Tax Edge

BMR Advisors

Vol. 4 Issue 1 January 2010

Apex Court holds that the taxpayer is entitled to claim interest on interest comprised in refund

The taxpayer was entitled to refund of certain taxes paid, which was refunded after a period of 57 months. However, no interest was paid by the Revenue at the time of granting refund. The taxpayer claimed interest on refund as per section 244A of the Income-tax Act, 1961 ("Act"), which was not allowed by the Revenue on the basis that the taxpayer was not entitled to receive any interest on interest. The Supreme Court held that the interest was payable as per section 244A of the Act for the 57-month period on the amount of tax refunded. The Supreme Court further observed that the interest, which accrued to the taxpayer for the 57-month period, should also be included in the term 'any amount due' referred to in section 244A of the Act and directed the Revenue to pay interest on the above basis.

CIT vs HEG Ltd (2009 TIOL 132)

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Upcoming Events

- Indian Corporate Taxation Course, March 18-19, 2010, Singapore

Awards & Recognitions

- BMR wins ITR's Asia Award for "Transfer Pricing Firm of the Year" for the third consecutive year
- BMR wins "India Case of the Year" award at ITR Asia Awards
- BMR named the leading Financial Advisor in the mid market segment in India and 10th in APAC

DIRECT TAX

Supreme Court Decisions

Conversion of marble blocks into slabs amounts to 'manufacture' or 'production' for claiming deduction under section 80IA of the Act

The taxpayer was engaged in the business of excavating marble blocks from mines, processing the same by separating waste material, sawing them into required shapes as slabs, polishing and ultimately selling the slabs. The taxpayer claimed deduction under section 80IA of the Act. The Revenue rejected the claim holding that the process did not amount to manufacture or production of any article or thing, which was a precondition for claiming the deduction. The Supreme Court took note of the new definition for the term 'manufacture' under the Income-tax Act inserted with effect from April 1, 2009. It observed that the taxpayer was not only cutting the marble blocks into slabs, but also polishing it, leading to conversion of blocks into polished slabs and tiles. The Supreme Court also held that the word 'production' is wider in its scope as compared to the word 'manufacture'. Since the original block does not remain the marble block, but becomes a slab or tile, the activity undertaken

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by the taxpayer was held to constitute manufacture or production in terms of section 80IA of Act. The Supreme Court observed that if the activity is held to be not a manufacture, it would have serious revenue consequences, particularly in view of the fact that the taxpayer would plead that it is not liable to pay excise duty, sales tax, etc. Thus, it held that the taxpayer was entitled to the deduction under section 80IA of the Act.
ITO vs Arihant Tiles and Marbles Pvt Ltd (2009 TIOL 127)

BMR comments:

It is anticipated that the principles laid down in this case would enable the Courts in disposing several appeals on similar issues, particularly in relation to software duplication

High Court Decision

Transactions pertaining to a subsequent year cannot be taken as comparable for transfer pricing adjustments

The taxpayer imported goods from an overseas associated enterprise ("AE"). The Revenue disallowed a portion of the purchase price paid to the AEs, holding that the price paid was higher than the price paid for similar goods purchased from local vendors. The Revenue came to this conclusion based on the transactions undertaken by the third party vendors in a subsequent year, which were taken as comparables. On appeal, the High Court held that while comparing the price with the transactions entered into by the third party vendors, subsequent year's transactions could not be relied upon. This is based on a strict interpretation of Transfer Pricing rules. It held that the prices were comparable only with the prices paid for similar goods in the same year. Accordingly, the Co urt deleted the disallowance made by the Revenue and held in favour of the taxpayer.
CIT vs Denso Haryana Pvt Ltd (2009 TIOL 696) (Delhi)

Deduction of profits and gains, derived from 100 percent EOU under section 10B of the Act, is not confined to income computed under the head 'profits and gains of business or profession'

The taxpayer, a 100 percent export oriented unit ("EOU") purchased goods from its sister concern, for which payments were made in advance. These advance payments yielded interest which was included in the profits eligible for deduction under section 10B of the Act. While the tax officer accepted the claim, the commissioner revised the assessment under section 263 of the Act and held that the interest income should be assessed as 'income from other sources', which was not eligible for relief under section 10B of the Act. On appeal, the Tribunal held that the interest income should be assessed as profits and gains of business as interest arose in the regular course of business. On appeal by the Revenue, the High Court observed that the term 'income' as defined under section 2(24) of the Act included 'profits and gains', which was not confined to the income classified under the head

- BMR is Tier 1 Firm in India for second consecutive year
- BMR is top mid-market dealmaker

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‘profits and gains from business or profession’. It observed that section 10B of the Act only referred to ‘profits and gains’ derived from the 100 percent EOU. Since, the term ‘profits and gains’ is wider than the term ‘profits and gains derived from business or profession’, the High Court held that the interest earned was eligible for deduction under section 10B of the Act, irrespective of whether it was assessed under the head ‘profits and gains from business or profession’ or ‘income from other sources’.
CIT vs Hycron India Ltd (185 Taxman 70) (Rajasthan)

Depreciation allowable on assets once included in the block of assets even if not used in the relevant year

The taxpayer claimed depreciation on certain non-operational machinery. The Revenue disallowed the claim holding that the depreciation under section 32 was allowable only if the individual asset was used in the relevant year. On appeal, the High Court took note of the purpose for introduction of the ‘block of assets’ concept under the Act and held that when a new asset was acquired and included in the block of assets, it became an inseparable part of the block and an individual asset lost its identity. The Court held that the condition that the asset should be ‘ *used for the purpose of business*’ prescribed in section 32 of the Act referred to the use of block of assets and not any specific asset comprised therein. Accordingly, the Court held that the use of the individual assets in subsequent years is not a pre-condition for claiming depreciation, if the asset formed part of the block.
CIT vs Bharat Aluminium Co Ltd (2009 TIOL 619) (Delhi)

Business is ‘set up’ when employees are hired and assets are purchased

The taxpayer was setting up its business during the year and claimed the expenses incurred after the date of recruitment of certain key employees, but before the date of Foreign Investment Promotion Board (“FIPB”) approval and opening of bank account. The Revenue held that the business could be treated to have been ‘set up’ only when the bank account was opened and disallowed the expenses incurred prior to the opening of the bank account. On appeal, the Tribunal observed that the expression ‘setting up of business in the previous year’ as per section 3 of the Act was different from commencement of business. It observed that business could be said to have been set up when the directors and staff were appointed, salaries were paid and when the assets were acquired. The opening of bank account or pending FIPB approval for equity investment was not a statutory formality required for setting up the business. Accordingly, the Tribunal held that the Revenue erred in holding that the business was not set up and allowed the expenses claimed by the taxpayer.
CIT vs Whirlpool of India Ltd (185 Taxman 387) (Delhi)

Writing-off of bad debts in the financial statements is not a conclusive proof for allowing deduction

The taxpayer wrote off a debt as irrecoverable in its financial statements and claimed the same as deduction under section 36 of the Act. The Revenue

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Snippet

The Government has decided to shelve the introduction of the Unique Transaction Number ("UTN"), which was required to be quoted alongwith Permanent Account Number ("PAN") when tax is withheld at source. The UTN was earlier expected to become operational by January 1, 2010. However, the Finance Ministry has not ruled out the possibility of introducing a new identity number similar to the UTN from the next fiscal. However, for the current year, the process of filing tax returns remains the same as earlier.

Source: The Economic Times
December 31, 2009

Snippet

The Government is planning to comprehensively revise tax treaties with as many as 25 nations, including Switzerland and Mauritius, and re-negotiating with 51 others, to trace black money. A comprehensive revision with 25 countries, unlike re-negotiation, is not confined to the articles on exchange of information or assistance in collection of taxes but is stated to extend to other areas in the treaty as well.

