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TAX UPDATE

November, 2010

DIRECT TAX

Domestic Tax	1
International Tax	3
Transfer Pricing	6

INDIRECT TAX

Service Tax	7
Central Excise & Customs	10
All-India Value-Added Tax	13

Domestic Tax

1. Sarthak Securities vs. ITO (Delhi High Court) [WP(C) No. 6087/2010]

Reopening of assessment on mechanical basis under section 147 is void even where assessment under Section 143(3) is not made.

The assessee filed its return of income for the AY 2003-04 offering income of Rs. 15,360/-. The said return was processed and intimation under Section 143(1) was issued on 6th April, 2004 accepting the return and no assessment u/s 143(3) was made.

For the year under consideration the assessee allotted shares to four companies. The allottee companies were active as per the records of the ROC and were allotted PAN and assessed to income-tax. The AO subsequently received information from the ADIT (Inv) unit that the assessee had received "bogus accommodation entries" in the form of share application money from the said four companies. The AO accordingly issued a notice u/s 148 seeking to reopen the assessment. The assessee challenged the reopening on the ground that (i) the reasons did not disclose the basis on which the ADIT had termed the subscription money as bogus accommodation entries and (ii) the AO had assumed the information provided by the ADIT as gospel truth without verification or application of mind and (iii) as the alleged bogus shareholders were on the records of the department, they should be pursued against and not the assessee.

On writ preferred by the assessee, the High Court held that,

- (i) The AO is required to form an opinion and record reasons before he proceeds to issue a notice u/s 148. Only the reason so recorded can be looked at for sustaining or setting aside a notice issued u/s 148. No addition, substitution or deletion is permissible nor can an inference be allowed to be drawn based on reasons not recorded. The reasons recorded should be clear and unambiguous and not suffer from any vagueness. The reasons cannot be supplemented by filing an affidavit or making an oral submission.

- (ii) The AO cannot reopen the assessment merely on the basis of information received without applying his mind to the information and forming an opinion. The reasons must show due application of mind to the information. He also cannot reopen merely because he has been directed to do so by a superior officer.
- (iii) On facts, the AO was aware of the existence of the companies with whom the assessee had entered into transaction. The said companies were not fictitious companies and their existence or identity was not disputed. The companies had bank accounts and payments were received by the assessee through banking channel. The argument that the companies were used as conduits is not acceptable in view of *Lovely Exports 216 CTR 195 (SC)* where it was held that share money cannot be regarded as undisclosed income u/s 68 if the names of the payers are given to the AO. The reasons showed no application of mind as to how income had escaped assessment.

2. CIT v. Parle Plastics Ltd. (ITA No. 37 of 2002) (Bombay High Court)

Deemed Dividend provisions are not applicable if money lending constitute significant part of overall business.

The assessee is a company engaged in the business of manufacture of plastic caps for mineral water bottles. The plastic caps were supplied by the assessee to Aqua Minerals Private Limited (AMPL) which was engaged in the business of production, sale and distribution of soft drinks, aerated water and mineral water. The AO held that the unsecured loan given by AMPL to the assessee should be treated as deemed dividend under Section 2(22)(e) of the Act since common shareholders held 74% shares in the taxpayer and 66% shares in AMPL.

The assessee has contended that AMPL had deployed about 40% of the total assets into the business of lending which was a significant part of its business and hence it was covered under specific exclusion provided under Section 2(22)(ii) of the Act and therefore excluded from the definition of deemed dividend.

Domestic Tax

Against the said contention, tax department argued that lending of money was not a substantial part of the business of AMPL and therefore the assessee was not covered by the exclusion under clause (ii) of Section 2(22) of the Act. Further, in order to consider the activity of moneylending as a substantial part of the business of the lending company, the business of moneylending must constitute more than 50% of the business of lending company.

On appeal by the Department, the High Court held that, the expression "substantial part", used in the exception to the provision of deemed dividend, does not mean a "major part" i.e. more than 50%. In ascertaining whether a part of business is substantial to overall business of the company, various factors such as turnover, profits, manpower used and capital employed are to be taken into consideration. The legislature had deliberately used the word "substantial" instead of using the word "major" and/or specifying any percentage of the business or profit to be coming from the lending business of the lending company for the purpose of clause (ii) of Section 2(22) of the Act.

Further, it was held that the assessee's business was complimentary to the business of AMPL. It is common for a manufacturer of a product to give some advance to the suppliers of raw material or other parts used by the manufacturer in manufacturing its products. Such advances are commonly made in the usual course of business. AMPL had deployed about 40% of the total assets into the business of lending which was a significant part of its business.

