ACCOUNTING, REGULATORY & TAX NEWSLETTER

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TABLE OF CONTENTS

ACCOUNTING UPDATES

ACCOUNTING UPDATES

The Institute of Chartered Accountants of India (ICAI)

1. **Ind AS Transition Facilitation Group (ITFG) Clarification Bulletin 8 and 9**

   ITFG issued various clarifications related to the applicability and /or implementations of Ind AS. Some of them are as follows:

   - The provision for the amount which is not spent on CSR activities may not be required in the financial statements. However, if a company has already undertaken certain CSR activity for which an obligation has been created, then in accordance with Ind AS 37, a provision for the amount of such CSR obligation needs to be recognized in the financial statements.
   - Disclosure of the impact of Ind AS 115, Revenue from Contracts with Customers: In accordance with Ind AS 8 Accounting Policies, Changes in Accounting Estimates and Errors, an entity is required to disclose the impact of Ind AS which has been issued but is not yet effective.

     However, Ind AS 115, which was earlier notified under Companies (Indian Accounting Standards) Rules, 2015, stands withdrawn under Companies (Indian Accounting Standards) (Amendments) Rules, 2016. Accordingly, an entity is not required to disclose the impact of Ind AS 115 for the financial year ending March 31, 2017.
   - In accordance with Paragraph 11 of Ind AS 101 the accounting policies that an entity uses in its opening Ind AS Balance Sheet may differ from those that it used for the same date using its previous GAAP. The resulting adjustments arise from events and transactions before the date of transition to Ind ASs. Therefore, an entity shall recognize those adjustments directly in retained earnings (or, if appropriate, another category of equity) at the date of transition to Ind ASs.

     Accordingly, the revaluation reserve should be transferred to retained earnings or if appropriate, another category of equity disclosing the description of the nature and purpose of such amount. This is because after transition, the Company is no longer applying the revaluation model of Ind AS 16, instead it has elected to apply the cost model approach.
     It may be noted that the requirements of Companies Act, 2013 for declaration of dividend will be required to be evaluated separately.

     It may also be noted that in accordance with Ind AS 12, Income Taxes, deferred tax would need to be recognized on any difference between the carrying amount and tax base of assets and liabilities. No deferred tax is created on equity components. However, since the asset has been revalued, there will be difference with respect to the amount between carrying value and tax base. Hence, deferred tax will have to be recognized on such asset.
   - The dividend income on an investment in debt instrument shall be recognized in the form interest. The recognition of income will depend on the category of investment in debt instrument (e.g. amortized cost, fair value through other comprehensive income or fair value through profit or loss) determined as per the requirements of Ind AS 109.

2. **Important Clarification on Amendment to Paragraph 17 of Revised Guidance Note (GN) on Audit of Consolidated Financial Statements (CFS**

   ICAI has issued a GN on CFS in October, 2016 which stated that the component auditor's observations on the component's financial statements, irrespective of whether the auditors of the component are also the auditors of the CFS or not, are required to be included in the parent auditor's report on the CFS, regardless of materiality.

   However, after detailed discussions, the Council concluded that the above guidance needs to be amended and accordingly ICAI issued a clarification that while considering the observations of the component auditor on the component's financial statements, the parent auditor should comply with the requirements of Standards on Auditing (SA 600), "Using the Work of another Auditor".

   SA 600 states that if the parent auditor considers the financial information of a component to be material in the preparation of CFS, the procedures outlined in SA 600 shall apply and if the parent auditor concludes that the financial information of a component is immaterial, the procedures outlined in SA 600 shall not apply.

ACCOUNTING UPDATES

However, when several components, immaterial in themselves, are together material in relation to the financial information of the entity as a whole, the procedures outlined in SA 600 should be considered.