Source: The Economic Times
December 07, 2009

disallowed the claim on the basis that there was no evidence to show that the taxpayer took legal steps to recover the debt. On appeal, the High Court observed that the taxpayer had not furnished the details required by the tax officer. It held that writing-off of the debts in books of accounts was substantial compliance of the requirement under the Act to prove that debts had become bad, but it was not conclusive. It held that even though the taxpayer was not required to establish that the debts became bad for claiming deduction under the section, the Revenue had wide powers to make inquiries about the debt. Accordingly, the Court remanded the case back to the Revenue by directi ng the taxpayer to provide the necessary records evidencing its claim of bad debts.
CIT vs Kohli Brothers Color Lab (P) Ltd (2009 TIOL 639) (Allahabad)

Tribunal Decisions

Under internal CUP, local factors in the country of the AE and all relevant factors which have a bearing on the price charged must be taken into consideration; report of an external expert cannot be the sole basis under external CUP, when it does not represent any Government agency and is on the basis of select transactions

The taxpayer had exported goods in wholesale quantities to its Wholly Owned Subsidiary ("WOS") in the USA. It exported identical goods to third parties in other countries in retail lots, where higher prices were charged. The Transfer Pricing Officer ("TPO") held that Comparable Uncontrolled Price method ("CUP method") was appropriate by taking the retail sale as a comparable transaction and held that the price charged to the WOS was below the Arm's Length Price ("ALP") and made adjustments to the income of the taxpayer. In appeal before the Tribunal, the taxpayer relied on a report issued by an external expert, which indicated that certain supplies of identical goods by a Chinese supplier to a buyer in the USA were at prices lower than those charged by the taxpayer to its WOS. It w as also contended that the retail prices should not be compared to wholesale prices and claimed that the sale to WOS was at ALP based on Resale Price Method ("RPM"). It was also argued that WOS only had losses over the years and there is no avoidance of tax in India. The Tribunal held that the losses in the overseas jurisdiction were not relevant to determine the ALP in India. It held that the RPM was applicable only when goods were purchased from an AE and sold to third parties and concluded that CUP was appropriate to the taxpayer's case. It held that internal CUP could not be applied, as the third party exports were in retail quantities and to countries other than the USA. The Tribunal also held that the expert evidence could not be the sole basis for determining the ALP, as the report considered only select transactions and did not represent any Government agency and, therefore, could not be solely relied upon. As the taxpayer filed, during the course of hearing, certain additional data from a Government agency in the USA, the Tribunal remanded the case back to the Revenue for fresh determination of the ALP.
Gharda Chemicals Ltd vs DCIT (2009 TIOL 790) (Mumbai)

General extension of time limit by the RBI under foreign exchange regulations for receiving export proceeds cannot be treated as an extension for the purposes of

Snippet

The Finance Ministry is proposing to include an anti-avoidance provision in the forthcoming Union Budget which can effectively check transactions devised exclusively for the purpose of evading paying taxes in India. The proposal includes vesting the Commissioners of Income-tax with the power to declare a transaction as a sham, if there is a reason to believe that its purpose is to avoid tax in this country. Though the Direct Taxes Code ("DTC") contains provisions for anti-avoidance, it is not certain if it would become law. Hence the Government is planning to include this and some other provisions of DTC in the forthcoming Budget.

Source: The Economic Times
December 30, 2009

Snippet

India and Japan have agreed to conclude the proposed Comprehensive Economic Partnership Agreement ("CEPA") by next year with a view to further trade between the two countries, especially in areas of urban

Income-tax Act

The taxpayer claimed deduction of profits derived from exports of software under section 10A of the Act. The Revenue disallowed a part of the export proceeds, as it was not received within six months from the end of the financial year as required by section 10A of the Act. The taxpayer contended that the Reserve Bank of India ("RBI") had allowed the exporters a general permission to receive export proceeds upto 12 months from the date of export and this should be taken as an extension for the taxpayer as well. The Tribunal observed that section 10A(3) of the Act envisaged the extension of time by RBI on an application by the taxpayer. It observed that the general permission was limited to the foreign exchange regulations and could not be taken as an extension of time as envisaged under section 10A(3) of the Act. Ac cordingly, it held that deduction could not be allowed when the proceeds were not received within six months from the end of the financial year.
J P Morgan Services India Pvt Ltd vs DCIT (2009 TIOL 718) (Mumbai)

Even if there is no profit under normal computation, deduction under section 80HHC is to be computed based on the book profit computed under section 115JB of the Act

The taxpayer, an exporter, had nil income as per the normal provisions of the Act. It paid Minimum Alternate Tax ("MAT") under section 115JB of the Act on its book profits. In computing the taxable income based on book profits, it claimed deduction under section 80HHC of the Act in respect of the profits derived from exports. The deduction was computed on the basis of book profits under section 115JB of the Act, relying on a decision of the Mumbai Special Bench of the Tribunal in *Syncome formulations*. The Revenue rejected the claim, holding that the decision was overruled by the Bombay High Court in the case of *Ajanta Pharma*. On appeal, the Tribunal noted that the Special bench had ruled on the method of computing book profits and also on the percentage of profits qualifying for deduction while computing book profits. It held that the High Court had overruled the ratio of the Special bench only to the extent of the second issue. It held that the other question relating to method of computing the deduction under section 80HHC was not placed before the Court. Applying the principle that any observation of a Court should be understood in the light of question placed before it, the Tribunal held that the Special Bench decision would continue to apply in this case and held that the deduction under section 80HHC was to be computed based on the book profits computed under section 115JB of the Act and the deduction would be allowable even if the taxpayer did not have a taxable profit as per normal computation of income.
DCIT vs Glenmark Laboratories Ltd (Unreported) (Mumbai)

Discount on bill of exchange provided to purchaser of the bill is not interest under the Act

The taxpayer, an Indian company, was in the business of export of goods. It drew bills of exchange ("BE") on the buyer and discounted the bills with a Singapore-

infrastructure, high technology, and renewable and energy efficient technologies. India has already introduced visa on arrival for Japanese citizens and has also requested Japan to liberalise its visa system to enable growth of trade and investment and people-to-people contact.

Source: The Financial Express
December 30, 2009

Snippet

The Ministry of Corporate Affairs ("MCA") has released 'Corporate Governance Voluntary Guidelines 2009' after taking into account recommendations of the task force on corporate governance set up by the Confederation of Indian Industry ("CII") and the comments received from the public to the CII report. The guidelines include a six year cap on the term of independent directors, with a three year mandatory gap before an individual can be inducted in the same company; a constitution of a nomination committee in companies for identification and appointment of independent directors; rotation of audit partners once in three years and r otation of audit firm once in five years; and an option of paying a fixed remuneration to the directors instead of profit linked remuneration. MCA also states that a mandatory corporate governance code, which would be a mix of guidelines and recommendations of India Inc

based related party. The discounting of BEs was without recourse and the taxpayer extinguished the export receivable in its books, without any link to the maturity date of the bill. The Singapore company did not have a Permanent Establishment ("PE") in India under the India-Singapore Tax Treaty. The Revenue held that the discounting charges on amounts to interest within the meaning of section 2(28A) of the Act, that it was subject to withholding of tax at source and disallowed the discount under section 40(a)(i) of the Act. On appeal, the Tribunal held that the word 'interest' is differently defined under Interest Tax Act to include discount on promissory notes and bills of exchange drawn or made in India, which however was not included under the definition of 'interest' under the Act. Thus, where the legislature was conscious of the fact that even the discount of bills of exchange was to be included within the definition of interest, the same was explicitly provided for, as under the Interest Tax Act. Since the proceeds were paid immediately on discounting and without recourse, the net amount paid was in the nature of a price paid for the bill, which could not technically be held as including any interest. Hence, it was held that the Singapore company was not chargeable to tax on the discount portion since it did not have a PE in India and consequently, the disallowance under section 40(a)(i) of the Act in the hands of the taxpayer was deleted.

