India Tax Konnect

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Editorial

India, amongst 67 countries, has signed the Multilateral Convention (the Convention/MLI) in Paris on 7 June, 2017 to implement tax treaty related measures to prevent Base Erosion and Profit Shifting (BEPS). More countries are expected to sign the Convention in coming days. The convention will not function in the same way as an amending protocol to a single existing treaty, which would directly amend the text of the CTA. Instead, it will be applied alongside existing tax treaties, modifying their application in order to implement the BEPS measures. The provisional MLI position of each signatory indicates the tax treaties it intends to cover, the options it has chosen and the reservations it has made. Signatories can amend their MLI positions until ratification. Even after ratification, parties can choose to opt in with respect to optional provisions or to withdraw reservations.

The Income-tax Act, 1961 (the Act) requires every reporting person/entity to submit the SFT in Form 61A. Recently, the Central Board of Direct Taxes (CBDT) issued a press release stating that in case there are reportable transactions for the year, the reporting person/entity is required to register with the income tax department and generate an Income Tax Department Reporting Entity Identification Number (ITDREIN). An entity having a PAN can take only PAN based ITDREIN. An entity having a TAN can generate an ITDREIN only when such TAN's organisational PAN is not available.

The registration of a reporting person is mandatory only when at least one of the transaction type is reportable. A functionality 'SFT Preliminary Response' has been provided on the e-Filing portal for the reporting persons to indicate whether a specified transaction type is reportable during the year.

The Mumbai Tribunal in the case of Gemological Institute International Inc. held that the amount received by the taxpayer for reimbursement of travel expenditure, group health insurance and other incidental expenditure pursuant to training and technical service agreement is not taxable as Fees for Technical Services (FTS). The Tribunal observed that no profit element has been included in such reimbursement.

The Union Government created a new Twitter handle to answer industry queries related to the Goods and Services Tax (GST) proposed to be implemented from 1 July 2017. Traders and the industry can ask questions on the twitter handle '@askGST_GoI' and officials from the Central Board of Excise and Customs (CBEC) will answer them. All taxpayers and other stakeholders are welcome to direct their queries related to GST on the said twitter handle for early resolution and clarification.

We at KPMG in India would like to keep you informed of the developments on the tax and regulatory front and its implications on the way you do business in India. We would be delighted to receive your suggestions on ways to make this Konnect more relevant.

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International tax

Decisions

International circuit for Formula One championship constitutes a fixed place PE under the India-U.K. tax treaty

The Supreme Court in the case of Formula One World Championship Ltd. dealt with the issue that whether the international circuit for formula one race constitutes a fixed place of business under the India-U.K. tax treaty. Further whether such international circuit was under the control and at the disposal of the taxpayer. The Supreme Court observed as follows:

- On a combined reading of Article 5(1), 5(2), 5(3) of the tax treaty, it indicates that only certain forms of establishment would not form a Permanent Establishment (PE) that are excluded in Article 5(3) of the tax treaty. Article 5(2) uses the word 'include' which means the list is not exhaustive and it may include the places which are not specified therein as PE. In order to bring any other establishment which is not specifically mentioned, the requirements laid down in Article 5(1) of the tax treaty are to be satisfied. Twin conditions which need to be satisfied are: (i) existence of a fixed place of business; and (ii) through that place of business an enterprise is wholly or partly carried out its business.
- It cannot be denied, that Buddh International Circuit is a fixed place. From this circuit different races, including the Grand Prix is conducted, which is undoubtedly an economic/business activity.
- There cannot be any race without participating/competing teams, a circuit and a paddock. All these are controlled by the taxpayer and its affiliates. An event has taken place by conduct of race physically in India. Entire income is generated from the conduct of this event in India. Thus, commercial rights are with the taxpayer which are exploited with actual conduct of race in India.
- Even the physical control of the circuit was with the taxpayer and its affiliates from the inception, i.e. inclusion of event in a circuit till the conclusion of the event. Omnipresence of the taxpayer and its stamp over the event is loud, clear and firm.
- As per Philip Baker, a PE must have three characteristics: stability, productivity and dependence. All characteristics are present in the present case. Fixed place of business in the form of physical location, i.e. Buddh International Circuit, was at the disposal of the taxpayer through which it conducted business. Aesthetics of law and taxation jurisprudence leave no doubt that a taxable event has taken place in India and a non-resident taxpayer is liable to pay tax in India on the income earned.
- The Supreme Court rejected the taxpayer's contention that since the duration of the event was only three days, the total duration for which limited access was granted to it was not sufficient to constitute the degree of permanence necessary to establish a fixed place PE. The Supreme Court observed that the question of the PE has to be examined keeping in mind that the aforesaid race was to be conducted only for three days in a year and for the entire period of the race the control was with the taxpayer.
- Also rejected the taxpayer's contention that it was Jaypee (Indian company) who was responsible for conducting races and had complete control over the event and clarified that mere construction of track by Jaypee or its ownership or organising other events is immaterial.

Formula One World Championship Ltd. v. CIT (Civil Appeal No. 3849 of 2017)

Reimbursement of expenditure pursuant training and technical agreement is not taxable as FTS as no profit element is embedded in such reimbursement

The taxpayer is a non-resident company incorporated in the United States. The taxpayer entered into a training and technical service agreement (TTA) with a group company (GIA India) to train the employees of GIA India and providing technical services for the implementation of grading policies, procedures and processes. In terms of the said agreement, the taxpayer provided technical services to GIA India. The taxpayer raised separate debit notes as 'fee for training and technical services' rendered by it to GIA India and also on account of 'reimbursement of travel expenses, group health insurance and other minor incidental expenses' incurred by it pertaining to the aforesaid assignment.

The taxpayer filed a return of income declaring total income of INR106.18 million. The amount received by way of reimbursement of expenditure was excluded from the income by the taxpayer for the reason that these constituted actual cost borne by the taxpayer, and therefore, these were not in the nature of income. The Assessing Officer (AO) held that the total amount received by the taxpayer from GIA India was liable to be included in the income of the taxpayer including the expenditure reimbursed by GIA India for the reason that these constituted part of FTS, and therefore, the AO made this addition in the assessment order.

The Mumbai Tribunal held that the amount received by the taxpayer for reimbursement of travel expenditure, group health insurance and other incidental expenditure pursuant to training and technical service agreement is not taxable as FTS. The Tribunal observed that no profit element has been included in such reimbursement.

Gemological Institute International Inc v. DCIT (ITA No. 4659/Mum/2014) and (ITA No. 385/Mum/2016) – Taxsutra.com

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Notifications/Circulars/Press Releases

Cabinet approves signing of the Multilateral Convention to implement tax treaty related measures to prevent Base Erosion and Profit Shifting by India

The final Base Erosion Profit Shifting (BEPS) project identified 15 actions to address BEPS in a comprehensive manner. Implementation of the final BEPS project requires changes to more than 3000 bilateral tax treaties which will be burdensome and time consuming. In view of the same, the Convention was conceived as a Multilateral instrument (the Convention/MLI) which would swiftly modify all covered bilateral tax treaties (CTA) to implement BEPS measures. For this purpose, formation of an ad hoc group for the development of such MLI was endorsed by the G20 Finance Ministers and Central Bank Governors in February 2015.

India was part of the ad hoc group of more than 100 countries and jurisdictions from G20, OECD, BEPS associates and other interested countries, which worked on an equal footing on the finalisation of the text of the Convention, starting May 2015. The text of the Convention and the accompanying explanatory statement was adopted by the ad hoc group on 24 November 2016.