Hence, the money lent by way of advance or loan to the assessee could not be regarded as a dividend since lending business was a significant part of the overall business of AMPL as required under clause (ii) of Section 2(22) of the Act.

International Tax

1. Emil Mathias Christian Weimert v. ACIT [2010-TII-150-ITAT-MUM-INTL]

Perquisite value of hotel stay of an employee of a parent company who has deputed to Indian subsidiary and receiving salary from subsidiary should be taxed in India. Also, tax paid by the employer on behalf of assessee and once included in income cannot be again included as perquisite.

Emil Mathias Christian Weimert ("the assessee"), was a German national and employee of Siemens AG, Germany. The assessee was deputed to Siemens India Ltd. and he stayed in a hotel for 235 days during his deputation. In addition to German remuneration, the assessee was also entitled to salary from Siemens India Ltd.

While making assessment, AO treated the country allowance, tax perquisite and house perquisite received by assessee as its income for the relevant year.

On appeal, CIT(A) disagreed with view taken by AO on taxing country allowance and also ordered for revised computation of taxable perquisites to be included as income of assessee for tax perquisite received. However, he conferred with the view of AO on taxing house perquisites as the assessee was getting a remuneration from his parent company in addition to salary from Siemens India and had stayed in a hotel in India for 235 days.

On further appeal before Tribunal, the court has observed as under:

On the issue of taxability of "house perquisites", the assessee contended that AO ignored the rule that perquisite has to be calculated at 24 per cent of the salary or the actual rent charges received, whichever was lower. The assessee had already declared actual rent charges received as Rs.2.47 lacs while he had already admitted perks of Rs 2.10 lacs. Therefore, only the differential amount of Rs. 0.37 lacs could be considered as income.

The Tribunal concluded that AO failed to consider the amount of actual rent paid or payable to the hotel while calculating the perquisite, due to which there was an apparent mistake in AO's calculation itself. Hence, the assessee's submission that only the differential amount of Rs.0.37 lacs should be considered as income was accepted.

With regard to taxability of "tax perquisite", the assessee submitted that he had already included the amount of tax borne by the parent company including interest as his income. However, AO further calculated tax on this "tax perquisite" and brought an additional amount of Rs.3.22 lacs to tax.

The Tribunal held that the tax paid by employer on behalf of employee was a perquisite within the meaning of Section 17(2). Further it was held that tax on "tax perquisite" should not be considered as a perquisite, after considering the special bench decision in case of RBF Rig Corporation LIC Vs. ACIT. Therefore, the AO was directed to exclude the tax on "tax perquisite".

2. DDIT v. Reliance Industries Ltd. (Judgment Date:29/10/2010)

Mumbai Tribunal rules that purchase of copyrighted article is not purchase of software and does not amount to transfer of any part of Copyright and hence was not taxable as "royalty" under the provisions of the Act or under India-USA tax treaty.

Reliance Industries Ltd. ["The taxpayers"], a listed public limited company, entered into a license agreement with a US entity for purchase/use of software. The taxpayer was granted non-exclusive, perpetual, irrevocable, royalty free, worldwide license to use specified number of copies for internal operations. The US entity transferred software to taxpayer on computer disk from outside India on FOB basis.

The taxpayer filed an application under Section 195(2) before Assessing officer (AO) for granting "Nil" withholding tax certificate in respect of payments to be made for purchase of software. The AO held that software is an intellectual

International Tax

property and falls within the category of copyrights, patents, etc. and thus amounts to royalty within the meaning of Section 9(1)(iv) of the Act and also under the Article-12(3) of the tax treaty between India and USA.

It was contention of AO that said license was granted for use of software. Accordingly, payment to be made for license to use a software was "royalty" within the meaning of Section 9(1)(iv) of the Act. AO also contented that even under the tax treaty between India and USA, payment for license of software was to be treated as "royalty".

On the other hand, the taxpayer contended that various judicial authorities had held that purchase of copyrighted article was different from purchase of copyright itself. Accordingly, the payments to be made by the taxpayer to US entity could not be considered as "royalty" which was taxable in India.

On appeal, CIT(Appeals) held that under the terms of Software Contract, the taxpayer acquired only a copy of software programme and did not acquire any copyright over such software. Thus payment to be made by taxpayer to US entity cannot be said to be payment for use of or right to use of any copyright.