ACIT vs Cargill Global Trading India Pvt Ltd (2009 TIOL 700) (Delhi)

When the profit and loss account is not prepared as per Schedule VI to the Companies Act, Revenue can re-compute profits for the purpose of section 115JB of the Act

The taxpayer had sold certain rights in a property and earned significant profits. The taxpayer treated the profits as capital reserve and took it directly to Balance Sheet without accounting it in the Profit and Loss account ("P&L"), which was also duly certified by the auditors and adopted by the shareholders in the Annual General Meeting ("AGM"). The taxpayer did not include the said profits in the book profits for computing the Minimum Alternate Tax payable under section 115JB of the Act. The Revenue added the said profits to the book profits on the basis that the P&L was not prepared in accordance with Schedule VI to the Companies Act. On appeal, the Tribunal considered Schedule VI to the Companies Act, which required the P&L of a company to disclose every ma terial feature including credits or receipts and debits or expenses in respect of non-recurring transactions or transactions of exceptional nature. On this basis, the Tribunal concurred with the view of the Revenue that that P&L was not in accordance with Schedule VI of the Companies Act. Accordingly, it held that the Revenue could re-compute the profit arising on the sale of investments and include it in book profits for taxing it under section 115JB of the Act.

DCIT vs Bombay Diamond Co Ltd (Unreported) (Mumbai)

Payment for acquiring a share in participating rights and licence in oil fields is a commercial right similar to licence and entitled to depreciation under section 32 of the Act

The taxpayer, an oil and gas exploration company, acquired a participating interest

would be issued within one year.

Source: Financial Express
December 23, 2009

Snippet

The RBI has reintroduced a ceiling on interest rates that Indian companies pay for external commercial borrowing ("ECB") obtained under the RBI approval route. The norms are effective from January 2010 and would permit Indian companies to raise debt for three to five years by paying interest up to 300 basis points above the London Inter-bank Offered Rate ("LIBOR"). The interest cap in respect of ECB raised for over five years would be 500 basis points over LIBOR. RBI has also withdrawn the buy back facility for foreign currency convertible bonds.

Source: Business Standard
December 10, 2009

Snippet

Securities Exchange Board of India ("SEBI") has relaxed the limitation period for investors to file arbitration applications by stipulating that the six month limitation period is to be

in a certain oil field in Russia. The taxpayer was granted a license by the Russian State to carry out hydrocarbon operations in the block for a period of 20 years. The taxpayer claimed that the amount paid for participating interest and the license to carry out operations were in the nature of an intangible asset, falling under the term 'any other business or commercial rights', which were 'similar in nature' to 'know-how, patents, copyrights, trademarks, licences and franchises' as referred to under section 32 of the Act. Accordingly, depreciation was claimed in respect of the payment made for such participating rights and licence. Alternatively, the entire expenditure was claimed as deductible in the first year. The Revenue rejected the claims and held that depreciation on intangible assets was available only to intellectual property rights ("IPRs") as the nature of intangible assets referred to under section 32 of the Act indicated a connection to IPRs. The claim for deduction of such expenditure in full in the first year was also rejected holding it to be a capital expenditure. On appeal, the Commissioner (Appeals) held that the expenditure was deductible over the 20 year period of licence as deferred revenue expenditure. On appeal, the Tribunal held that the share in participating rights and licence, acquired by the taxpayer, was a commercial right similar to 'licence', which is specified as an intangible asset under section 32 of the Act. Accordingly, it held that payment was entitled to depreciation under section 32 of the Act. It further held that the payment could not be treated as a def erred expenditure as the concept was alien to the Act.
ONGC Videsh Ltd vs DCIT (2009 TIOL 748) (Delhi)

Profit on sale of securities cannot be excluded in computing book profits under section 115JB of the Act, even if such profits were not taxable under the normal provisions of the Act

The taxpayer did not have any taxable income under the normal provisions of the Act. The Revenue computed Minimum Alternate Tax on the book profits of the taxpayer as per section 115JB of the Act. In computing the book profits, the profit on sale of securities was also included, as it formed part of the income as per the P&L of the taxpayer. The taxpayer had invested the sale proceeds in specified securities as per section 54EC of the Act and was, therefore, entitled to deduct the invested amount in computing long term capital gains under the normal provisions of the Act. Accordingly, it contended that the profit on sale of securities was not to be included, as it was not liable to be taxed under the normal provisions of the Act. The Revenue rejected the claim and held that book profits had to be computed as per section 11 5JB of the Act and that the other provisions of the Act were not relevant. On appeal, the Tribunal observed that section 115JB of the Act was a deeming provision and had an over-riding effect on other provisions of the Act. It held that in computing the book profits, the permitted adjustments were limited and once the taxpayer included profit from sale of securities in the P&L account, there was nothing in prescribed adjustments in section 115JB of the Act to exclude such profits. Accordingly, the Tribunal held that profit on the sale of securities could not be excluded in computing the book profits even though it was not taxable under the normal provisions of the Act.
Growth Avenue Securities Pvt Ltd vs DCIT (2009 TIOL 801) (Delhi)

computed from the end of the quarter in which the disputed transaction was executed instead of the present practice of computing it from the day the transaction. Further, stock exchanges have the power to extend the time limit by another three months if the application is delayed for reasons beyond the control of the investor.

Source: Business Standard
December 03, 2009

Snippet

SEBI has formed a committee comprising senior officials of SEBI, investor associations, Bombay Stock Exchange ("BSE") and National Stock Exchange ("NSE") to resolve the pending grievance against companies which have been suspended for trading by the exchanges. The committee will ascertain the losses incurred by the investors and will try to mitigate it. The data available in the public domain states that 1,702 companies have been suspended in both the stock exchanges.

Source: The Economic Times
December 31, 2009

Authority for Advance Rulings

Capital gains do not arise when assets are transferred without consideration and transfer pricing provisions also do not apply

The applicant, a US company, had subsidiaries in the USA and India. The applicant filed for bankruptcy for its reorganisation under chapter 11 proceedings in the USA. As part of the reorganisation, the applicant transferred the equity shares it held in the Indian subsidiaries to its US subsidiaries, and its holding in the US subsidiaries were ultimately transferred to a newly formed holding company for no consideration. The applicant sought for a ruling from the Authority for Advance Ruling ("AAR") as to whether the transfer of shares in the Indian subsidiaries was taxable in India. The AAR ruled that capital gains would arise as no consideration could be attributed to the transfer of shares. The AAR relied on the decisions of the Supreme Court in the cases of *Sunil Siddharthbhai* and *B C Srinivasa Shetty* and held that the consideration for transfer of shares could not be arrived at on a notional or hypothetical basis. The AAR applied its earlier ruling in the case of *Vanenbury Group BV* and held that transfer pricing provisions did not intend to bring in a new head of income or to charge the tax on income which was not otherwise chargeable under the Act. Accordingly, the AAR held that when there was no consideration for the shares, transfer pricing provisions would not be applied to adopt a consideration at ALP.
Dana Corporation (2009 TIOL 29)

Income of a non-resident from services provided in relation to exploration of mineral oils is to be computed under section 44BB and not under section 44DA of the Act