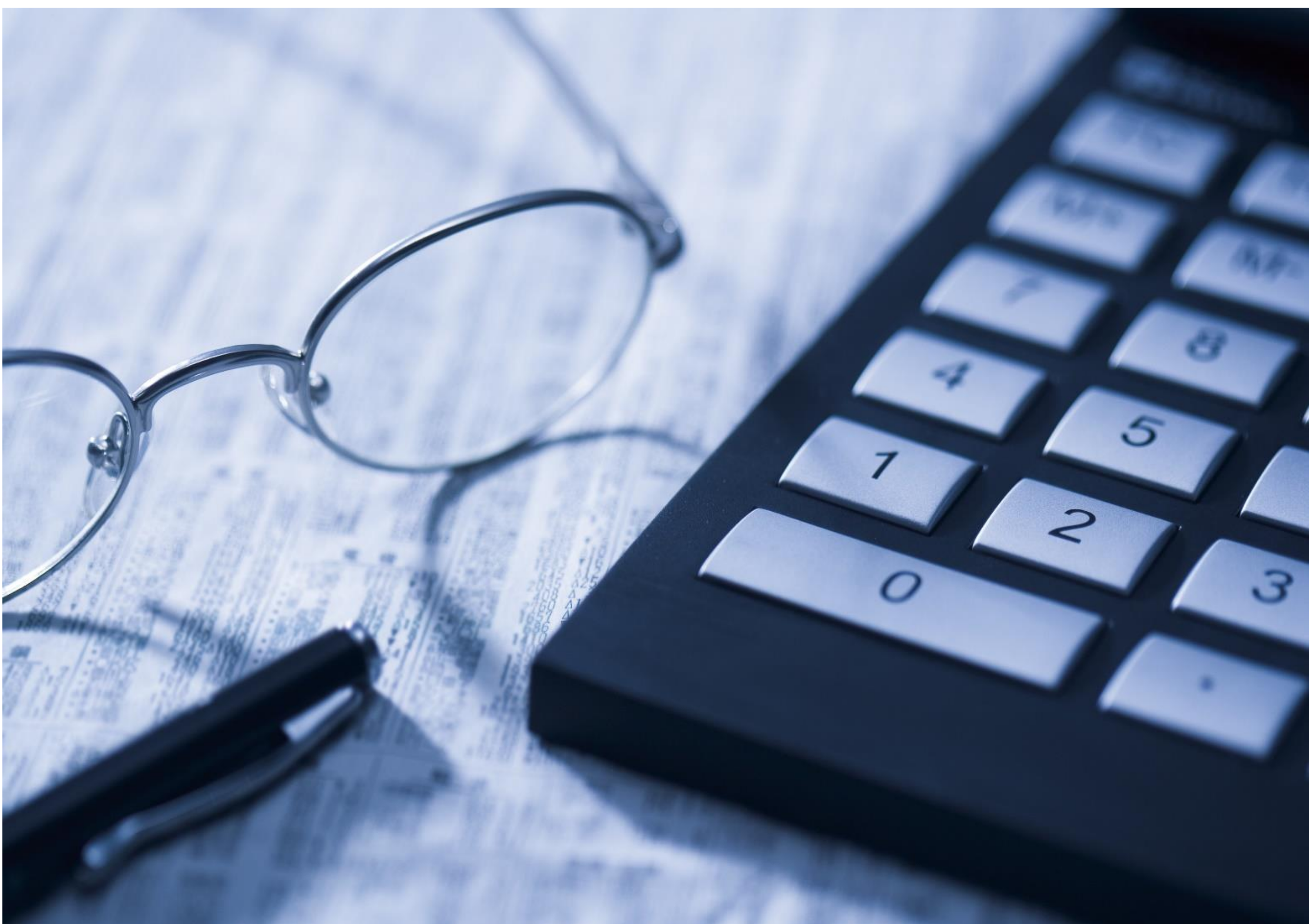
Cabinet approval for signing of the Multilateral Convention

The Convention has been opened for signature as on 31 December 2016 and a first joint signing ceremony is scheduled to be held in Paris on 7 June 2017. Signature is the first step in the process of expressing consent to be bound by the Convention, which will become binding only upon ratification.

The Union Cabinet chaired by the Prime Minister has given its approval for the Multilateral Convention to implement tax treaty related measures to prevent BEPS. It is also proposed to make a provisional list of CTA and a provisional list of reservations at the time of signature in June 2017. Final lists for both will be submitted by India at the time of submission of instrument of ratification.

The Convention implements two minimum standards relating to prevention of treaty abuse and dispute resolution through Mutual Agreement Procedure. The Convention will not function in the same way as an amending protocol to a single existing treaty, which would directly amend the text of the CTA. Instead, it will be applied alongside existing tax treaties, modifying their application in order to implement the BEPS measures. Signing of the Multilateral Convention will enable the application of BEPS outcomes through modification of existing tax treaties of India in a swift manner. It is also in India's interest to ensure that all its treaty partners adopt the BEPS anti-abuse outcomes.

Source-www.pib.nic.in, dated 17 May 2017



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Corporate tax

Decisions

15 per cent payment of disputed tax demand is not a pre-condition before filing a stay application

The AO passed an assessment order against the taxpayer determining total income at INR19.7 million as against INR0.46 million claimed in the income-tax return. On scrutiny assessment, a demand notice of INR9.14 million was issued to the taxpayer. The taxpayer appealed before the Commissioner of Income-tax (Appeal) [CIT(A)] and also approached the AO with an application under Section 220(6) of the Act to keep the demand in abeyance till the disposal of the first appeal. The AO rejected such application on the ground that at the time of submitting the stay application, the taxpayer had not deposited 15 per cent of the demand as pre-deposit. Stay application filed to Pr. CIT was also rejected and asked the taxpayer to pay entire outstanding demand failing which the AO shall be free to take suitable action as per the law. Aggrieved, the taxpayer filed a petition before the Gujarat High Court.

The High Court observed that the AO's interpretation for reasons of rejection was made absolutely on misconception and/or misreading of the modified instructions dated 29 February 2016. The High Court observed that considering the modified instructions dated 29 February 2016 as a whole, there is no such requirement of pre-deposit of 15 per cent of the disputed demand either at the time of submitting stay application or before the stay application of the taxpayer is considered on merits. Rejecting the AO's interpretation of modified instructions, the High Court observed that the AO may/shall grant stay of demand till disposal of first appeal on payment of 15 per cent of the disputed demand, unless the case falls in the category mentioned in para 4[B] of the modified instructions. The decision of the tax department in rejecting the stay application and consequently directing the taxpayer to deposit 100 per cent of the disputed demand on the ground that the taxpayer has not deposited 15 per cent of the disputed demand cannot be sustained and the same is to be quashed and set aside.

Further, the High Court observed that if the AO opined that the case falls within the parameters of Clause 4[B](a), the AO is required to refer the matter to the administrative Principal CIT/CIT, who shall, after considering the relevant facts, decide the quantum/proportion of demand to be paid by the taxpayer as lump sum payment for granting a stay of the balance demand. The High Court observed that between Clause 4[B](a) and clause 4[B](b), the word used is 'or' and therefore, in both the eventualities, the AO is required to refer the matter to the Principal CIT/CIT. Regarding the decision of the Pr. CIT, the Tribunal observed that after the decision was given by the AO, the taxpayer filed a stay application before the Pr. CIT and the Pr. CIT passed the order mainly considering the order of the AO. Thus, the High Court remanded the matter to the AO to pass an appropriate order on the stay application afresh in accordance with law and on merits and considering the modified instructions dated 29 February 2016 read with earlier Instruction No. 1914, dated 21 March 1996.