On further appeal, the Tribunal held that:

- Computer software, after being put on to media and then sold, becomes goods like any other Audio Cassette or painting on canvas or a book. Therefore, AO was wrong in holding that providing computer software copies on a media disk amounts to providing intellectual property right.
- The taxpayer purchased a copyrighted article and not copyright itself and there was no transfer of any part of copyright. Accordingly, the payment received by US entity cannot be termed as "royalty" which was taxable in India.
- The amount payable/paid by the taxpayer to US entity will be covered under Article 7 dealing with "Business Profits". However, in the absence of any permanent establishment of US entity in India, the payment received by US entity was not taxable in India. Therefore, the taxpayer was not required to withhold tax at source in this case.

3. International Global Networks BV v. DDIT [2010-TII-140-ITAT- MUM-INTL]

Income arising from sale of time slots for advertising on behalf of the non-resident holding company should be taxed in the hands of the assessee and not in the hands of the holding company.

The assessee, "International Global Networks BV", a company incorporated in Netherlands, was granted exclusive rights for sale of advertising time in India on the channels up to 31.03.1999. The assessee appointed Star India Pvt. Ltd. as its collecting agent in India with respect to advertising charges from Indian advertisers for advertisement placed on the channels.

The revenues earned by assessee in India were reported to tax authorities on 'receipt' basis at a deemed profit rate of 10% under the provisions of Circular 742 dated 02.05.1996 issued by CBDT.

The assessee was a tax resident of Netherlands and in the return of income, it reserved the right to be taxed as per the provisions of the India-Netherlands Tax Treaty even though it was offering its income to tax as per the provisions of Circular No.742 dated 02.05.1999 issued by CBDT.

During assessment year 2004-05 (financial year 2003-04), although no income accrued to assessee, it received advertisement revenues relating to invoices raised prior to 01.04.1999. The assessee reported the amount received as income for the assessment year 2004-05 by computing profit @10%.

However, AO made a protective assessment by concluding that the income was taxable in the hands of the assessee's holding company i.e. Satellite Television Asian Region Limited ("STAR Ltd."), on the ground that the assessee was a mere 'conduit' for STAR Ltd. Further, the income of the assessee was computed at the rate of 20% of the gross advertising revenue.

International Tax

On appeal, CIT(A) upheld the order of AO.

On further appeal, the Tribunal disapproved the decision of CIT(A) upholding the decision of AO for taxing the holding company rather than the assessee. The Tribunal observed that:

- There was no dispute that the advertising revenues were generated through the commission agent i.e. Star India Pvt Ltd and that the commission agent was paid a fair remuneration for its services.
- The commission income was already taxed in the hands of Star India Pvt Ltd, and, in terms of the circular 23, taxability in respect of such sales cannot extend beyond that income.
- Also, according to decision pronounced by Bombay High Court in the case of SET Satellite (Singapore) Pte. Ltd. Vs DDIT (307 ITR 205), where sales by a non-resident to Indian customers are secured through an agent, the assessment of income in India arising from the said transaction will be restricted to amount of profit which is attributable to the agents' services.

Thus, income arising from sale of advertising time slots were to be taxed in the hands of assessee-company and not in the hands of its holding company.

4. M/s. Goldcrest Exports v. ITO [2010-TII-124-ITAT-MUM-INTL]

Compensation payable for breach of contract to a foreign company would not be taxable in the hands of the foreign company in the absence of a permanent establishment (PE) in India. Deduction claimed by assessee for compensation including interest, cannot be disallowed on account of non-withholding of taxes thereon.

M/s. Goldcrest Exports ("Assessee") was engaged in the business of export and import and was also trading in different commodities. The assessee had

entered into a contract with a foreign company through a broker for supply of commodities. It repudiated the contract and consequently the foreign company claimed compensation from the assessee through arbitration proceedings. The arbitrator passed the award against the assessee, requiring the assessee to pay compensation including interest.

The Assessing Officer disallowed the compensation paid to the foreign company on the ground that the assessee had not withheld taxes in terms of provisions of Section 195(1) of the Income-tax Act, 1961 ("the Act"). On appeal by the assessee, the Commissioner of Income-tax (Appeals) upheld the Assessing Officer's order.

On further appeal before the Tribunal, the assessee contended that:

- The compensation was a business profit since it had arisen out of a trading contract entered between the assessee and the foreign company.
- The contract entered was only for the supply of goods. As such, the broker was not the dependent agent of the foreign entity and therefore the foreign company had no PE in India in terms of the provisions of Article 5(5) of the tax treaty.
- Since the Foreign company had no Permanent Establishment in India, the obligation to deduct tax at source does not arise.
- Reference was drawn to the judgement in case of Islamic Investment Co. wherein it was held that interest awarded in an arbitration award loses its original character and assumes the character of a judgement debt. Therefore, interest partakes the character of compensation itself.
- In light of the above observation, the Tribunal held that the compensation including interest would be allowable as deduction to the assessee.