The applicant, a Polish company, was engaged in conducting seismic surveys and providing seismic data to oil companies in connection with their oil exploration and drilling activities. The applicant applied for a ruling from AAR on whether the income derived by the applicant was assessable under section 44BB or under section 9(1)(vii) read with section 44DA of the Act. Section 44BB of the Act provides for the computation of income of a non-resident taxpayer engaged in providing services in connection with extraction or production of mineral oil in India and section 44DA of the Act provides for the computation of income of a non-resident who receives royalties from an Indian concern. The Revenue contended that the term 'services' as mentioned in section 44BB of the Act should relate only to 'technical services' as referred to under Explanation 2 to section 9(1)(vii) of the Act. However, the AAR held that the term 'services' could not be narrowed down to the meaning assigned in section 9 of the Act and that services could also be of a nature other than technical, managerial or consultancy services. Further, the AAR held that the services provided by the applicant had a real, intimate and proximate nexus with the prospecting for or extraction of mineral oil, without which the activity of prospecting was impracticable. The AAR, also observed that section 44DA would not supersede section 44BB of the Act and that both the sections had to be read in harmony with each other. The AAR observed that the nature of business was an important factor which served as an indicator to choose either of the sections. Accordingly, the AAR

Snippet

The Takeover Regulatory Advisory Committee set up by the SEBI has proposed that acquirers must mandatorily make an open offer for up to 100 percent stake in any listed company. This could make corporate acquisitions in India costlier. Presently, where an entity purchases 15 percent equity either from the promoters or the open market, it is required to make an open offer for a minimum of 20 percent in the target company.

Source: Business Standard
December 31, 2009

Snippet

The Government plans to issue new guidelines for Special Economic Zones ("SEZs") which is expected to be notified in early 2010. As per the guidelines, the developers are mandated to set aside five percent of the total area of 100 hectares or more for construction of low-cost housing or dormitories for workers and staff. The onus of providing mass transportation would also be on the developer. The developers would also be required to provide appropriate medical facilities in the zone for use by the residents and employees and low cost food facilities for workers living in dormitories. Developers would also have to follow specific guidelines in providing power supply, water supply and ensuring good drainage

held that the profits derived by providing services in relation to extraction of mineral oil were exclusiv ely governed by section 44BB of the Act.
Geofizyka Torun Sp Zo O (2009 TIOL 31)

Notifications and Circulars

Procedure tightened for issuing nil or lower withholding tax certificates

The Central Board of Direct Taxes ("CBDT") has instructed officers of the Revenue to obtain prior approval from the Commissioner of Income-tax (Tax Deduction at Source ("TDS") before issuing certificates for non-deduction/lesser rate of deduction of tax to the taxpayers under section 197 of the Act. This requirement will apply where the tax foregone arising out of the certificate exceeds INR 5 million in cases falling under Delhi, Mumbai, Chennai, Kolkata, Bangalore, Hyderabad, Ahmedabad and Pune. The limit for other locations is specified at INR 1 million.
Instruction No 7 dated December 23, 2009

CBDT circulates recent rulings on commission to air travel agents

The CBDT has sent out a communication to the officers of the Revenue drawing their attention to the recent rulings of the Madras High Court in the case of *Around the World Travels & Tours (P) Ltd vs Union of India* and the Delhi High Court in the case of *CIT vs Singapore Airlines Ltd & Other Airlines.* In these rulings, the Courts had ruled that supplementary commission or the discount on sale of air tickets provided to air travel agents by airline companies as liable for withholding of taxes under section 194H of the Act. The CBDT has called for action from the Revenue authorities based on these rulings.
F No 275/70/2009-IT(B) dated December 22, 2009

CBDT scheme for improving 'quality of assessments'

According to the scheme introduced by the CBDT, from the calendar year 2010 onwards, five pending time-barring assessments in respect of each tax officer would be selected every year by the Range Head, who would provide directions under section 144A of the Act to guide the tax officer complete the assessments. The Range Head would also monitor the subsequent developments in the assessment proceedings in these identified cases. The CBDT expects that this scheme would result in improved quality of assessments. It defines a quality assessment as one in which issues arising for consideration are clearly identified, investigation of basic facts in respect of these issues is carried out, adequate opportunity to rebut adverse evidence is given to the taxpayer and the rival evidence are suitably analysed and ev aluated in the light of correct interpretation of law.
Instruction No 6 dated December 18, 2009

Please see BMR Tax Edge Special on new perquisite rules released by CBDT

INDIRECT TAX

and sewerage.

Source: The Economic Times
December 30, 2009

Snippet

The RBI has extended the deadline to June 2010 for banks to classify loans extended to mutual funds as capital market exposure. The stipulation was introduced by the RBI in December 2007, but the date of its taking effect was postponed. As a result, lending to mutual funds would be subject to the caps applicable to loans to capital markets, once the stipulations take effect.

Source: Livemint
December 23, 2009

Snippet

Composite contracts or bundled products involving both services and goods like software, construction, works contract could be treated as services under the proposed Goods and Service Tax ("GST"). The proposal, aimed to simplify the tax regime, is a complete turnaround from the current tax system for bundled

Excise

High Court Decisions

No option to reverse Cenvat credit taken on inputs used in the manufacture of exempted goods; liability to pay duty on the price of exempted goods is mandatory

The taxpayer took Cenvat credit of duty paid on inputs used in the manufacture of dutiable and exempted goods and reversed the credit relating to the exempted goods before removal of goods from the factory. The full bench of the Tribunal held that in such cases, the taxpayer would not be required to pay an amount equal to eight percent/ 10 percent of the price of exempted goods under Rule 6(3)(b) of the Cenvat Credit Rules, 2002 ("Cenvat Rules").

The High Court allowed the Revenue's appeal against the full bench decision of the Tribunal and observed as under:

- The ratio of the earlier judgments rendered in the context of eligibility to exemption from duty, where the taxpayer had not taken Cenvat credit, cannot be applied to construe Rule 6 of the Cenvat Rules;
- Rule 6(1) clearly provides that no Cenvat credit will be allowed on inputs used in the manufacture of exempted goods;
- Rule 6(2) will be attracted if the taxpayer manufactures both dutiable and exempted goods from common inputs and on failure to maintain separate records as stipulated in that clause, Rule 6(3) would apply. In other words, the taxpayer has to pay an amount equal to eight percent/ 10 percent of the price of exempted goods. This rule is mandatory;
- If the taxpayer can reverse the credit before the goods are removed from the factory, on the same basis, it should be possible to maintain records of the inputs at an intermediary stage;
- Credit can be availed only under the method laid down by the law. It is not open to the taxpayer to choose any other method not in consonance with the language of Rule 6;
- The taxpayer does not have the choice of claiming the credit on exempted goods and subsequently reversing the same.
  CCE vs Nicholas Piramal (India) Ltd (2009 TIOL 649) (Mumbai)

Once levy of penalty under section 11AC of the Central Excise Act is imperative, there is no discretion to levy a lesser amount of penalty

The taxpayer had wrongly taken Cenvat credit on capital goods, which was reversed after issuance of show cause notice by the Revenue. Penalty equal to the amount of duty was levied under section 11AC of the Central Excise Act, 1944 ("Excise Act"). The Commissioner (Appeals) upheld the levy of duty and interest but reduced the amount of penalty. The Tribunal also upheld the levy of duty and interest since the taxpayer was guilty of wrong availment of the Cenvat credit but further reduced

products where they are bifurcated into components of goods and services on which respective taxes are levied.

Source: Financial Express
December 1, 2009

Snippet

With the Indirect tax collections dipping, as a part of revenue maximization measures, the Central Board of Excise and Customs ("CBEC") has directed its field formations across the country to open all cases, irrespective of year and amount involved, where it had raised a demand but had these stayed by courts, otherwise known as call-book cases. CBEC has suggested empanelling counsels of repute, seeking a designated bench in courts for early decisions and a two-member review committee of Chief Commissioners to decide on Tribunal orders before filing an appeal in the High Court or the Supreme Court.

Source: Business Standard
December 3, 2009

the amount of penalty.