Jagdish Gandabhai Shah v. Pr.CIT (Special Civil Application No. 5679 of 2017) – Taxsutra.com

Interest levied under Section 220(2) of the Act cannot be waived since no 'genuine hardship' had been caused to the taxpayer

The taxpayer is the branch office of Pioneer Overseas Corporation, USA (POC US) and engaged in contract research activities and cultivation of parent seeds. Since Assessment Year (AY) 1993-94, the taxpayer was claiming exemption by treating its entire income as agricultural income under Section 10(1) read with Section 2(1A) of the Act. The taxpayer's claim was accepted by the tax department from AY 1993-94 to 1996-97. From AY 1997-98, the AO treated the taxpayer's income as business income holding it to be a PE of POC US. On appeal before the CIT(A), partial relief was granted to the taxpayer by deleting 50 per cent of the addition made on account of estimated attribution of income holding that only that much profit could be attributed to the PE which was derived from the assets and activities of the PE in India. On further appeal, the Tribunal held that only 10 per cent of income was treated as agricultural income, taxing balance sum as business income. During the course of assessment, the interest was levied under Section 220 of the Act. Subsequently, the taxpayer filed an application before the CIT under Section 220(2A) of the Act for waiver of interest levied under Section 220(2) of the Act which was dismissed by the CIT on the ground that no genuine hardship had been caused to the taxpayer. Aggrieved, the taxpayer filed a writ petition before the Delhi High Court.

The High Court observed that no error was committed by the CIT in rejecting the taxpayer's request for waiver of interest under Section 220(2) of the Act. The High Court reiterated three conditions laid down under Section 220(2A) of the Act which ought to be satisfied, viz., (i) payment of the amount towards interest under Section 220(2A) of the Act should cause the taxpayer 'genuine hardship' (ii) default in the payment of the amount should be due to circumstances beyond the control of the taxpayer; and (iii) the taxpayer should have cooperated in the proceedings for recovery of the amount. The High Court observed that the only fact emphasised by the taxpayer was that interest was paid besides incurring costs on maintaining a bank guarantee was more than 1.5 times of the tax amount. The CIT had correctly held that mere fact that the interest was 1.5 times the tax by itself was irrelevant for determining whether the taxpayer was suffering from any 'genuine hardship'.

The High Court rejected the taxpayer's submission that the CIT declined relief on that belief that it was a part of the global conglomerate 'DuPont', which made humongous profits in billions of dollars meant that it did not suffer any 'genuine hardship' and further held it as a relevant factor. The High Court observed that the conclusion arrived at by CIT could not be called an erroneous exercise of discretion. The CIT's view was a plausible view and did not call for interference. Thus, the High Court dismissed the taxpayer's writ petition.

Pioneer Overseas Corporation USA v. CIT (W.P.(C) 5423/2016) – Taxsutra.com

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HUF is a group of relatives and hence a gift received by a member of the HUF is exempt from tax under Section 56(2)(vi) of the Act

During the year under consideration, the taxpayer, an individual, received gift amounting to INR 8.5 million from Hindu Undivided Family (HUF). The AO held that HUF is not covered within the definition of the term 'relative' as defined under Section 56(2) of the Act. Therefore, the gift received from HUF was held to be taxable. The CIT(A) deleted the disallowance. The taxpayer claimed that it is squarely covered by the decision of the Rajkot Tribunal in the case of Veenit Kumar Rahgavjibhai Bhalodia v. ITO [2011] 140 TTJ 58 (Rajkot)

The Mumbai Tribunal observed that the Rajkot Tribunal in the case of Veenit Kumar Rahgavjibhai Bhalodia v. ITO [2011] 140 TTJ 58 (Rajkot) held that gift received from a 'relative', irrespective of whether it is from an individual relative or from a group of relatives is exempt from tax under the provisions of Section 56(2)(vi) of the Act as a group of relatives also falls within the Explanation to Section 56(2)(vi) of the Act. It is not expressly defined in the Explanation that the word 'relative' represents a single person. It is not always necessary that singular remains singular. Sometimes a singular can mean more than one. In that case the taxpayer also received a gift from HUF. The word HUF, though sounds singular unit in its form and assessed as such for income-tax purposes, finally at the end a HUF is made up of 'a group of relatives'. Thus, singular words could be read as plural also, according to the circumstance/situation. The 'relative' explained in Explanation to Section 56(2)(vi) of the Act includes 'relatives' and as the taxpayer received gift from his 'HUF', which is 'a group of relatives', the gift received by the taxpayer from the HUF should be interpreted to mean that the gift was received from the 'relatives' therefore the same is not taxable under section 56(2)(vi) of the Act.

In the light of the aforesaid decision of the Tribunal, the Mumbai Tribunal in the present case did not find any infirmity in the conclusion drawn by the CIT(A). Accordingly, the appeal of the tax department is liable to be dismissed.

DCIT v. Ateev V. Gala (ITA NO.1906/Mum/2014) – itatonline.com

Penalty cannot be levied on late filing of transfer pricing audit report if it was duly submitted before completion of assessment

The taxpayer filed a return of income but audit report in Form 3CEB was not filed along with the return of income. The same was not filed before the due date of filing the return of income under Section 139(1) of the Act. The AO levied penalty under Section 271BA of the Act for non-filing of audit report in Form 3CEB on or before the due date of filing the return under Section 139(1) of the Act. On appeal, the CIT(A) upheld the penalty levied by the AO. The taxpayer contended that it was in a bona fide belief that no documents need to be filed along with the return of income in terms of explicit provisions contained in Section 139D(c) of the Act. It was accordingly advised not to file the audit report or any other documents along with the return of income. It was argued that the audit report was obtained from the Chartered Accountant much before the due date of filing of return. However, it was made available to the Transfer Pricing Officer (TPO) at the time of framing of the assessment, thus, vitiating the levy of penalty for technical reasons which overlooked the reasonable cause shown by the appellant for belated filing.

Tribunal ruling

In the instant case, the taxpayer had made available the audit report in Form 3CEB much before the completion of proceedings by the TPO. The expression 'may' used in Section 271BA of the Act needs to be viewed liberally, in view of the reasoning given by the taxpayer. The taxpayer's bona fide mistaken understanding of provisions contained in Section 139D(c) of the Act itself would determine reasonable cause in terms of Section 273B of the Act. Also, it is not the case of the tax department that audit report in Form 3CEB was not obtained by the taxpayer. Accordingly, it is held that the taxpayer had substantively complied with the provisions of the Act by obtaining the audit report in time, by filing the same though belatedly but before the date of completion of assessment. Accordingly, the AO was to delete the penalty levied under Section 271BA of the Act.

Magick Woods Exports (P.) Ltd. v. ACIT [2017] 81 taxmann.com 231 (Chen)

Expenditure is to be disallowed under Section 14A in relation to dividend income which is subject to dividend distribution tax

The taxpayer is engaged in the business of manufacture of steel furniture, security equipments, typewriters, electrical equipments and a host of other related products. It is also a promoter of various other companies and invests its funds in such companies in order to maintain control of such concerns as sister concerns. For AY 1998-1999, 1999-2000 and 2001-2002, the AO notionally allocated the interest expenditure to the earning of the dividend income and disallowed such interest expenditure and consequently, reduced the exemption available under Section 10(33) of the Act to the net dividend. The CIT(A) allowed exemption of the entire dividend income. The Tribunal confirmed the order. The said order had attained finality. During AY 2002-03, the facts were similar to earlier years. The taxpayer has not made fresh investments during AY 2002-2003, in fact, there is a reduction in the value of investments. The taxpayer had sufficient interest free funds available for the purpose of making investments. However, the AO disallowed the part of interest expenditure holding the same to be attributable to earning the dividend income. The CIT(A) deleted the disallowance relying on earlier favourable decision of the Tribunal. On further appeal to the Tribunal, it was held the decision in favour of the tax department holding that sub-sections (2) and (3) of Section 14A of the Act were retrospectively applicable and the matter is remanded back to the AO for recording his/her satisfaction/findings in the light of Section 14A of the Act. On appeal to the High Court, the High Court held that Section 14A of the Act has to be construed on a plain grammatical construction thereof and the said provision is attracted in respect of dividend income referred to in Section 115-O as such income is not includible in the total income of the shareholder. Against the decision of the High Court, the taxpayer filed an appeal before the Supreme Court.