3. **Expert Advisory Committee (EAC) issues an opinion on 'Accounting Treatment of Exchange Variation Arising in Respect of a Wholly Owned Foreign Subsidiary Company'**

   The queries raised in the EAC Opinion relate to the following matters:

   - Applicability of paragraph 46A to a subsidiary company, when the holding company has already opted the same for long- term foreign currency monetary items since 2012-13. In case if applicable to subsidiary company, whether there will be any prior period implication;
   - Suggested accounting treatment/disclosure in the consolidated financial statements of Company A in respect of exchange differences arising on account of long-term lease obligations in the books of Subsidiary B which has a participating interest in a joint venture.

   In respect of the above queries, the EAC has concluded as follows:

   - The company should have applied paragraph 46A to subsidiary company as well while preparing its consolidated financial statements. In view of this, the impact of not applying paragraph 46A by subsidiary in past in the context of consolidated financial statements, should be considered as prior period item and should be dealt with in accordance with Accounting Standard (AS) 5, 'Net Profit or Loss for the Period, Prior Period Items and Changes in Accounting Policies'.
   - The exchange differences arising on finance lease payable in the stand-alone books of joint venture would continue to be recognised in the consolidated statement of profit and loss of Company A (to the extent of subsidiary B's share in joint venture), even though the underlying finance lease payable (to the extent of subsidiary B's share in joint venture) is eliminated against the finance lease receivable. Further, the disclosures should be in accordance with the requirements of AS 11.

REGULATORY UPDATES

SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI)

SEBI streamlines norms for listing of Non-Convertible Redeemable Preference Shares ('NCRPS') / Non-Convertible Debentures ('NCDs') pursuant to Scheme of Arrangement ('Scheme')

SEBI vide circular dated March 10, 2017 had laid down the requirements to be complied with by the listed entity for filing of Scheme along with conditions for listing of equity shares, or warrants issued pursuant to Scheme. However, it did not cover guidance for listing of NCRPS and NCDs, which is now prescribed through circular dated May 26, 2017. The circular is applicable only in respect of NCRPS and NCDs issued to the holders of listed Specified Securities* vide a Scheme.

However, if same series/class of NCRPS/NCD are also allotted to other investors other than to the holders of Specified Securities, then such NCRPS/NCD shall not be eligible for seeking listing.

Key additional conditions supplemental to SEBI Circular No. CFD/DIL3/CIR/2017/21 dated March 10, 2017 to be complied with, before filing the Scheme for sanction by the National Company Law Tribunal ('NCLT')

Particulars	Conditions
Tenure/ Maturity	Atleast 1 year
Credit Rating	NCRPS/NCDs have been assigned minimum Credit Rating, if any, as specified for public issue of NCRPS under SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013 ('NCRPS Regulations') or for NCD under SEBI (Issue and Listing of Debt Securities) Regulations, 2008 ("ILDS Regulations'), by a registered Credit Rating Agency.
Valuation Report	Valuation of underlying NCRPS/NCDs issued pursuant to Scheme to be included in the Valuation Report
Additional Disclosure in Scheme	▪ Face Value and Price ▪ Terms of Dividend/Coupon including frequency, etc ▪ Credit Rating ▪ Tenure/Maturity ▪ Terms of Redemption ▪ Other embedded features (put/call option, dates, etc) ▪ Term Sheet ▪ Any other information/details pertinent to investors.

Particulars	Conditions
Other Conditions	▪ Mandatory compliance with all applicable provisions of Companies Act, 2013 ('Cos Act') ▪ Issue shall be in demat form only ▪ Appointment of Debenture Trustee, creation of an appropriate charge or security, in compliance with ILDS Regulations and Cos Act. ▪ Compliance with all the provisions of NCRPS Regulations and ILDR Regulations except for provisions related to Public issue, Private placement, filing of offer document, etc.
POST SANCTION OF SCHEME BY NCLT	The format of Compliance Report has been amended to include details of compliance with the abovementioned additional conditions

*Specified Securities means equity shares and convertible securities;

Permissible investments by Portfolio Managers, Alternate Investment Funds and Mutual Funds operating in IFSC

SEBI has amended the permissible investments by Portfolio Managers, Alternate Investment Funds and Mutual Funds operating in International Financial Services Centre (IFSC). As per the amendment, these investors are now permitted to invest even in securities which are listed on IFSC or issued by companies incorporated in IFSC, India or companies belonging to foreign jurisdiction. However, all investments by these investors shall be subject to guidelines stipulated by the Reserve Bank of India or the Government of India.