On appeal by the Revenue, the High Court observed that once the Tribunal sustained the allegation of suppression of the fact with intent to evade duty on goods, levy of penalty was axiomatic under section 11AC of the Excise Act. The Court held that once the application of section 11AC was imperative, there was no discretion to quantify the amount of penalty and such penalty should be equal to the amount of duty levied. The High Court relied on the decision of the Supreme Court in *Dharmendra Textile Processors*, which was subsequently interpreted in *Rajasthan Spinning and Weaving Mills.*
CCE vs Franco India Remedies Pvt Ltd (2009 TIOL 699) (Madras)

Penalty for wrong availment or utilisation of Cenvat credit cannot be levied in the absence of finding of fraud, suppression etc

The taxpayer had wrongly taken and utilised Cenvat credit on fuel, used in generation of electricity, which was sold to their joint ventures and vendors. The Revenue disallowed the credit and also demanded interest and penalty. The Tribunal upheld the demand of duty and interest but set aside the levy of penalty under Rule 13(2) of the Cenvat Credit Rules, 2002 ("Cenvat Rules").

On appeal by the Revenue, the High Court observed that the language of Rule 13(2) of the Cenvat Rules is similar to section 11AC of the Central Excise Act, 1944 and that imposition of penalty is not automatic. In the absence of finding fraud, willful misstatement, collusion or suppression of facts etc with an intention to evade payment of duty, the High Court held that levy of penalty is not permissible.
CCE vs Maruti Udyog Ltd (2009 TIOL 672) (Punjab and Haryana)

Any person aggrieved can appeal to the Appellate Tribunal if prejudice has been occasioned to him and can't be said to have no locus standi

The taxpayer purchased goods from another company ("seller"). No excise duty was collected by the seller on the presumption that the goods were subject to 'nil' rate of duty. However, the seller obtained a bank guarantee from the taxpayer undertaking to reimburse the excise duty in the event of demand of duty by the Revenue. The Revenue classified the goods under a different tariff heading and demanded duty from the seller. The Commissioner (Appeals) dismissed the appeal filed by the seller against the demand and the seller encashed the bank guarantee. Since the seller did not file any further appeal to the Tribunal, the taxpayer himself filed an appeal, which was dismissed on the ground that the taxpayer had no *locus standi.*

The High Court observed that section 35B of the Central Excise Act, 1944 which provides for appeal to the Appellate Tribunal uses the words 'any person aggrieved' and not 'manufacturer'. Since the taxpayer had been prejudiced by the seller not preferring an appeal, the High Court held that the taxpayer is a person aggrieved and is entitled to file an appeal.

Snippet

The Government is reviewing the excise duty benefits provided to the states of Himachal Pradesh and Uttarakhand, to enable boosting revenues and to plug in loopholes. This move has been considered with a view to push for a friendly GST. Investments in these two states were exempt from excise duty for 10 years as a special case to push growth in the economically backward regions. These exemptions will be available for investments made upto March 2010, unless extended. If the exemption is not extended, many companies which planned to invest in those states may not do so.

Source: Economic Times
December 10, 2009

Snippet

The Chairman of the Empowered Committee of State Finance Ministers has reiterated that the target date to rollout dual GST would still be April 1, 2010. The Government is also working on a draft model for the Central, State and inter-state GST. The preparations for developing IT infrastructure are also in progress.

Source: Business Standard
December 12, 2009

Usha B Agarwal vs CCE (243 ELT 492) (Bombay)

Tribunal Decisions

Buyer's premises is not 'place of removal'

The taxpayer supplied goods at the buyer's premises but discharged excise duty at the factory gate, which was declared as 'place of removal'. The Revenue contended the transfer of goods took place at the buyer's premises and hence the freight and insurance charges should form part of the assessable value. The Revenue relied on Circular 251/85/96/CX, of October 14, 1996 ("Circular") which clarifies that 'place of removal' includes depots, consignment agents or any other place or premises from where the goods are sold by or on behalf of the taxpayer and that sale price prevailing at such depots etc include transport charges etc. The taxpayer contended that dispatch of goods at the manufacturer's risk would not establish that the ownership of goods continued with the manufacturer and that th e property in goods was passed on to the buyer at their factory gate and not at the buyers' premises.

The Tribunal observed that the Circular merely indicated that if the manufacturer had different places for removal of goods for sale, these different places were to be considered as 'place of removal' and that the Circular did not indicate that the place of removal was the buyer's place. The Tribunal held that the 'place of removal' was the factory gate of the taxpayer and therefore, freight and transit insurance would not form part of the assessable value of goods.
CCE vs Larsen & Toubro Ltd (244 ELT 306) (Mumbai)

Education cess paid on excise duty is also a duty of excise

The taxpayer purchased capital goods and took Cenvat credit of 50 percent of the excise duty and 100 percent of the education cess in the year of purchase. The taxpayer contended that the restriction of availment of 50 percent of duty in rule 4(2)(a) of the Cenvat Credit Rule, 2004 ("Cenvat Rules") was not applicable for education cess.

The Tribunal observed that though the Cenvat Rules do not define 'duty' for the purpose of Cenvat credit, Rule 3(1) of the Cenvat Rules defines Cenvat credit as duties of excise, additional duties of excise, additional duties of customs, education cess etc and clause 93 of the Finance Act, 2004 provides that education cess shall be a duty of excise. The Tribunal held that the restriction of availment of 50 percent of duty would apply to education cess also.
DCW Ltd vs CCE (244 ELT 286) (Chennai)

Pre deposit of tax in pursuance of stay order can be made from Cenvat account

The taxpayer filed an appeal before the Commissioner (Appeals) along with an application for waiver of pre-deposit of duty and penalty. The Commissioner (Appeals) directed the applicants to deposit a part of the duty amount for hearing the

Snippet

The Chairman of the Empowered Committee of State Finance Ministers has stated that GST once implemented will have 2 percent additional impact on India's Gross Domestic Product. Revenue losses in the initial period of implementation of GST are expected to be compensated by a higher degree of collection in less than a year. It is also expected that there would be considerable gains from service tax. States are to be compensated for revenue loss on account of purchase tax.

Source: Financial Express
December 12, 2009

Snippet

The Government has suggested that both alcohol and tobacco, which are demerit goods and considered harmful for health, should be kept under GST, with the states getting the power to levy excise duty over and above GST on alcohol. The Centre would have similar power in case of tobacco. The Centre and the states have also agreed to keep octroi and local taxes out of GST. It has been decided to keep entertainment and luxury tax within GST, while no consensus has been reached on purchase tax and tax on natural gas.

appeal. The taxpayer paid the amount from their Cenvat account and reported compliance. The Commissioner (Appeals) dismissed the appeal on the ground of non-compliance with the stay order since the taxpayer deposited the amount in cash. On appeal, the Tribunal relied on the decision of the Allahabad High Court in the case of *Indian Casting Co* and held that the amount deposited by the taxpayer from Cenvat account was sufficient compliance with the conditions of stay order and remanded the matter to the Commissioner (Appeals) to decide the appeal on merits. ***Nicco Corporation Ltd vs CCE (243 ELT 610) (Kolkata)***

Customs

High Court decisions

Export duty is not leviable on supply of goods to a unit in a Special Economic Zone

The issue for consideration was whether the taxpayer was liable to pay export duty on supply of iron ore pellets to a unit in a Special Economic Zone ("SEZ"). The taxpayer contended that an SEZ, located within India and the levy of export duty under the provisions of the Customs Act, 1962 ("Customs Act") would apply only to 'export' to a place outside India. The Revenue contended that export duty would apply since a SEZ is deemed to be a territory outside the customs territory of India under the SEZ Act, 2005 ("SEZ Act") and the definition of 'export' under the SEZ Act also includes supply of goods from Domestic Tariff Area ("DTA") to a unit or a developer in a SEZ. The Revenue also contented that the definition of export under SEZ Act would prevail over the defi nition of export under the Customs Act in view of section 51 of the SEZ Act which provides for an overriding effect of the SEZ Act over any other law.