Transfer Pricing

1. M/s. Panasonic India Private Limited

During F.Y. 2001-02, the assessee was operating three business divisions, viz, Consumer Product Division (CPD), System Products Division (SPD) and Industrial Sales Division (ISD). The ISD division had incurred losses during the relevant financial year.

The first two divisions performed trading functions whereas the third one performed commission agency functions. For the purpose of transfer pricing documentation, the assessee had aggregated CPD and SPD divisions in the capacity of distributor and considered ISD in the capacity of business agent. The aggregated international transactions under CPD and SPD divisions were benchmarked with TNMM method taking net operating profit margin on sales as profit level indicator and transactions under ISD division were also benchmarked with TNMM method taking net operating profit margin on net cost. While doing the benchmarking, the assessee considered the reimbursement of advertising cost as part of operating revenue. For the purpose of benchmarking of loss making operations of ISD, the assessee relied on the average of past 2 years financial including the financial year under consideration.

During the course of transfer pricing assessment, Transfer Pricing Officer (TPO) rejected the benchmarking made by the assessee and proposed addition, on the following grounds:

- The transactions of CPD and SPD cannot be aggregated due to differences in the nature which cannot be said as closely integrated and interconnected.
- Reimbursement of advertisement expenditure are in the nature of non-operating revenue and should be excluded while arriving at net profit margin,
- Losses of ISD division are not attributable to low volume which can be regarded as specific business dynamics.

Aggrieved by the order of the Assessing Officer, the assessee preferred an appeal to the Commissioner of Income Tax (Appeals) (CIT(A)). CIT(A) upheld the findings of TPO. Being aggrieved by the order of the CIT(A), assessee preferred an appeal before the Income Tax Appellate Tribunal (ITAT).

The tribunal after considering the facts and rival submission of parties to the appeal has concurred with the contentions of assessee and decided in assessee's favour. The important observation made by the ITAT are as under:

- For the applicability of TNMM method, functional similarity is required. Functions, assets and risks (FAR) of both the divisions are same as both are engaged in trading activities.
- The list of comparables used by the TPO is same for both the division which further substantiate that FAR is same in both the divisions.
- Keeping in view the above two claims, the Tribunal affirmed the aggregation of the CPD and SPD divisions.
- Also, the receipt of reimbursement of advertisement expenditure is related to the business of taxpayer and thus cannot be ignored although there was no contract regarding this aspect.
- In case of the ISD division, the tribunal observed that the taxpayer incurred losses on account of low volumes and not due to any association with the third party. Determination of transfer prices was done by the use of multiple year data for both the taxpayer and comparable companies as required under the proviso to rule 10B(4).
- Taxpayer's argument of relying upon the valuation done by Special Valuation Bench (SVB) of the custom department to justify arm's length price was held wrong by the tribunal as it held that where specific rules of law exist in the statute on a particular subject, they would hold the field.

Service Tax

Judicial Pronouncements

Notification No. 49/2010

A composition scheme for lottery ticket marketing agents and distributors whose services are taxable u/s 65(105) zzzzn has been introduced:

Sl. No.	Rate	Condition
1.	Rs 6000/- on every Rs 10 Lakh (or part of Rs 10 Lakh) of aggregate face value of lottery tickets printed by the organising State for a draw	If the lottery or lottery scheme is one where the guaranteed prize payout is more than 80%
2.	Rs 9000/- on every Rs 10 Lakh (or part of Rs 10 Lakh) of aggregate face value of lottery tickets printed by the organising State for a draw	If the lottery or lottery scheme is one where the guaranteed prize payout is less than 80%

The distributor or selling agent should exercise such option within a period of one month of the beginning of each financial year and such option shall not be withdrawn during the remaining part of that financial year. The distributor or selling agent should exercise such option for financial year 2010-11, within a period of one month of the publication of this sub-rule in the Official Gazette or, in the case of new service provider, within one month of providing of service and such option shall not be withdrawn during the remaining part of that financial year.

Notification No. 50/2010

If the distributors or selling agents authorised and appointed by State adopt the composition scheme mentioned above, then the persons marketing the lottery tickets other than the distributors or selling agents will be exempt from paying service tax on the taxable service. However, if the authorised agents have not adopted for the composition scheme then the persons marketing the lottery tickets will have to pay service tax on the taxable service.