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Supreme Court's decision

Disallowance in respect of exempt dividend income

On reference to Section 14A of the Act it indicates that the income must not be includible in the total income of the taxpayer. Once the said condition is satisfied, the expenditure incurred in earning the said income cannot be allowed to be deducted. The section does not contemplate a situation where even though the income is taxable in the hands of the dividend paying company and the same to be treated as not includible in the total income of the recipient taxpayer, yet, the expenditure incurred to earn that income must be allowed. Such a meaning, if ascribed to Section 14A of the Act, would be plainly beyond what the language of Section 14A can be understood to reasonably convey.

The provisions of Section 10(33) of the Act should be read in the light of Section 115-O of the Act. In so far as the types of dividend income on which tax is payable under Section 115-O of the Act is concerned, the earning of the said dividend is tax free in the hands of the taxpayer and not includible in the total income of the said taxpayer. Therefore, Section 14A of the Act would not apply to such dividend income. Section 10(33) and Section 115-O of the Act were brought in together; deleted and reintroduced later in a composite manner, also, does not assist the taxpayer. In so far as the dividend income is taxable in the hands of the dividend paying company, the same is not includible in the total income of the recipient taxpayer.

So far as the provisions of Section 115-O of the Act are concerned, even if it is assumed that the additional income tax under the aforesaid provision is on the dividend and not on the distributed profits of the dividend paying company, no material difference to the applicability of Section 14A would arise. Sub-sections (4) and (5) of Section 115-O of the Act clearly provides that the further benefit of such payments cannot be claimed either by the dividend paying company or by the taxpayer. The provisions of Sections 194, 195, 196C and 199 of the Act, would further fortify the fact that the dividend income under Section 115-O of the Act is a special category of income which has been treated differently by the Act making the same non-includible in the total income of the recipient taxpayer as tax thereon had already been paid by the dividend distributing company. Accordingly, it has been held that Section 14A of the Act would apply to dividend income which is subject to dividend distribution tax.

Applicability of Section 14A of the Act to the facts of the present case

The issue with respect to Section 14A of the Act stands concluded in its favour in respect of the AYs 1998-1999, 1999-2000 and 2001-2002. Earlier to the introduction of sub-sections (2) and (3) of Section 14A of the Act, such a determination was required to be made by the AO in his best judgement. In all the aforesaid AYs it was held that the tax department had failed to establish any nexus between the expenditure disallowed and the earning of the dividend income in question. In some of the AYs, the aforesaid question was specifically looked into from the standpoint of the requirements of the provisions of sub-sections (2) and (3) of Section 14A of the Act which had by then been brought into force. It is on such consideration that findings have been recorded that the expenditure in question bore no relation to the earning of the dividend income and hence the taxpayer was entitled to the benefit of full exemption claimed on account of dividend income.

Whether such determination is to be made on application of the formula prescribed under Rule 8D or in the best judgement of the AO, what the law postulates is the requirement of a satisfaction in the AO that having regard to the accounts of the taxpayer, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the taxpayer.

In the present case, neither any basis has been disclosed establishing a reasonable nexus between the expenditure disallowed and the dividend income received. Any part of the borrowings of the taxpayer had been diverted to earn tax free income despite the availability of surplus or interest free funds available remains unproved by any material whatsoever. While it is true that the principle of res judicata would not apply to assessment proceedings under the Act, the need for consistency and certainty and existence of strong and compelling reasons for a departure from a settled position has to be spelt out which conspicuously is absent in the present case. In this regard the decision of the Supreme Court in the case of Radhasoami Satsang v. CIT [1992] 193 ITR 321 (SC). Accordingly, it has been held that for the AY 2002-2003, no disallowance shall be made under Section 14A of the Act.

Godrej & Boyce Manufacturing Company Limited v. DCIT (Civil Appeal No. 7020 of 2011) – Taxsutra.com

Notifications/Circulars/Press Releases

CBDT issues draft ICDS on real estate transactions

On 31 March 2015, the Ministry of Finance issued 10 Income Computation and Disclosure Standards (ICDS) operationalising a new framework for computation of taxable income by all taxpayers in relation to their income under the heads 'Profit and gains of business or profession' and 'Income from other sources'. Subsequently, the Finance Minister had constituted a Committee (the Committee) comprising of experts from the accounting field, departmental officers and representatives from the Institute of Chartered Accountants of India (ICAI) to suggest the areas in respect of which further ICDS may be notified under the Act.

The Committee vide a press release dated 11 May 2017 has issued the draft ICDS on real estate transactions. The draft ICDS is based on the Guidance Note issued on Real Estate Transactions (GN) issued by ICAI in 2012. For the purposes of providing uniformity and certainty and harmonising the same with provisions of the Act, the Committee suggested certain changes in draft ICDS in comparison to the GN.

CBDT press release, dated 11 May 2017

CBDT notifies Form 10-IB for certain domestic companies to opt for lower tax rate

The CBDT has issued a Notification introducing a new rule with respect to concessional rate of tax [specified in Section 115BA of the Act] applicable to certain domestic companies subject to certain specified conditions. The new rule also prescribes Form No. 10-IB in case option for lower rate of tax is exercised under Section 115BA of the Act. Form 10-IB shall be furnished electronically either under digital signature or electronic verification code. The rule shall come into force on the date of their publication in the Official Gazette.

CBDT Notification No. 3636/2017, dated 2 May 2017

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CBDT press release on the draft notification prescribing the method of valuation of unquoted shares for the purpose of Section 56(2)(x) and Section 50CA of the Act

The CBDT has issued a press release and draft notification prescribing the method of valuation of unquoted shares for the purpose of Section 56(2)(x) and Section 50CA of the Act. The same has been uploaded on the website www.incometaxindia.gov.in. The draft notification states that it shall come into force from the 1 April 2018 and shall apply in relation to AY 2018-19 and subsequent years.

CBDT press release and draft notification, dated 5 May 2017

Lease rent from letting out premises/developed space along with other amenities in an Industrial Park/SEZ is to be treated as business income - CBDT circular

The issue whether income arising from letting out of premises/developed space along with other amenities in an Industrial Park/SEZ is taxable under the head 'Profits and Gains of Business' or under the head 'Income from House Property' has been subject matter of litigation in recent years.

Recently, the CBDT has issued a circular clarifying that in view of the decision of the Karnataka High Court in the case of CIT v. Velankani Information Systems Pvt. Ltd. [2013] 218 Taxman 88 (Kar), it is settled position that in the case of an undertaking which develops, develops and operates or maintains and operates an industrial park/SEZ notified in accordance with the scheme framed and notified by the government, the income from letting out of premises/developed space along with other facilities in an industrial park/SEZ is to be charged to tax under the head 'Profits and Gains of Business'. Accordingly, going forward, the tax department may not file appeals on the above settled issue and those already filed may be withdrawn/not pressed upon.