The High Court held that no export duty is leviable on goods supplied from the DTA to SEZ for the following reasons:

- In the absence of amendments to the definition of 'export' and 'India' under the Customs Act, movement of goods form DTA to SEZ cannot be treated as a taxable event for levy of export duty under the Customs Act;
- Section 76F of the Customs Act which provided for levy of export duty on goods supplied from DTA to SEZ has been omitted by the Finance Act, 2007 with effect from May 11, 2007 and no corresponding provision akin to section 76F has been enacted in SEZ Act;
- The SEZ Act and the SEZ Rules, 2006 ("SEZ Rules") do not provide for or contemplate levy of export duty on movement of goods form DTA to SEZ; wherever levy of duty is contemplated, it is specifically provided for; Section 30 of the SEZ Act provides for imposition of duties of customs including anti dumping, countervailing duty and safeguard duties on goods removed form a SEZ to a DTA;
- The SEZ Act and SEZ Rules provide for exemption from duties of customs and excise on goods brought into a SEZ;
- The legal fiction of treating the movement of goods from DTA to SEZ as

The Government has suggested that both alcohol and tobacco, which are demerit goods and considered harmful for health, should be kept under GST, with the states getting the power to levy excise duty over and above GST on alcohol. The Centre would have similar power in case of tobacco. The Centre and the states have also agreed to keep octroi and local taxes out of GST. It has been decided to keep entertainment and luxury tax within GST, while no consensus has been reached on purchase tax and tax on natural gas.

Source: Business Standard
December 12, 2009

Snippet

GST would have four slabs and it would be zero for exempted items, one standard rate for majority of the goods and services and another having a moderate rate. Precious metals are likely to continue to attract one percent.

Source: Economic Times
December 13, 2009

Snippet

export is restricted to the SEZ Act and SEZ Rules;
- If SEZ is treated to be a territory outside India the entire SEZ Act would be rendered redundant since the SEZ Act extend to whole of India.
  Essar Steel Ltd vs UOI (2009 TIOL 274) (Gujarat)

Identity of goods is a prime criteria for claiming duty drawback on re-export of goods

The taxpayer re-exported certain goods which were originally imported and claimed drawback under section 74 of the Customs Act, 1962 ("Customs Act"). Revenue denied the drawback in respect of the goods in respect of which the identity could not be established under the respective bills of entry or the market value of the goods was less than the drawback claimed. The taxpayer filed a writ petition before the High Court.

The High Court observed that drawback claim was not an absolute right and that all the conditions mentioned in section 74 of the Customs Act should be fulfilled. The High Court dismissed the writ petition filed against rejection of the drawback claim since the identity of goods, a prime criterion for claim of drawback on re exported goods, was not established.
Perfetti Van Melle India Pvt Ltd vs UOI (243 ELT 654) (Madras)

Service Tax

Supreme Court Decision

Prior to April 18, 2006 there is no liability on the recipient of services under reverse charge

The Supreme Court dismissed the special leave petition filed by the Revenue against the decision of the High Court of Bombay wherein it was held that prior to April 18, 2006 service tax cannot be levied on the recipient of services in India in respect of services received from a non resident outside India.
UOI & Ors vs Indian National Ship Owners (2009 TIOL 129)

Tribunal Decisions

ERP implementation is taxable under 'information technology service'

The taxpayer was providing Enterprise Resource Planning ("ERP") advice and also ERP implementation service involving implementation and adaptation of ERP software. The taxpayer paid service tax under 'management consultancy service' for ERP advice service. The Revenue sought to levy tax on ERP implementation service provided by the taxpayer also under management consultancy services. The taxpayer contented that ERP implementation and adaptation service would be covered under 'Information Technology Software Service' taxable from May 16, 2008 and that prior to that date the service was specifically excluded from the scope

The Chairman of the Empowered Committee of State Finance Ministers has said that an early amendment to the Constitution would be needed for timely implementation of the proposed GST. Further progress in the formulation of draft legislation would not be possible unless the amendments are in place. A target date of January 15, 2010 has been fixed for setting up the information technology infrastructure for administering the proposed GST.

Source: Business Line
December 13, 2009

Snippet

The Ministry of Commerce and Industry has come out with draft guidelines to make all SEZs eco-friendly by mandating the use of renewable energy sources, and energy efficient buildings that conform to internationally recognised standards. The measures taken by SEZs to comply with the norms will be audited and certified by the Indian Green Buildings Council and Tata Energy Research Institute.

Source: Financial Express
December 15, 2009

of ‘consulting engineering service’.

The Tribunal observed that where a particular service was excluded from the scope of taxable service, it would not be levied to tax under any other category. The Tribunal thus held that ERP implementation could not be taxed as management consultancy services as these services were specifically excluded from ‘consulting engineering service’. The Tribunal further held that ERP implementation was taxable under ‘Information Technology Software Service’ from May 16, 2008.
IBM India Pvt Ltd vs CST (23 STT 338) (Bangalore)

Supply of labourers for housekeeping, toilet cleaning etc liable to service tax under ‘manpower recruitment or supply service’

The taxpayer entered into a contract for cleaning of factory premises and providing beverages to staff. The Revenue levied service tax under ‘manpower recruitment or supply services’ since the contract was only a labour contract obligating the taxpayer to provide labourers and the consideration included reimbursement of Provident Fund and Employee State Insurance.

The Tribunal observed that the contract referred to the number of labourers supplied in various places, the actual quantum of work to be done was not indicated and the consideration was related to the number of labourers supplied during a specific period and not the quantum of work carried out. The Tribunal thus held that the contract was for supply of manpower and liable to service tax.
Jivanbhai Makwana vs CCE (2009 TIOL 1958) (Ahmedabad)

Value of materials supplied by customer is not includible in the gross amount charged for taxable service

The taxpayer was engaged in providing ‘commercial or industrial construction service’ and ‘construction of complex service’. The taxpayer paid service tax on 33 percent of the gross receipts after availing abatement of 67 percent under the abatement notifications. The issue for consideration was whether the value of material supplied free of charge by the customer was includible in the value of the ‘gross amount charged’ for the purpose of claiming abatement since the Notification required inclusion of value of all goods or materials supplied, provided or used by the service provider. The taxpayer applied the principles of *noscitur a socciis* and *ejusdem generis*, and contended that the value of materials supplied by the service provider were only includible in the value of gross amount charged and not the value of materials supplied by the recipient of service. The taxpayer further contended that the services were not taxable during the relevant period since ‘works contracts’ were made liable to service tax only from June 1, 2007.

The Tribunal observed that inclusion of cost of materials supplied by the service receiver would be contrary to section 67 of the Finance Act, 1994 which provides that the value of taxable service shall be the gross amount charged by the service provider for such service. The Tribunal relied on the decision of the Madras High

Snippet

The Thirteenth Finance Commission (“Finance Commission”) in its report on GST has recommended a revenue neutral rate of 12 percent for the proposed GST, five percent for Central GST and seven percent for State GST. The Finance Commission has proposed that all businesses with an annual turnover of INR 10 lakh and above should be brought under the GST net and also proposed exemptions to sectors like unprocessed food, school and college education and non-government health services.

Source: Financial Express
December 16, 2009

Snippet

The introduction GST would help attain higher Gross Domestic Product (GDP) growth and pull down prices of manufactured items, but would make farm goods and services expensive. The report of the TFC has stated that prices of agricultural goods would increase between 0.61 and 1.18 percent, whereas the overall prices of all manufacturing sector would decline between 1.22 and 2.53 percent.