REGULATORY UPDATES

Further, it has been clarified that Portfolio Manager, Alternative Investment Fund or Mutual Fund shall invest in India through the Foreign Portfolio Investor (FPI) route.

Disclosure Requirements for Issuance and Listing of Green Debt Securities

SEBI has amended the SEBI (Issue and Listing of Debt Securities) Regulations, 2008 to define "Green Debt Securities" and has prescribed additional disclosure requirements for such green debt securities. The Circular provides guidance on the additional disclosures required to be made in the Offer Document and also specifies the continuous disclosure requirements. It also specifies the responsibilities of the issuer of such securities.

MINISTRY OF CORPORATE AFFAIRS ('MCA') AMENDMENTS

Notification of Companies (Acceptance of Deposits) Amendment Rules, 2017 to amend the Companies (Acceptance of Deposits) Rules, 2014

To put Infrastructure Investment Trusts (InvITs) at par with Alternate Investment Funds, Domestic Venture Capital Funds and Mutual Funds, the rules are made allowing InvITs to subscribe to Optionally Convertible Debentures and unsecured Non-Convertible Debentures of companies, without these being viewed as deposits.

- Any amount received by a company, from InvITs registered with SEBI, has been excluded from the definition of "deposit". The amendment brings InvITs at par with Alternate Investment Funds, Domestic Venture Capital Funds and Mutual Funds.
- Companies could accept deposits without a deposit insurance contract till 31 March 2017. The MCA amendment now permits companies to accept deposits without a deposit insurance contract till 31 March 2018 or till the availability of a deposit insurance product, whichever is earlier.

MCA notifies draft Companies (Registered Valuers and Valuation) Rules, 2017

The MCA has issued draft Companies (Registered Valuers and Valuation) Rules, 2017 which outlines the criteria for eligibility, qualifications and registration of registered valuers and also provides for recognition of valuation professional organisations. It also prescribes that valuation shall be done as per Valuation Standards which shall be notified by the Central Government. Further, it prescribes the contents of the Valuation Report. It also covers ancillary matters such as disciplinary procedure, model code of conduct, etc.

Clarification regarding due date of transfer of shares to Investor Education and Protection Fund (IEPF) Authority

MCA has issued a clarification pursuant to second proviso to Rule 6 of IEPF Authority (Accounting, Audit, Transfer and Refund) Amendment Rules, 2017. According to the Rule, where the seven year period under section 124(5) is completed during September 7, 2016 to May 31, 2017, the due date for transfer of such shares by companies is May 31, 2017. IEPF Authority is considering opening special Demat account and until opening of such Demat accounts, the earlier due date for transfer of shares being May 31, 2017 stands extended.

INSURANCE REGULATORY AND DEVELOPMENT AUTHORITY OF INDIA (IRDAI)

Insurance Regulatory and Development Authority of India (Appointed Actuary) Regulations, 2017

IRDAI has issued Insurance Regulatory and Development Authority of India (Appointed Actuary) Regulations, 2017. These regulations shall supersede Insurance Regulatory and Development Authority (Appointed Actuary) Regulations, 2000. These regulations lay down the following:

- Procedure for Appointment of an Appointed Actuary
- Duties and obligations of an Appointed Actuary, etc.
- Provisions for existing Appointed Actuaries as on date of notification of these regulations
- Cessation of Appointment of Appointed Actuary
- Powers of Appointed Actuary
- Duties and obligations
- Conflict of Interest

FAQ's on Insurance Ombudsman Rules 2017

IRDAI has issued FAQ's on Insurance Ombudsman Rules 2017. Ombudsman is an official appointed to investigate individuals' complaints against a company or organization, especially a public authority.