2010-TIOL-686-HC-MUM-ST

THE COMMISSIONER OF CENTRAL EXCISE, NAGPUR Vs MANIKGARH CEMENT (High Court, Mumbai)

Service tax: CENVAT credit cannot be availed on the service tax paid on services of repair, maintenance and civil constructions used in the residential colony.

Assessee is engaged in manufacturing of cement and has constructed a residential colony for the purpose of welfare of employees.

CENVAT credit in respect of the said activity is not allowable as input credit on the following ground:

1. Establishing a residential colony for the employees and rendering taxable services in that residential colony may be a welfare activity undertaken while carrying on the business and such expenditure may be allowable under the Income Tax Act. However, to qualify as an input service, the activity must have nexus with the business of the assessee. The expression 'relating to business' in rule 2(l) of CENVAT Credit Rules, 2004 refers to activities which are integrally related to the business activity of the assessee and not welfare activities undertaken by the assessee.
2. As per the case of Maruti Suzuki Limited vs. Commissioner of Central Excise, Delhi, unless the nexus is established between the services rendered and the business carried on by the assessee, the benefit of CENVAT credit is not allowable.

Service Tax

2010-TIOL-686-HC-MUM-ST

THE COMMISSIONER OF CENTRAL EXCISE, NAGPUR Vs

- 1. M/s ULTRATECH CEMENT**
- 2. CESTAT, MUMBAI**

Service tax: CENVAT credit can be availed on service tax paid on mobile phone service.

In 2006-2007 the respondent-assessee had availed CENVAT Credit of Service Tax paid on various input services including Mobile Phone service.

Central Board of Excise & Customs' Circular dated 20th June, 2003, the Board has clarified that the credit of Service Tax is not available on mobile phone.

Under Rule 3(6) of the Service Tax Credit Rules, 2002, service tax credit was available in respect of such telephone connections which are installed in the premises from where output service is provided.

However, the above mentioned circular and Rules will not be relevant for the period governed by The CENVAT Credit Rules, 2004.

Interpreting the provisions of 2004 Rules, the Central Board of Excise and customs has issued a circular on 23rd August, 2007 superseding all earlier circulars and has held that credit of service tax on mobile phones would be available under the 2004 Rules.

2010-TIOL-1357-CESTAT-DEL

M/s. SAYAJI HOTEL LIMITED Vs CCE, INDORE

Service Tax – Mandap Keeper – Cost of Food supplied cannot be deducted under Notification No. 12/2003 – Only abatement under Notification No. 1/2006 can be allowed

Assessee provides Mandap keeper and other services. Initially the hotel was availing the abatement of 40% in terms of notification no. 12/2004-ST. But after issue of notification no. 12/2003-ST the assessee started availing benefit of such notification from March 2005.

(Notification no. 12/2003-ST states that the value of goods and materials sold by the service provider to the service recipient shall be exempt from service tax leviable under Section 66 of Finance act.)

It was held that assessee cannot claim benefit of the notification no. 12/2003-ST because it does not have any distinct evidence to clearly show the amount of goods sold while providing service.

Therefore, the assessee will be governed by notification no. 1/2006-ST for concessional taxation in respect of catering receipts from the gross value of mandap keeper service.

Also the levy of sales tax or VAT will not have an impact on service tax levied under Finance Act, 1994.

2010-TIOL-1362-CESTAT-MUM

M/s. MILEEN ENGINEERS Vs COMMISSIONER OF CENTRAL EXCISE, MUMBAI-III

Service tax - No input service is available on the telephone installed at the residence of the executive of the appellants.

The appellants availed the facility of CENVAT credit of the duty paid on the inputs as well as Service tax paid on the services of CHA for clearance of their import and

Service Tax

export consignments and telephone installed in the residence of the executive of the appellants firm.

The services on clearing and forwarding CHAs availed by the appellants are eligible for input service credit as it had been allowed by the Tribunal in several cases and the same had attained finality. However, the telephone installed at the residence of the Executive of the company is not entitled for input service credit as clarified in the Board's Circular No.59/8/03 dated 22.06.2003.

2010-TIOL-1366-CESTAT-BANG

M/s. SOBHA DEVELOPERS LTD. Vs CCE, BANGALORE

Service Tax – Import of service – Services provided by foreign consultancy firm viz., attending due diligence and drafting sessions with underwriters, company representatives and auditors, conducting legal due diligence etc. are in the nature of legal services and not management consultancy service – Recipient liable to service tax only from July 7, 2009

The appellant received services of an amount of Rs.11, 63,695/- from M/s. Dorsey & Whitney, LLP based in U.K. The appellant had paid the service provider charges for the services rendered under. Invoice dt.25/8/2006 and dt.15/11/2006. Service received were classifiable under 'management consultancy' as defined under sub-clause (r) of Clause of 105 of Section 65 of the Finance Act, 1994 (the Act). The appellants had received the following services in connection with its 'initial public offering' outside India.