Source: Business Standard
December 17, 2009

Court in *Larsen and Toubro Ltd,* wherein interim stay was granted by the High Court on a similar issue, and observed that the value of materials supplied by the customer was not includible in the 'gross amount charged' for the service. The Tribunal further held that works contract could not be legally liable to service tax prior to June 1, 2007 and considering the fact that the activities of the taxpayer fall under the 'Works Contract Service', no service tax was leviable.
Cemex Engineers vs CST (23 STT 389) (Bangalore)

Delivery of report outside India would amount to part performance of service outside India and eligible for export benefit

The taxpayer was engaged in the business of conducting clinical trials for their clients in India and outside India and paid service tax under the category of 't *echnical testing and analysis'* on services provided to clients in India. The taxpayer claimed benefit of export of service on services rendered to the foreign clients and did not pay service tax. The Revenue demanded service tax on the ground that the services provided by the taxpayer to their foreign clients were wholly performed in India and did not qualify as 'export' under Export of Service Rules, 2005 ("Export Rules"). The Commissioner (Appeals) treated the services as exported and set aside the demands.

The Tribunal observed *the performance of service was not complete until the testing and analysis report was delivered to the client and when such reports were delivered to the clients outside India, it amounted to part performance of service outside India. The Tribunal further observed that the* performance of testing and analyzing had no value unless and until it was delivered to its client and that the service was to be complete only when such report was delivered to the client. The Tribunal thus held that *delivery of the report was an essential part of the service and since the report was delivered outside India and used outside India, the Tribunal held that the service was exported and not liable to service tax.*
CST vs B A Research India Ltd (2009 TIOL 1981) (Ahmedabad)

Value of materials/parts sold is not includible in the value of taxable service

The taxpayer was engaged in maintenance and repair of Helicopters on which service tax is leviable under 'maintenance or repair service'. The taxpayer paid service tax on the labour charges and did not include the cost of materials/parts used for providing the service. The Revenue did not accept the contention that the parts/materials were sold by the taxpayer and demanded service tax on the gross amount charged. The Tribunal observed that the invoice of the taxpayer clearly indicated the material charges and the labour charges separately and sales tax was paid on the material charges. Following the decision of the Supreme Court in the case of *BSNL* and the decision of the Tribunal in *Delux Colour Lab*, the Tribunal held that when there is a clear distinction between the sales of materials/parts and the labour charges, levy of service tax on the value of such materials/parts is incorrect.

Snippet

The Prime Minister's Economic Advisory Council ("PMEAC") has suggested a single slab each for goods and services or one common rate for both at the Central level under the proposed GST. This is contrary to the suggestion made by the Finance Commission in its report on GST, which suggested multiple rates for the GST. PMEAC has suggested that following a single rate could be more beneficial.

Source: Business Standard
December 21, 2009

Snippet

The indirect tax collection for the period April 2009 to November 2009 has dipped 21 percent despite an unexpected 7 percent growth in GDP and 7.1 percent rise in industrial output till October 2009. The decline was primarily due to poor collection in Customs duty, which fell due to decline in imports and duty cuts on essential commodities. The tax department is therefore likely to miss the indirect tax collection target for the fiscal.

Source: Business Standard

December 22, 2009

Hindustan Aeronautics Ltd vs CST (2009 TIOL 1974) (Bangalore)

Services mentioned in inclusive part of the definition of 'input service' have to satisfy parameters laid down in the main part of the definition

The issue for consideration was whether Cenvat credit is eligible on service tax paid on security service received in the off-factory residential colony of the taxpayer. The Revenue contended that the word security in the definition of 'input service' under Cenvat Credit Rules, 2004 should be read *ejusdem generis* with expressions immediately preceding it, which relate to business and provision of security at the residential colony does not appear to be one of the activities relating to business.

Relying on the decision of Supreme Court in *Ponds India Ltd* and *Lucknow Development Authority* in the context of interpretation of a definition using the words 'means and includes', the Tribunal held that the services mentioned in the inclusive part of the definition of 'input service' should also satisfy the parameters laid down in the main part of the definition. The Tribunal further held that applying the rule of *ejusdem generis*, security service received in place and for a purpose unconnected with the business activities of the manufacturer would not qualify to be an 'input service' within the horizons of the inclusive part of the definition, even without reference to the main part.

CCE vs UltraTech Cement Ltd (16 STR 611) (Mumbai)

Cenvat credit on input services eligible only if such services are used in or in relation to manufacture or clearance of final products

The issue for consideration was whether the taxpayer was eligible for Cenvat credit of service tax paid on construction service, repair and maintenance service, manpower recruitment service and cleaning service provided in a residential colony for employees outside the factory.

The taxpayer contented that the inclusive part of the definition of 'input service' contains expressions like 'in relation to setting up, modernization etc' and 'in relation to activities relating to business' and therefore, it was not necessary to show any nexus between the services mentioned in the inclusive part of the definition and the manufacture/clearance of final products (referred to in the main part of the definition). On appeal, the Tribunal observed as follows:

- The decision of the Supreme Court in *Maruti Suzuki* Ltd would also apply to 'input service' and there is no indication of different legislative intention for 'input' and 'input service'
- The decision of the Supreme Court impliedly overruled the decision of Mumbai High Court in *Coca Cola India Pvt Ltd*
- The definition of 'Input service' has to be considered in its entirety and the inclusive part is not independent of the main part
- Any service which is covered by the parameters of the Inclusive part of the definition of 'input service' should also satisfy the requirements of the main

part of the definition ie service must be used in or in relation to the manufacture of final products

The Tribunal thus held that since the taxpayer had not established nexus between the services and the manufacture or clearance of excisable goods, Cenvat credit was not eligible on such services.
CCE vs Manikgarh Cement Works (2009 TIOL 2059) (Mumbai)

Cenvat credit not available on tippers used for providing excavation service

The taxpayer was providing excavation, blasting, loading and transporting services and registered under 'site formation and clearance service'. The taxpayer had claimed Cenvat credit on tippers purchased by it as capital goods used for providing the output service. The manufacturer of the tipper had classified the same under Chapter 87of the Central Excise Tariff Act, 1985 ("Excise Tariff"). The Revenue denied the credit since tipper was not eligible capital goods and since 'site formation and clearance service' was not in the list of services eligible for credit on motor vehicles. The taxpayer contended that usage of tipper was indispensable in providing the output service; that tippers were classifiable under chapter 84 of the Excise Tariff and that tippers would certainly qualify as ' ;input'.

The Tribunal observed that the tippers falling under Chapter 87 of the Excise Tariff were not eligible capital goods and that the definition of input under the Cenvat Credit Rules, 2004 also specifically excluded motor vehicles from the benefit of input credit, except in some specific situations. Hence, the Tribunal held that Cenvat credit was not admissible on the tippers purchased by the taxpayer. The Tribunal further held that since the taxpayer had only availed the credit but not utilised it, the credit remained merely as entries in books without any effect on revenue and hence no interest was leviable. Penalty levied was also set aside.
Ganta Ramanaiah Naidu vs CCE (23 STT 353) (Bangalore)

Cenvat credit is eligible on testing and technical analysis service used in trial manufacture and research and development

The issue for consideration before the Tribunal was whether Cenvat credit was admissible in respect of technical testing and analysis, commission paid to foreign agents, courier charges and clearing and forwarding agent services for the taxpayer engaged in manufacture of medicaments.