CBDT Circular No. 16/2017, 25 April 2017

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Transfer pricing

Decisions

40 per cent of the global profit to an Indian PE is attributed based on the functions performed, assets deployed and risk assumed

- Arrow Asia Pac Limited, Hong Kong, (Arrow HK) had set up a branch in Singapore (Arrow Singapore) to service the customers in India. In 1994, the Singapore Branch had opened Liaison Offices (LOs) in multiple cities of India (main operations and control based in Bengaluru). In December 2002, a fully owned subsidiary of Arrow HK was set up in India. Subsequently LO became inoperative. Few of the employees of LO were later moved to the Indian subsidiary.
- In 2006, a survey was conducted on the LO premises (Bengaluru) where the office of the Indian subsidiary was also located. Details pertaining the LO were found and impounded under Section 133A. Post the survey, reassessment notices were issued for AY 2000-01 to AY 2004-05 to the taxpayer and the taxpayer filed the returns declaring an income on the basis of cost plus 6 per cent mark-up.
- The AO concluded that the LO was carrying out income earning activities in India based on the statements recorded from the employees and the activities are not preparatory and auxiliary in nature and the LO is a PE of Arrow Singapore. The AO then computed 40 per cent of the global profits of Arrow Singapore and attributed to the LO's India operations.
- For AY 2002-03 to AY 2004-05, the AO determined the profit attributable to the LO (40:60 attribution ratio) as determined for AY 2000-01 and AY 2001-02 based on findings that the Singapore entity had business connections in India. Subsequently, the cases were referred to the Transfer Pricing Officer (TPO) for evaluation of arm's length nature of the transactions between the Associated Enterprises (AEs). The TPO held that entire sales were as a result of the taxpayer's function as a trader and the entire sales for the year represented the international transaction made during the year. The CIT(A) upheld the AO's decision for AY 2000-01 to AY 2001-02 confirming the existence of PE in India through a LO.

Tribunal's ruling

- The Tribunal observed that the taxpayer itself had admitted that the LO's activities were taxable in India by showing income at cost plus 6 per cent basis in return of income. Thus, the taxpayer has indirectly accepted the fact that the company had a business connection in India and also the Indian LO as a PE of Arrow Singapore. The Tribunal upheld the CIT(A)'s orders for AY 2000-01 to 2001-02.
- The Tribunal upheld the CIT(A)'s view on the AO's consideration of sectoral weightage for functions performed, assets employed and risks involved, assets and risks in the intra sectoral ratio pertaining to LO and HO and the final quantification of profits attributable to LO and HO at 40:60.
- The Tribunal held that, to be consistent with the Revenue's own stand for AY 2000-01 and AY 2001-02, the Arm's Length Price (ALP) to be determined based on the 40 per cent of the turnover of the Singapore entity as attributable to LO and not on the total turnover.

Bengaluru Tribunal in the case of Arrow Electronics India Ltd vs ADIT [I.T (TP).A Nos.209 & 210/Bang/2011] - AY 2000-01 & AY 2001-02 and ADIT vs Arrow Electronics India Ltd [I.T (TP).A Nos.617 to 619/Bang/2011 & 31-33/Bang/2011] - AY 2002-03, 2003-04 & 2004-05

Deemed brand development is not a separate international transaction

The taxpayer, a wholly owned subsidiary of Hyundai Motor Company, Korea (HMC), is involved in manufacturing and sale of cars using the brand 'Hyundai', whose legal owner is Hyundai Motor Korea. The taxpayer is to mandatorily use a badge with trademark Hyundai in every vehicle manufactured by it as per the intercompany agreement entered into between the taxpayer and HMC. The TPO referred to the special bench ruling in the case of LG Electronics Pvt Ltd[1] which treated brand building in the local market as an international transaction and was of the view that the taxpayer is neither getting any benefit for developing the brand of the AE nor allowed to create its own brand and logo. The AO proposed an adjustment which the Dispute Resolution Panel (DRP) upheld in principle.

Tribunal's ruling

- There is a clear difference between LG Electronics and the taxpayer's case, as it is an undisputed position that the percentage of Advertisement, Marketing and Promotion (AMP) expenses as a proportion of net sales is not an unreasonably high figure and the taxpayer's arguments that there is no excess over and above a market benchmark average in the relevant Financial Year (FY) is accepted.
- No services are rendered by the taxpayer, unlike in LG's case where brand building was due to conscious and focussed efforts of the Indian company to do so.
- If the taxpayer, instead of using 'Hyundai' in the name of each of its brand of cars manufactured, was to use a name owned by the taxpayer, the advantage of adding value to a brand, as a result of sale of cars manufactured by the taxpayer, would have gone to the taxpayer, rather than going to the AE. It is this arrangement, for the benefit of the AE, which is stated to be an international transaction.
- The use of the brand name, owned by the AE, in the motor vehicles manufactured by the taxpayer does amount to a benefit to the AE of the taxpayer, but is an incidental benefit. The question is whether such an incidental benefit to the AE, even if there be any, can be treated as an international transaction.
- The Tribunal referred to the definition of international transaction under Section 92B of the Act and stated that for intangibles, the definition of international transactions, includes only transactions of purchase, sale or lease of intangible properties. Further, the Tribunal opined that though, 'provision for services' is included in the definition of 'international transaction', accretion in brand value due to use of the foreign AEs brand name in the name of the taxpayer's products cannot be treated as service either.

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1. LG Electronics Pvt Ltd vs ACIT [(2013) 22 ITR 1 (Del) (Trib)]

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- The Tribunal held that a service has to be a conscious activity and it cannot be a subliminal exercise as is the impact on brand value. Every benefit accruing to an AE, as a result of dealing with another AE, is not on account of service by the other AE. What is benchmarked is not the accrual of 'benefit' but rendition of 'service'. The expressions 'benefit' and 'service' have different connotations, and what is truly relevant, for the purpose of definition of 'international transaction' in the Indian context, is 'service' - not the benefit. There is no rendition of service in the present context. The incidental benefit accruing to an AE, therefore, cannot be benchmarked unless it is the result of a specific service by the taxpayer.
- The Tribunal held that the accretion in brand value of the AE's brand name is not on account of costs incurred by the taxpayer, or even by its conscious efforts and it does not result in impact on income, expenditure, losses or assets of the taxpayer. It is not, therefore, covered by the residuary component of definition of 'international transaction' either.
- The Tribunal held that the accretion of brand value, as a result of use of the brand name of the foreign AE under the technology use agreement which has been accepted to be an arrangement at ALP, does not result in a separate international transaction to be benchmarked and therefore, deleted the adjustments.

Chennai Tribunal in the case of Hyundai Motor India Limited vs DCIT (I.T.A. No. 853/Chny/2014 and 563/Chny/2015)

Export commission cannot partake the character of royalty and it cannot be disallowed under Section 40(a)(i) of the Act

- The taxpayer is engaged in the business of manufacture and sale of motorcycles using technology licensed by Honda Motor Co. Ltd., Japan (HMCL). The taxpayer, pursuant to a technical collaboration contract with HMCL, received technical assistance for which the taxpayer paid royalty to HMCL.
- The aforesaid agreement was extended, renewed and revised to form the Licence and Technical Assistance Agreement (LTAA) which provided for grant of an indivisible, non-transferable and exclusive right and licence, without the right to grant sublicences, to manufacture, assemble, sell and distribute the products and parts within the territory (defined as India).
- During FY 2004-05, a separate Export Agreement (EA) was entered into between HMCL and the taxpayer whereby HMCL accorded consent to the taxpayer to export specific models of two wheelers in specific territories on payment of export commission of 5 per cent of the FOB value of such exports.
- The TPO proceeded to determine the ALP of the export commission payment as nil by applying Comparable Uncontrolled Price Method. The TPO held that the payment of export commission by the taxpayer to its AE was unnecessary and did not lead to any economic benefits to the taxpayer. The TPO also asserted that the exports happened in a pre-determined restrictive environment regulated by the AEs and proposed transfer pricing adjustment. Apart from transfer pricing adjustment, the AO also disallowed the same expenditure on various grounds. The DRP did not provide any relief to the taxpayer.
- The Tribunal held that the existence of consideration for payment for export commission and benefits derived by the taxpayer thereof, have been clearly established.
- As regards the disallowance of export commission under Section 40(a)(i) of the Act, for corporate tax purposes, the Tribunal held that both the LTAA and EA are distinct and independent agreements. As per the EA, the taxpayer has not been transferred or permitted to use any patent, invention, model, design or secret formula. Similarly, HMCL, by way of the EA, has not rendered any managerial, technical or consultancy services. Accordingly, export commission was neither royalty nor fee for technical services and, therefore, the taxpayer was not required to deduct tax at source.
- The Tribunal also observed that the taxpayer has not acquired any asset or even the intangible right in the nature of a capital asset via EA and hence the payment of running export commission paid as a percentage of export amount every year cannot be deemed as a capital expenditure.