- i. Attending due diligence and drafting sessions with the underwriters, company representatives, their auditors and their Indian Legal advisors;
- ii. Conducting legal due diligence on the company;
- iii. Reviewing and commenting on and drafting portions of the prospectus and drafting the international wrap;

- iv. Advising on publicity and research issues;
- v. Drafting and negotiating the comfort letter with the auditors on the company.
- vi. Other matters incidental to the above.

From the definition of management consultancy, it is clear that legal services of the type received by the appellant herein would not constitute management consultancy services. Reference can also be made on clarification issued by the Service Tax Commissionerate, Delhi DT. 26/11/2007 wherein, the CBEC had clarified that the services by a lawyer in his professional capacity relating to law were not taxable under the services.

Legal consultancy services were brought into tax net only in the year 2009, much after the period of dispute. Hence, the appellant will not be taxed for the above amount.

Central Excise & Customs

Central Excise

Judicial Rulings

Tribunal is bound by the decision of any High Court even though of different state

CCE, MUMBAI-III Vs M/s. VALSON DYEING BLEACHING & PRINTING WORKS [2010-TIOL-710-(High Court – Bombay)]

The respondents are engaged in manufacturing man-made fabrics classifiable under Chapters 52, 54, 55 and 60 of the Schedule to Central Excise Tariff Act, 1985. The said goods were notified goods exigible to Excise Duty in accordance with the provisions of 3A of the Central Excise Act, 1944 ("the Excise Act") with effect from 16th December, 1998.

The issue was on the applicability of excise notification where the Mumbai Tribunal did not examine the validity of the Notification but merely followed the decision of Madras High Court's in case of Beauty Dyers v. Union of India and ruled it in favour of the respondents.

The issue before the High Court in the present case was whether the Tribunal is justified in following judgment of High Court of a different state to decide the case on hand.

It was held that the Tribunal is bound by the decision of a High Court, even of a different State so long as there is no contrary decision of any other High Court.

CENVAT Credit of Service Tax on services of repair, maintenance and Civil constructions used in residential colony are not admissible.

CCE, NAGPUR VS MANIKGARH CEMENT [2010-TIOL-720-(High Court – Bombay)]

The issue in this case is whether CENVAT credit is admissible on the amount of

Service tax paid on services of Repair, maintenance and Civil Constructions used in residential colony to the manufacture of cement.

It is held by the High Court that the residential colony for the employees and rendering of taxable services in that colony may be a welfare activity undertaken while carrying on the business and such expenditure may be allowable as deduction under the Income Tax Act, 1961. However, for the purpose of claiming credits, the same should qualify as input service and have nexus with business activities of the assessee.

Unless such nexus is established between the services and business carried on by the assessee, the CENVAT credit benefit is not admissible. Accordingly, in the given scenario, as the residential colony established by the assessee for the benefit of the employees is not an activity integrally connected with the business, the CENVAT credit on such services is not admissible as it does not constitute an 'input service' under rule 2(l) of the CENVAT credit Rules, 2004 ("CENVAT Rules").

CENVAT credit of Service tax paid on the telephone installed at the residence of the executive is not admissible.

M/S. MILEEN ENGINEERS VS CCE, MUMBAI [2010-TIOL-1362-(Tribunal – Mumbai)]

The issue involved in the present case was whether CENVAT credit of Service tax paid on the telephone installed at the residence of the executive is admissible.

Relying on Central Board of Excise & Customs Circular No.59/8/03 dated 22.06.2003, it was held by the Tribunal that CENVAT credit of Service tax paid on telephone sets installed in the business premises is only admissible. Accordingly, in absence of any finding that the telephone installed at the residence of the executive is exclusively used for business purpose, the CENVAT credit is not admissible.

Central Excise & Customs

Interest on differential duty in absence of provisional assessment

INDIAN EXPLOSIVES LTD Vs CCE & ST, NAGPUR
[2010-TIOL-1334-(Tribunal – Mumbai)]

The issue involved in the present case was whether the appellants are liable to pay interest under Section 11AB of the Excise Act on differential duty paid subsequent to the clearances of goods.

The appellants cleared goods to their sister-unit and made payment of duty on approximate basis. Subsequent clearances of the goods, at the end of the financial year, as per the cost construction method the appellants arrived at the cost of assessable value of the goods and paid the differential duty.