The Tribunal observed that the manufacturing process of medicaments was not comparable to other products and that commercial expediency required the products to undergo several stages of testing and technical analysis. The Tribunal further observed that even the trial manufacture and research and development conducted on medicines which did not reach market should be considered as part of manufacturing process and business activity. The Tribunal held that the definition of 'input service' was wide enough to allow the credit of technical testing and analysis services. The Tribunal also allowed the credit on the other input services on which

credit was claimed.
Cadila Healthcare Ltd vs CCE (23 STT 224) (Ahmedabad)

No restriction for input service distributor to distribute credit to a unit even if the service is not related to the unit

The taxpayer distributed credit of service tax from its head office to Unit A even though such services were used in Unit B. The Revenue objected to such distribution. The Tribunal observed that Rule 7 of the Cenvat Credit Rules, 2004 which deals with distribution of credit by input service distributor provides for only two restrictions, namely, the credit should not exceed the amount of service tax paid and the credit should not be attributable to services used in a unit exclusively engaged in the manufacture of exempted goods or providing of exempted services. The Tribunal also observed that the availability of credit was related to the manufacturer or service provider as a whole and not restricted to any particular unit of the manufacturer or service provider.

The Tribunal thus held that in the absence of any specific restriction such distribution of credit should be allowed.
Ecof Industries Pvt Ltd vs CCE (23 STT 381) (Bangalore)

Ignorance of the statutory requirements held to be a sufficient cause for waiver of penalty

The taxpayer rendered taxable services falling under the entry 'cable operator services' but did not register with the Revenue authorities and pay service tax. On initiation of proceedings by the Revenue, the taxpayer paid service tax and interest before issue of show cause notice. The issue which arose for consideration before the Tribunal was whether penalty was leviable. The Tribunal observed that suppression had been alleged on the sole ground that the taxpayer had not registered with the Revenue authorities and had not paid the service tax due in time. Since there was no substantiation of the finding with any evidentiary material, the Tribunal observed that failure to pay tax had to be considered as ignorance of statutory requirements. The Tribunal held that the taxpayer had sufficient cause which prevented it from discha rging the tax liability in time hence waived the levy of penalty under section 80 of the Finance Act, 1994.
CCE vs Padma Cable TV (2009 TIOL 2105) (Bangalore)

Refund of input service cannot be denied to the exporter of goods unless the assessment of the service provider is revised

The taxpayer was a merchant exporter and claimed refund of the service tax paid on the input services specified under Notification No 41/2007–ST of September 17, 2007 ("Notification") in relation to export of goods. The Revenue rejected the refund on certain amounts on the ground that no service tax was leviable by the input service providers on certain services and such services were not included in the list of specified services in the Notification. The Tribunal

observed that the refund of service tax was sought to be disallowed to the taxpayer (service receiver) by reviewing the assessment of service tax at service provider's end, which was not permissible. The Tribunal held that refund of the service tax could not be denied to the exporters, unless the service tax payment by the service provider is revised by the jurisdictional service tax authorities.
CCE vs Anant Commmodities Pvt Ltd (2009 TIOL 2100) (Delhi)

Subsequent refund claim before correct authority beyond the time limit is admissible, if original claim was filed within prescribed period

The taxpayer filed refund of service tax paid on input services within the time limit prescribed under Notification No 41/2007 – ST of October 6, 2007. Since the claim was filed before a wrong authority the refund application was returned with a direction to file the claim before the appropriate authority. The taxpayer again filed the claim before the appropriate authority but the Revenue contended that the claim was filed beyond the prescribed time limit. The Tribunal held that subsequent refund claim before the correct authority should be held to be filed within the permitted time, particularly when both the authorities are working under the same department.
CCE vs Gujarat Tea Processor & Packers Ltd (23 STT 265) (Ahmedabad)

VAT/CST

High Court Decisions

Contract for fabrication and installation of rolling shutters is not eligible for the benefit of compounded rate for works contracts

The taxpayer was an association whose members were engaged in fabrication, supply and installation of rolling shutters (“RS”). The issue which arose for consideration before the Court was whether fabrication and installation of RS for the customers was a works contract, which is entitled for payment of tax at compounded rate under the Kerala Value Added Tax Act, 2003 (“KVAT Act”).

The Court observed that the RS was supplied in the fabricated form and that installation was only an incidental work, the cost of which was insignificant when compared to the value of RS. The Court relied on the decision of the Supreme Court in *Kone Elevators* wherein it was held that a lift fabricated and installed at the premises of the customer would amount to sale of goods and not works contract. The Court also observed that the provisions of KVAT Act restrict the dealer from availing the benefit of compounded rate if the works contract involves transfer of materials in the form of goods. Since the contract for fabrication and installation of RS involved transfer of RS, which was goods, the Court held that the dealers were not entitled to payment of tax at the compounded rate.
Ernakulam District Rolling Shutter Fabricators Association and Others vs Commissioner (26 VST 499) (Kerala)

Notifications and Circulars

Excise

Reversal of Cenvat credit when finished goods / WIP is written off

The Central Board of Excise and Customs ("CBEC") has clarified the treatment of Cenvat credit when finished goods/work in progress ("WIP") is written off. Excise duty is liable to be paid if value of finished goods is written off. If remission under the provisions of Central Excise law has been granted, Cenvat credit taken on inputs used in such goods shall be reversed. In respect of WIP, if such goods have reached the stage to be considered as manufactured goods, the duty attributable to the WIP is required to be paid when they are written off. If the activity carried out on the WIP goods does not amount to manufacture, they should be considered as inputs and credit shall be reversed as applicable to inputs.
Circular No 907/27/2009-CX dated December 7, 2009

Directions to issue show cause notice for inclusion of after sales service and pre-delivery inspection charges in assessable value

The issue as to whether after-sales-service and pre-delivery inspection charges incurred by dealers would form part of assessable value of the manufacturer is pending before the Larger Bench of the Tribunal in case of *Maruti Udyog Ltd.* Similarly, the issue on the concept of transaction value under new Section 4 of the Central Excise Act, 1944 is also pending for decision by the Larger Bench of the Supreme Court. The CBEC has directed the authorities to issue show cause notice demanding duty and transfer to call book pending the decisions of Larger Bench.
Circular No 909/29/2009-CX dated December 11, 2009

Activity of offloading chemicals from tankers into smaller drums will not amount to manufacture

The Circular clarifies that offloading of liquid chemicals in bulk containers at the dealers' premises or godown into smaller drums for subsequent marketing would not amount to manufacture. The CBEC has clarified that such containers cannot be termed as bulk packs and the activity of transferring the goods from containers into smaller drums is not covered by Chapter Note 10 to Chapter 29 Central Excise Tariff Act, 1985.
Circular No 910/30/2009-CX dated December 16, 2009

Removal of Capital Goods after a period of 10 years

The CBEC has clarified that if the capital goods on which Cenvat credit has been taken are cleared as waste and scrap, even after a period of 10 years, an amount equal to the duty leviable on the transaction value for such capital goods cleared as waste and scrap, shall be payable.

Instruction No F No 267174/2009-CX8 dated December 7, 2009

Customs

Customs duty benefits for expansion of mega power projects

Exemption from levy of Customs duty has been provided on import of goods required for expansion of existing certified mega power projects. While basic customs duty has been exempted in excess of 2.5 percent, countervailing duty, education cess and additional Customs duty have been fully exempted.
Notification Nos 137/2009, 138/2009 & 139/2009-Customs dated December 11, 2009

Service Tax

Taxability of reimbursements received by customs house agents

The Circular clarifies the taxability of reimbursements received by Clearing House Agent ("CHA") from the customers in the course of providing the clearing house agent service. The Circular provides for exclusion of reimbursements received from the value of taxable services even where the documents do not bear the name of the customer, subject to the satisfaction of specified conditions including recovery of actual amount, authorisation by the customer for incurring the expenses etc. The Circular further clarifies that any other miscellaneous or out of pocket expenses charged by the CHA would be includible in the taxable value for the purposes of charging tax on CHA services.
Circular No 119/13/2009-ST dated December 21, 2009

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