High Court's ruling

- The technical know-how was licenced by HMCL to the taxpayer since 1984 and thus the EA which was entered into on 21 June 2004 could not be said to be contemporaneous.
- The payment of the export commission was not without consideration as it permitted the taxpayer to effect export sales in the specified countries, thereby reporting substantial profits, without having to pay for using the existing distribution and sales networks in those territories.
- The attempt at recharacterising the transaction as one involving royalty payment overlooks the fact that the payment under the LTAA is treated by the taxpayer itself as royalty and such royalty is also paid on the export consignments.
- The Department's reliance on the case of Shiv Raj Gupta[2] was misplaced on facts as it has not been able to show that the EA was a colorable device, as was the case in the judgement relied upon.
- The High Court upheld the Tribunal's decision and concluded that the payment of export commission by the taxpayer to HMCL was not in the nature of payment of royalty or fee for technical services attracting disallowance under Section 40(a)(i) of the Act and no substantial question of law arises.

CIT v. Hero Motocorp Limited (ITA 923/2015)

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2. CIT vs Shiv Raj Gupta [2015] 372 ITR 337 (Del)

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Notifications/Circulars/Press Releases

CBDT releases first APA Annual Report 2016-17

The first annual report on Advance Pricing Agreement (APA) programme was recently released by the CBDT, Ministry of Finance, Government of India.

Key highlights of the Indian APA programme

- Total of 815 APAs were filed in India till 31 March 2017 including 688 Unilateral APAs (UAPAs) and 127 Bilateral APAs (BAPAs).
- 152[3] APAs have been signed so far which includes 141 UAPAs and 11 BAPAs. 78 APAs out of 152 signed so far have rollback provisions. Of the 11 BAPAs signed, six of them are with the U.K. and five with Japan.
- The U.S. effectively opened its BAPA programme with India in February 2016; and since then there has been an increase in the number of BAPA applications and also in the number of conversions from UAPA to BAPA applications.
- Comparative analysis of India's APA programme with China and the U.K. shows that India has concluded more APAs within the first five years of its APA programme (152 between FY2012-13 to FY2016-17) as against China (113 in ten years 2005 - 2014) and the U.K. (143 in five years 2009 to 2014)
- Indian APA authorities have performed better (average duration of processing UAPA in India has been 29 months and BAPA has been 39 months) than their U.S. counterparts (average duration 34 months and 51 months for UAPA and BAPA respectively) in terms of concluding APAs.
- Of the total UAPAs entered, service sector dominates with 72 per cent of the total UAPAs signed. Further, Information Technology and Banking/Finance industries lead with almost 50 per cent (70 out of 141) of the total UAPAs. APAs have been concluded with respect to about 20 different industries.
- The nature of transactions covered in UAPAs predominantly include Provision of Software Development Services and provision of IT enabled Services followed by intra-group payments and other transactions.
- With regard to BAPAs, the covered transactions predominantly include availing of intra-group services followed by purchase and sale of goods transaction and provision of marketing/sales support services.

CBDT APA Annual Report (2016-17) dated April 2017

KPMG in India APA survey report 2017

Recently, KPMG in India conducted the APA Survey 2017 which is the first of its kind which attempts to collate an all-encompassing perspective about APA from taxpayers and the CBDT. The survey provides some valuable insights and observations on the Indian APA programme from both the taxpayers' and the government's viewpoint. While the taxpayers applaud the rational and pragmatic approach of the Indian APA authorities, they expect a faster resolution rate, stronger administration and clarity around certain complex issues related to APAs. The CBDT in response to the survey, highlighted the need for applicants to respond to APA authorities on time as well as being more transparent and collaborative to share relevant information pertaining to their multinational group.

KPMG India APA Survey report 2017 dated May 2017

OECD releases a discussion draft on implementation guidance on approach to Hard-to-Value Intangibles for tax administrations

On 23 May 2017, the OECD released a discussion draft providing guidance on the implementation of the approach to pricing transfers of hard-to-value intangibles (HTVI). The purpose of this guidance is to reach a common understanding and practice among tax administrations on how to apply adjustments resulting from the application of the approach for HTVI, so as to improve consistency and reduce the risk of economic double taxation. OECD has sought public comments on this discussion draft by 30 June 2017.

Important considerations

Principles underpinning the application of the approach to HTVI:

- Tax administrations can consider ex post outcomes as presumptive evidence about the appropriateness of the ex ante pricing arrangements - significant differences between ex post outcome and ex ante pricing presents presumptive evidence probability weighing of which shall require further scrutiny of underlying factors
- The ex post outcomes inform the determination of the valuation that would have been made at the time of the transaction; however, it would be incorrect to base the valuation on the actual income or cash flows without taking into account the probability of achieving such income or cash flows at the time of the transfer of HTVI - Essential to evaluate, what was known and could have been anticipated at the time of entering into the transaction involving the HTVI and also taking into account the probability of achieving the actual income or cash flows, at the time of the transaction.

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3. As on 31 March 2017
4. Transfer Pricing statistics: 2013 to 2014 dated 6 March 2015 - published by HM Revenue & Customs

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- Where a revised valuation shows that the intangible has been transferred at undervalue or overvalue compared to the arm's length price, the revised value of the transferred intangible may be assessed to tax taking into account contingent payments and price adjustment clauses, irrespective of the payment profiles asserted by the taxpayer - Tax administrations may make appropriate adjustments, including adjustments that reflect an alternative pricing structure (for example, milestone payments, running royalties with or without adjustable elements, price adjustment clauses, or a combination of these)
- Tax administrations should apply audit practices to ensure that presumptive evidence based on ex post outcomes is identified and acted upon as early as possible - Countries may consider targeted changes to procedures or legislation (say, introduction of a requirement to notify promptly the transfer or licence of an intangible falling within the HTVI definition)

In the actual implementation of the HTVI approach, the guidance in the discussion draft acknowledges the fact that, the elapsed time between the transfer of HTVI and the emergence of ex post outcomes may not always correspond with audit cycles or with administrative and statutory time periods. However, it notes that there is already a time-lag between the time when the transaction is undertaken and the time when it is scrutinised by the tax administrators, thus, the impact of timing issue may not be overstated. Thus, it is emphasised on early identification of the transactions involving HTVI and initiation of process to determine the appropriateness of ex ante pricing, by the tax administrations.

Public Discussion Draft on BEPS Action 8: Implementation Guidance on Hard-to-Value Intangibles

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Indirect tax

Service tax - Decisions

Supply of food by employer to workers is not a 'service'

The issue in the instant case was whether the food supplied by an employer to his workers at a subsidised rate would constitute a 'service' and become liable to service tax.

In this regard, the Andhra Pradesh High Court held that the said activity of supply of food to workers cannot be construed as a 'service' on the basis of the following rationale:

- The food supplied by the employer to its employees forms part of the wages in terms of the provisions of Industrial Disputes Act, 1947 and therefore such remuneration paid to employees is outside the purview of the definition of 'service';
- The employer had already discharged Value Added Tax on the value of food supplied to employees and therefore, once the State Authorities have treated the supply of food as 'sale', it cannot be treated as a service.

M/s Bhimas Hotels Pvt. Ltd. v. Union of India, 2017-VIL-213-AP-ST

Notifications/Circulars/Press Releases

Exemption to Life Insurance services under Pradhan Mantri Vaya Vandana Yojana

Life insurance services provided under the Pradhan Mantri Vaya Vandana Yojana has been exempted from service tax levy.