The Tribunal relying on the Apex Court's judgment in case of CCE, Pune vs. SKF India Ltd. held that interest is liable to be paid under Section 11AB of the Excise Act on payment of differential duty. This is more so as the appellants have not opted for Provisional Assessment.

CENVAT Credit on MS Plates, MS Joints and MS Steel is not admissible

CCE, TIRUCHIRAPPALLI Vs THIRU AROORAN SUGARS LTD.
[2010-TIOL-1311-(Tribunal – Madras)]

The issue involved in the present case was whether Beams, MS plates, MS joists, MS steels etc. could be treated as "capital goods" under CENVAT credit Rules, 2004 for claiming credit of duty paid on these goods.

The Tribunal relying in the case of Vandana Global Ltd. held that the items do not satisfy the definition of "capital goods" and hence CENVAT credit not admissible.

Unjust Enrichment – Uniformity in price does not indicate non-passing of duty to customer

THE CCE, AURANGABAD VS MIDAS CARE PHARMACEUTICALS PVT. LTD. [2010-TIOL-1346- (Tribunal – Mumbai)]

In the given case, the department has filed the appeal against the Commissioner (Appeal) since the claim of refund was being awarded to the assessee on the ground that since the Maximum Retail Price (MRP) of goods on which the duty is paid and the ones on which are cleared at NIL rate of duty was same during the period in dispute, it can be presumed that duty burden has not been passed on. Relying on the Apex Court's decision, the Tribunal concluded that mere uniformity in price does not indicate that duty burden has not been passed on to the customer. The case was remanded to the Commissioner (Appeal) for the fresh consideration. Also, the liberty to produce fresh evidence was allowed.

Levy of duty equivalent to input credit availed amounts to reversal of duty and the duty so paid cannot be considered as deposit under Section 11D of the Excise Act

CCE, MUMBAI-III VS M/S. CROMPTON GREAVES LTD.
[2010-TIOL-1318- (Tribunal – Mumbai)]

The respondent, in the present case, are repairing electrical motors manufactured by them within warranty period free of charge as well as those manufactured by other manufacturers on labour / job work basis. All the clearances were made under prescribed challans and duty is paid only on the electrical motors manufactured by them.

It was alleged against the respondent that they are doing job work and the activity undertaken by them for repairs under job work challan, they are not liable to pay any duty, and hence the credit taken on the inputs by them is liable to be reversed and the duty paid by them is to be treated as a deposit under Section 11D (1) of the Excise Act.

Central Excise & Customs

The provisions of Section 11D (1) of the Excise Act are attracted when duties of excise are collected from buyers to be deposited with Central Government. In the instant case, respondent has reversed the credit availed by them on the inputs used in repair of the transformers by paying the duty at the time of clearance.

Hence, the Tribunal held that provisions of Section 11D (1) are not attracted in the present case and accordingly, the appeal filed by department to consider the duty paid as deposited under the provision of Section 11D (1) has been rejected.

Applicability of Rule 6 of CENVAT Credit Rule, 2004

*CCE, PUDUCHERRY VS M/S. TANFAC INDUSTRIES LTD.
[2010-TIOL-1299-(Tribunal – Madras)]*

The primary criteria for the applicability of Rule 6 i.e. payment of duty at 10% value of the exempted goods, is applicable only when the assessee is manufacturing different categories of goods namely excisable goods and non-excisable goods. In the instant case there was no dispute the goods so manufactured by assessee are dutiable / excisable. It is only that these goods are cleared to certain categories of customers availing the exemption benefit under prescribed notification. Such practice does not make the goods non-dutiable / exempted. Relying on the ration laid down by Chennai Tribunal, the appeal filed by the department was rejected.

CUSTOMS

Judicial Rulings

Interest is payable only on delayed refund of duty and not on delayed refund of Fine or Penalty

*SMT. SARANGA AGARWAL Vs CC, CHENNAI
[2010-TIOL-1363-(Tribunal – Madras)]*

It was held by the Tribunal that interest is payable only on delayed refund of duty and not on delayed refund of Fine or Penalty as per the Customs Act, 1962.

