on MRP basis

The larger bench of the Tribunal held in the case of Indica Laboratories that quantity discount, bonuses etc. are applicable for the valuation of goods under section 4 of the Central Excise Act, 1944 and not in case of goods valued under Section 4A. Since the appeal filed by the taxpayer before High Court is pending and no stay has been granted by the High Court, the Board has directed the Revenue authorities to take necessary action to protect the revenue interests.

Circular No. 938/28/09-CX dated November 29, 2010

Condition of power purchasing agreements for claiming excise duty exemption not applicable for power projects notified by the State Governments as the 'State Transmission Utility and Licensee'

The Central Government vide Notification No.33/2005-Central Excise of September 8, 2010, subject to specified conditions, had granted exemption from levy of excise duty on import of all machinery required for initial setting up of a power project using non-conventional materials such as agricultural, forestry, industrial, municipal and urban waste, bio waste etc.. One of the specified conditions was that there should be a valid power purchase agreement ("PPA") between the importer and the purchaser for a period of not less than ten years from the date of commissioning of the project. The condition would not be applicable to power generation projects promoted by State electricity boards or corporations that are notified by the respective State Governments as the 'State Transmission Utility and Licensee'.

Notification No 34/2010-Central Excise dated November 18, 2010

Pre-delivery Inspection charges and After-sale Service charges collected by the dealers are to be included in the assessable value.

The Central Board of Excise and Customs ("Board") vide its Circular No 643/34/2002-CX of July 1, 2001 had clarified that after-sale Service and pre-delivery inspection charges were liable to be included in the assessable value under Section 4 of the Central Excise Act 1944. Further, the Board vide circular No 909/29/09-CX of December 11, 2009, had directed to transfer all the show cause notices issued on the above aspect to call book pending the decision of the Larger Bench of the Tribunal in the case of Maruti Udyog Ltd. Since the Tribunal upheld the inclusion of these charges in the assessable value, the Board has directed the Revenue authorities to decide the cases pending in accordance with the Tribunal decision.

Circular No 936/26/2010-CX dated October 27, 2010

Exemption prevails over concession and the taxpayer is bound to opt for exemption

Notification No 29/2004-CE dated July 9, 2004 grants full exemption to certain items of Textile Sector without any condition; and Notification No 59/2008-CE of December 7, 2008 ("Concession Notification") grants a concessional rate of duty of 4 percent on these items, with the benefit of Cenvat credit. The Board considered the provisions of section 5A(1A) of the Central Excise Act, 1944 ("Excise Act") and held that the taxpayer was bound to avail the unconditional exemption and cannot avail the benefit of the concessional Notification.

Circular No 937/27/2010-CX dated November 26, 2010

Customs

Condition of power purchasing agreements for claiming customs duty exemption not applicable for power projects notified by the State Governments as the 'State Transmission Utility and Licensee'

The Central Government vide Notification No 81/2005-Customs of September 5, 2010, subject to specified conditions, had granted concessional customs duty at the rate of 5 percent on import of all machinery required for initial setting up of a power project using non-conventional materials such as agricultural, forestry, industrial, municipal and urban waste, bio waste etc. One of the specified conditions was that there should be a valid power purchase agreement ("PPA") between the importer and the purchaser for a period of not less than ten years from the date of commissioning of the project. A proviso has been inserted after this condition, which provides that the same would not be applicable to power generation projects promoted by State electricity boards or corporations that are notified by the respective State Governments as the 'State Transmission Utility and Licensee'.

Notification No 118/2010-Customs dated November 18, 2010

Monetary Limit prescribed for Government Litigation in Tribunal and High Court.

In view of the National Litigation Policy formulated by the Government of India, the Board has decided that appeals in the Tribunal shall not be filed where the duty involved or the total revenue including fine and penalty is one lakh rupees and below. Similarly in the case of High Courts, appeals would not be filed in cases where the duty involved or total revenue including

fine or penalty is two lakhs rupees and below. While deciding the thresholds mentioned above, the duty involved would be the decisive element. However, adverse judgments relating to the following would be contested irrespective of the amount involved:

- Where the constitutional validity of the provisions of an Act or Rule is under challenge;
- Where notification/instruction/order or Circular has been held illegal or ultra vires;
- Where audit objection on the issue involved in a case has been accepted by the Revenue.

Instruction F No 390/Misc/163/2010-JC dated October 20, 2010

Board clarifies on classification of PXI, Input/Output Modules, Signal Converters and Chassis and its parts.

The Board has observed that there are divergent practices regarding classification of Industrial Process Controllers ("PXI"), Input/Output Modules, Signal Converters and Chassis and its parts. In this regard, relying on the decision of the Supreme Court in the case of N I Systems India (P) Ltd, the Board has clarified as under:

- PXI constitutes a complete system performing the work of measurement, regulating or controlling instrument but perform specific function as parts of sensors and are classifiable under Tariff item 9032 89 10 of the Customs Tariff Act, 1975 ("Customs Tariff")
- nput/Output Modules, Signal Converters and Chassis are parts of such system and are classifiable under Tariff Item 9032 90 00 of the Customs Tariff:
    - Input/Output Module is tailored to a specific function and each of them is a part of regulating and controlling apparatus like sensor, thermostat etc. and their primary function is part of measuring and control system.
    - Chassis of PXI provides connectivity and housing for embedded controllers and data acquisition modules allowing them to communicate with each other.

Circular No 42/ 2010-Customs dated November 29, 2010

Service Tax

Exemption granted for marketing lottery tickets

The Central Government has exempted persons marketing the lottery tickets, other than the distributors or selling agents appointed or authorized by the lottery organizing State , from the whole of service tax leviable thereon under section 66(105) (zzzzn) of the Finance Act, 1994 ("Finance Act"). The exemption is available only if the optional composition scheme under Rule 6(7C) of Service Tax Rules, 1994 is availed of by such distributor or selling agent, in respect of such lottery during the financial year: No exemption is available if such person also markets lottery tickets for distributors or selling agents who have not opted for the composition scheme.

Notification No 50/2010 - Service Tax dated October 8, 2010

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