Notification No. 17/2017 - Service tax dated 04 May 2017

Central Excise - Decisions

Refund of Excise Duty paid

The taxpayer was operating as an EOU and in the month of November 2011 they intimated their intention to exit from the EOU scheme. Accordingly, the taxpayer paid the applicable duties on finished goods lying in the stock. Basis the provisions of Central Excise law, when the taxpayer has paid the applicable excise duty on the finished goods in stock at the time of de-bonding, they need not pay excise duty, when the said goods are cleared in DTA. However, the taxpayer inadvertently, cleared certain finished goods on payment of excise duty. When the taxpayer realised that they have paid excise duty twice on the said goods, refund application was filed. The original authority sanctioned the refund claim. However, the department filed an Appeal before the Commissioner (A) against the said refund sanction, who upheld the sanction of refund. The revenue aggrieved by the said order, preferred an Appeal before the CESTAT.

The Hyderabad Tribunal considering the submissions observed that the argument by the department is that initial duty paid by the respondent is for meeting the requirement of de-bonding from EOU to DTA. This amount cannot be refunded, since it would tantamount of non fulfilment of mandatory requirement for de-bonding. The duty has been paid a second time by the respondent, while clearing the goods in DTA. This amount also cannot be refunded as it is hit by unjust enrichment, since the duty has been collected by the respondent from the customers. When the duty is paid by the respondent as a mandatory condition for conversion of EOU to DTA, the duty paid is Central Excise duty on the goods. The respondent need not pay duty on the goods again. However, by mistake they paid central excise duty on the goods again while clearing the goods in DTA. It is correct that such duty was collected from the customers while clearing the goods in DTA and hence, the goods have suffered Excise duty twice. Therefore, the lower authorities have taken the view that the duty paid by the respondent at the time of conversion is eligible for refund.

Further, the Tribunal held that when the respondent has paid duty for the second time on the goods by raising invoices, the earlier duty paid at the time of conversion becomes an extra duty and becomes a mere deposit in the hands of the department. The duty that is collected by invoices from customers is central excise duty and the same can be imposed on the goods only a single time. At the time of conversion, from EOU to DTA, the duty is collected in order to protect Revenue. The amount is collected in the nature of Central Excise duty and not as a fee for de-bonding. On such score, the duty paid by the respondent while de-bonding from EOU to DTA becomes a deposit in the hands of the department and therefore is to be refunded to the taxpayer, in case the duty is paid once again at the time of clearance of goods in DTA.

CCE vs RHI Clasil Ltd. (2017-TIOL-1514-CESTAT-Hyd)

At the time of availment of CENVAT credit on inputs, final product is dutiable, later, when final product became exempt, CENVAT credit is not required to be reversed

In the instant case, the taxpayer is engaged in manufacturing of pet jars/bottles/cans, which were captively used for manufacture of the final product i.e. mustard oil. The taxpayer was availing CENVAT credit on the inputs used in the manufacturing of final goods. On realising that pet jars/bottles/cans manufactured by them were exempted under Notification No. 10/96 C.E., they stopped paying Excise duty and surrendered their Excise Registration Certificate. On pointing out by the Revenue, the taxpayer deposited an amount, which was attributed to CENVAT credit involved on inputs lying in stock, inputs contained in semi-finished goods and inputs contained in finished goods on the date of opting of exemption along with interest. Thereafter, the taxpayer filed a refund claim of amount paid on account of CENVAT credit along with interest on the ground that there was no provision for reversal of CENVAT credit, therefore, the amount deposited is to be refunded. The said refund claim was rejected.

In the above backdrop, the CESTAT observed that the said issue is settled by the High Court of Punjab & Haryana in the case of CCE, Panchkula v. HMT (TD) [2010-TIOL-316-HC-P&H-CX] holding that at the time of availment of CENVAT credit on inputs, the final product is dutiable, later on the final product became exempt, in such a situation, CENVAT credit is not required to be reversed. Therefore, in the instant case also, at the time of opting exemption, the taxpayer was not required to reverse CENVAT credit. Accordingly, it was held that the appellant is entitled for refund claim filed by them.

Khandelia Oil & General Mills Pvt Ltd vs CCE (2017-TIOL-1366-CESTAT-CHD)

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Notifications/Circulars/Press Releases

Quantum of mandatory 'Pre-Deposit' for filing an appeal before the CESTAT

A circular has been issued to clarify the quantum of mandatory 'Pre-Deposit' required for filing an appeal before the CESTAT. The circular was issued to give effect to the CESTAT's larger bench decision resolving the issue as to whether an appellant is required to deposit 10 per cent over and above the deposit of 7.5 per cent of the duty liability/penalties in terms of Section 35F of the Central Excise Act, 1944 and 129E of the Customs Act, 1962.

It was clarified that the taxpayer is required to deposit 10 per cent of the mandatory deposit, over and above the mandatory deposit of 7.5 per cent of the duty liability/penalties in terms of Section 35F of the Central Excise Act, 1944 and 129E of the Customs Act, 1962.

Circular F.No.390/Misc./37/2017-JC, dated 9 May 2017

Customs duty

Notifications/Circulars/Press Releases

Monitoring of 'Export Obligation Fulfillment' under EPCG and Advance Authorisation Schemes

With regard to, action to be taken by the customs authorities for non-submission of Export Obligation Discharge Certificate within the stipulated time, a simple notice may be issued to the licence/authorisation holders for submission of proof of discharge of export obligation. In case, where the licence /authorisation holder submits proof of their application having been submitted to DGFT, the matter may be kept in abeyance till the same is decided by DGFT. However, in cases where the licence/authorisation holder fails to submit proof of their application for EODC/Redemption Certificate, extension/clubbing, etc., action for recovery may be initiated by enforcement of a bond/bank guarantee. In cases of fraud, outright evasion, etc., field formations shall continue to take necessary action in terms of the relevant provisions.

Circular No. 16/2017 – Customs dated 2 May 2017

Foreign Trade Policy: Notifications/Circulars/Press Releases

Utilisation of Duty Credit Scrips

Duty Credit Scrip can be utilised/debited for payment of Custom Duties in case, of EO defaults for Authorisations issued under Chapters 4 and 5 of previous Foreign Trade Policy as well. The Para 3.18(a) of the Foreign Trade Policy 2015-20 has been amended to bring more clarity on the utilisation of Duty Credit Scrips for payment of Customs Duties in case of EO defaults.

Notification 04/2015 – 20 dated 21 April 2017

VAT - Decision

Retrospective amendment in the Act is valid when intent of legislation is apparent from statutory provisions, irrespective of its faulty implementation mechanism

In the present case, the taxpayer had opted for the Packaged Scheme of Incentives, 1993 (PSI Scheme) in the state of Maharashtra and was entitled to claim MVAT exemption on the goods production carried out by eligible units. The Scheme originally stated that, fixed assets acquired outside the scheme if accepted can be considered for the purpose of proportionate incentives. Thereafter, in 1994, vide a government resolution, the word 'proportionate' was deleted, thereby giving an impression that entire acquisition of new assets would be considered for the purpose of incentives.

Subsequently, a Trade Circular was issued in 1998 by the Commissioner of Sales Tax, stating that the incentive would be given in proportion of expansion capacity to total capacity and not on entire production of an eligible unit. However, the Maharashtra Sales Tax Tribunal rendered the circular as invalid on the basis that an administrative circular contrary to the scheme could not be issued as the scheme was statutory in nature. The Hon'ble High Court upheld the order of the Tribunal. Thereafter, the state government amended the Bombay Sales Tax Act, 1959 (BST Act) and introduced a provision on proportionate incentives to an Eligible Unit overriding the PSI Scheme. Similar provision also continued under the Maharashtra Value Added Tax, 2002 (MVAT Act). However, no rules were framed in relation to computation of such proportionate turnover till the year 2009.