All-India Value-Added Tax

Chandigarh

Chandigarh Notification increase Rate from 4% to 5%

Notification No. E&T-ETO (Ref) 2010/2856 Dated 26th October, 2010

Schedule	Serial No.	New Provision
A	Serial No. 4	Aquatic feed, poultry and cattle feed including feed supplements, grass, hay and straw except Pet Animal feeds and its supplements
A	Serial No. 50	Omitted
B	of Goods Taxable @ 4 Per cent	of Goods Taxable @ 5 Per cent
B	for serial No. 27	27. Cotton waste
B	serial No. 30	Omitted
B	serial No. 79	Omitted
B	serial No. 80	Omitted
B	for serial No. 82	Pipes and pipe fittings of ductile pipes and Poly Vinyl Chloride
B	for serial No. 134	134. Yarn of all types, including yarn waste and sewing thread except cotton yarn
B	for serial No. 155	Pet Animal feeds and its supplements
B	after serial No. 155	156. Sweetmeats (Halwai goods only)

Rajasthan

Exemption to the purchasing dealer from provisions of sub-section 2A of Section 20 of the Rajasthan Value Added Tax Act

Notification No. F12(39) FD/Tax/10-86., Dated 22nd October, 2010

In exercise to the powers conferred by the proviso to sub-section (2A) of Section 20 of the Rajasthan Value Added Tax Act, 2003 (Act No. 4 of 2003) read with sub rule (1) of rule 40A of the Rajasthan Value Added Tax Rules 2006, the State Government being of the opinion that it is expedient in the public interest so to do, hereby with immediate effect, exempts the following class of purchases from the provisions of the sub-section (2A) of Section 20 of the said Act.

Sl. No.	Details of Purchases
1.	Purchases of petroleum product from Oil companies registered under Rajasthan Value Added Tax Act, 2003 i.e. M/s. Indian Oil Corporation Ltd., M/s. Bharat Petroleum Corporation Ltd., M/s. Hindustan Petroleum Corporation Ltd., and M/s. Numaligarh Refinery Ltd.
2.	Purchases of all kinds of goods, where gross value of invoice is less than 50,000 (Rs. Fifty Thousand).
3.	Purchases of goods made by the Co-operative Society having contribution of State Government in its share capital from other co-operative societies.

Uttar Pradesh

Uttar Pradesh Circular Extend the Date for Annual Return

The government of Uttar Pradesh keeping in mind the various obstacles in filing of annual returns extended the date of filing Annual returns in Uttar Pradesh by 90 days from 31/10/2010.

All-India Value-Added Tax

Rajasthan

Extend the Date of Filing of Second Quarter Return

Notification No.F.16(375)Tax/CCT/2006/1092 Dated 27th October, 2010

The government of Rajasthan in pursuance of the powers conferred on it by sub-section(3) of Section 21 of the the Rajasthan Value Added Tax Act, 2003 (Act No. 4 of 2003 has extended the date of submission of the Second quarterly return (i.e. for the period ending on September 30, 2010) for the year 2010-11.

- 1) For dealers covered under Section 19 (7) upto 30/11/2010.
- 2) For others upto 15/11/2010.

Haryana

New Entry in Schedule C

Notification No. S.O. 106/H.A. 6/2003/S.59/2010 Dated 20th, October, 2010

The following serial number and entry there against shall be inserted schedule C, after serial number 21B, Compressed Natural Gas (CNG) sold for use in transport sector, Piped Natural Gas (PNG) supplied to domestic sector, and that sold for use in manufacture, against production of form VAT D-1.

Himachal Pradesh

Extention of the Annual filing of return upto 16th November, 2010

Notification No. EXN-F (10)- 5/2010- Dated 29th October, 2010

The date for filing the Annual return in the state of Himachal Pradesh has been extended. Annual return may be furnished by the registered dealer in Form VAT-XV-A on or before 16th November, 2010.

Judicial Pronouncements

Modi Industries Limited Vs State of Uttar Pradesh and Others

(Dated: April 27, 2010)

[2010] 34 VST 289 (All)

Where the price of goods and the packing material are separately charged in case of goods covered under the category of exempted goods, the value of packing material would not be exempted under Section 3AB of the Act. The same view which was expressed by the commissioner in the circular dated 30th September, 2003 was legally correct and in accordance with the provisions of the Act.

Mitsubishi Corporation India P. Ltd. Vs Value Added Tax Officer and Another (Dated: July 30, 2010)

[(2010) 34 VST 417 (Delhi)]

In order to attract Section 6(2) of the Central Sales Tax Act, 1956, it is essential that the sale concerned must be a subsequent inter-state sale effected by transfer of documents of title to goods during the movement of goods from one state to another and it must be preceded by a prior inter-state sale. When the conditions specified in Section 6(2) of the Central Sales Tax Act, 1956, whether in the main provision or in the provisos, are all satisfied the dealer would be entitled to exemption on the second or subsequent inter-state sale, irrespective of the fact whether the first sale was exempted or not.

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