In 2009, the aforesaid section of the MVAT Act was amended retrospectively from 1 April 2005, and the ratio in proportion to which benefit could be availed under the PSI Scheme was introduced, requiring the assesse, who had already availed of exemption benefit on the entire turnover, to pay VAT on proportionate turnover from the period 2005. The taxpayer filed a writ petition with the HC challenging constitutional validity of the amendment. It was contended exemption was available on the entire turnover as no rules were framed to restrict the exemption only up to proportionate turnover under BST Act & MVAT Act and allowing exemption only on proportionate turnover amounts to a fresh levy with retrospective effect, thereby, violating the Article 14 of the Constitution of India.

The High Court observed that, the legislature has the power to enact a law prospectively as well as retrospectively and where a law suffers from an infirmity, it is constitutionally permissible for the legislature to cure the same by removing the defect in the earlier legislation. The provisions restricting the exemption to proportionate turnover, were overriding the PSI Scheme, however, the government did not prescribe the ratio to calculate the proportionate turnover in order to avail the exemption. Also, retrospective operation of such amendment is permissible as it was in the nature of a valid legislation and it is permissible for the legislature to remedy the defect by curing it. Thus, the High Court rejected the taxpayer's contention that a new levy was imposed with retrospective effect and dismissed the writ petition.

Thereafter, the taxpayer filed an appeal before the Supreme Court, and argued that the High Court has failed to appreciate the consequences and practical impact of the retrospective amendment on the industrial units, which did not recover any VAT from their customers and if VAT would have been recovered from customers during such period, it would have been considered as illegal and constituted as criminal offence. Referring to various judicial pronouncements, the learned counsel of the state submitted that, the Legislature is empowered to enact a law, either prospectively or retrospectively and also empowered to nullify the effect of a judicial decision by changing the law retrospectively by removing the basis on which the decision was pronounced. Also, retrospective enactment cannot be impugned on the ground that the retrospective levy did not afford any opportunity to the dealers to pass on the tax to consumers.

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The Supreme Court affirmed that where law suffers from an infirmity, it is permissible for the legislature to cure the same. This is known as legislation of validating nature, which is constitutionally permissible in as much as such validating law is in the nature of removing the defect in the earlier legislation. Further, in connection to trade circular issued by Commissioner of Sales Tax, the Supreme Court stated that the government did prescribe a ratio for computation of proportionate turnover eligible for exemption under PSI Scheme but have chosen an incorrect method by issuing an administrative circular rather than issuing statutory notification in the form of rules. Such mistake is rectified by way of amending the MVAT Act and therefore it was not a new levy. The Supreme Court also mentioned that it is concluded in various judgements of this court that the legislature had given power to the state government to prescribe the ratio/proportion in which the benefit was to be given. It was also observed that, it is also settled a position in law that the dealer upon whom the tax is imposed is not in a position to pass on tax on the consumers, is of no relevance to the competence of the legislature.

M/s. Eurotex Industries & Exports Ltd. and ANR v. State of Maharashtra and ANR, TS-116-SC-2017

Notifications/Circulars/Press Release/Order

Gujarat

Effective from 12 May 2017, every registered dealer will have to file a monthly inventory statement in Form 201C instead of quarterly inventory statement. Further, prescribed registered dealers have been given the option to file the quarterly inventory statement in Form 201C instead of half yearly inventory statement.

Notification No. (GHN-15) VAR-2017 (44)Th dated 12 May 2017

Maharashtra

Effective from 15 April 2017, Maharashtra government has introduced a scheme for remission of 75 per cent interest liability for the class of dealers who had failed to obtain registration under the Maharashtra Value Added Tax Act, 2002 (MVAT Act), on fulfilment of conditions stipulated in the notification.

Notification No. VAT. 1517/CR-43(C)/Taxation-1- Dated 19 April 2017

The following budget proposals made under the Maharashtra Budget 2017-18, have been approved by the Governor and would be effective from 15 April 2017:

a) Amendments related to assessments and appeals [Section 23 and 26 of MVAT Act]:-

- Powers of remand back to First Appellate Authority (FAA):-

  FAA has been empowered to set aside the ex-parte assessment order and refer the case back to the assessing authority for making fresh assessment, within six months from the date of filing of an appeal. However, in case an appeal has been filed by the dealer prior to 15 April 2017, the said time limit is nine months. Also, assessing authority is required to pass fresh assessment order within 18 months from the date of communication of the order to him by the FAA.

- Cancellation of ex-parte assessment order [Section 23(11) of MVAT Act]:-

  No application in Form 316 for cancellation of ex-parte assessment order can be made, for orders passed on or after 15 April 2017. Therefore, the only option available with the dealer is to file an appeal before the concerned appellate authority.

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- **Compulsory pre-deposit for filing of appeal to FAA and Tribunal (Section 26(6A) and Section 26(6B):-**

  Effective from 15 April 2017, fixed part payment is required to be made by the dealer to file an appeal before the FAA and the Tribunal and submission of proof of payment (of below mentioned amounts), is a mandatory requirement for filing of an appeal:

Class of order appealed against	Payment if appeal before FAA	Payment if appeal before Tribunal
a) Order disallowing claim against declaration or certificate	100% of tax demanded	100% of tax demanded
b) Order disallowing claims as stated in (a) above and other grounds too	- 100% of tax demanded (non-produced declarations) - on other grounds (10% of tax disputed by appellant or INR15 crore, whichever is less)	- 100% of tax demanded (non-produced declarations) - on other grounds (10% of tax disputed by appellant or INR15 crore, whichever is less)
c) (c) other than a and b above	10% of tax disputed by appellant or INR15 crore, whichever is less	10% of tax disputed by appellant or INR15 crore, whichever is less
d) (d) Appeal to FAA (penalty order) **And** Appeal to Tribunal, for any other order	As fixed by FAA but not more than 10% of penalty amount	As directed by Tribunal

b) **Time limit for filing an appeal before the High Court (Section 27 of MVAT Act):-**

Effective from 15 April 2017, the time limit for filing an appeal before the High Court by the Commissioner or the taxpayer, against an order passed by the Tribunal has been increased to 180 days from 120 days.

c) **Recovery from directors of a private company [Section 44 of MVAT Act]:-**

Directors can be held liable jointly and severally, for payment of dues of the private company, whether existing or wound up or under liquidation, for any period, if the same cannot be recovered for any reasons, unless proven that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part.

Trade Circular No. 11T of 2017 Dated 20 April 2017

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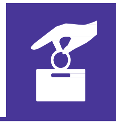
Personal tax



Notifications/Circulars/Press Releases

Government of India declares 8.65 per cent interest rate on Employees' Provident Funds Scheme

The Government of India has declared a rate of interest of 8.65 per cent for crediting interest on Provident Fund (PF) accumulation for members of the Employees' Provident Funds Scheme for the Financial Year (FY) 2016-17. The Employees' Provident Fund Organisation (EPFO) issued a Circular dated 27 April 2017 in this regard.

http://www.epfindia.com/site_docs/PDFs/Circulars/Y2017-2018/RateOfInterest_1617_906.pdf

Intern visa – Detailed guidelines issued by the Government of India

In order to meet the industry's demand and growing business needs of various multinational corporations operating in India, the Government of India has issued comprehensive guidelines on the 'intern (I) visa'.

As per the issued guidelines, intern visa may be sponsored by an Indian company or an educational institution or a Non-Government Organisation. The guidelines provide in detail the eligibility criteria, validity, quota, restrictions, special approvals and other matters which are applicable to the said visa.

The release of comprehensive guidelines on intern visa is a welcome step and would help clear lot of doubts that the Indian sponsors have on the said visa. Human resource and immigration managers of the Indian sponsors should take note of the guidelines and make the best use of the same per their business requirements.

Source – www.mha.nic.in

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