Some of the clarifications given in the FAQs are as follows:

- Who can approach Insurance Ombudsman
- Meaning of Insurance on Personal Lines
- Complaints entertained by the Insurance Ombudsman
- Procedure to lodge a complaint
- Time limit to approach the Insurance Ombudsman
- Whether Insurance Ombudsman is empowered to entertain a complain received after the expiry of specified time limit
- Circumstances under which complains cannot be filed before the Insurance Ombudsman, etc

REGULATORY UPDATES

IRDAI (Outsourcing of Activities by Indian Insurers) Regulations, 2017

IRDAI issued IRDAI (Outsourcing of Activities by Indian Insurers) Regulations, 2017. These regulations shall supersede the Guidelines issued in this regard vide Reference IRDA/Life/CIR/GLD/013/02/2011 dated February 1, 2011 and any clarification circulars issued in this regard.

These Regulations are applicable to all Insurers registered with the IRDAI excluding those engaged in reinsurance business. If an Insurer is engaged in both direct Insurance as well as Reinsurance business, these regulations are applicable only in respect of direct Insurance business of such Insurers.

These are applicable to outsourcing arrangements entered into by an Insurer with an outsourcing service provider located in India or outside India.

The objective is to ensure that insurers follow prudent practices on management of risks arising out of outsourcing with a view to preventing negative systemic impact and to protect the interests of the policyholders.

Investments - Master Circular - IRDAI (Investment) Regulations, 2016

IRDAI had issued various Circulars and Guidelines at different times enforce IRDAI (Investment) Regulations, 2016. This Master Circular covers all Circulars, Guidelines which are effective to date, to serve as one stand point reference. Areas covered by the Master Circular include:

- Investment Categories
- Risk Management And Concurrent Audit
- Valuation Guidelines
- Operational Procedure
- Disclosures And Reporting Norms
- Fund Clearance Formats & Investment Category Codes

INSOLVENCY AND BANKRUPTCY CODE

Insolvency Professionals (IP) to act as Interim Resolution Professionals (IRP) (Recommendation) Guidelines, 2017

IBBI has issued guidelines for Insolvency Professionals (IP) to act as Interim Resolution Professionals (IRP) on May 25, 2017.

As per the Insolvency and Bankruptcy Code, the Adjudicating Authority (AA) is required to make a reference to the Insolvency and Bankruptcy Board of India (Board) for recommending an IP to act as an IRP in case an operational creditor makes an application for corporate insolvency resolution process (CIRP).

On receipt of reference from AA for recommending the name of an IP, the Board has no information about the volume, nature and complexity of the CIRP or the resources available at the disposal of an IP. Therefore, it is necessary to have guidelines to recommend one IP out of all registered IPs for any CIRP.

TAX UPDATES
Direct Tax

CIRCULARS/ NOTIFICATIONS/PRESS RELEASES

Draft rules for ascertaining fair market value of unquoted equity share

Section 56(2)(x) of the Income-tax Act, 1961 (the IT Act) seeks to tax the recipient where property (that includes unquoted shares) is received without/ for inadequate consideration i.e. below fair market value (FMV). A separate section 50CA of the IT Act provides that if consideration for transfer of unquoted shares is less than FMV, such FMV will be considered as full value of consideration for computing capital gains. The Central Board of Direct Taxes (CBDT) has issued draft rules amending Rule 11UA for valuation of unquoted equity share for section 56(2)(x) and section 50CA. The salient features are:

- in aggregate from a single person or
- in respect of a single transaction or
- in respect of transactions relating to one event or occasion from a person.
- jewellery and artistic work – price it would fetch in open market (based on valuation report)
- immovable property – value adopted or assessed for stamp duty
- shares and securities – as specified in Rule 11UA
- other assets – book value

For further details, refer BDO India Transaction Tax Alert at http://www.bdo.in/en-gb/insights/alerts-updates/transaction-tax

[Press Release dated May 05, 2017 and draft Rules]

Draft Income Computation and Disclosure Standard (ICDS) on real estate transactions

The CBDT has released draft ICDS on real estate transactions for seeking stakeholders' comments. This draft is based on Guidance Note issued by ICAI. Some of the key features of draft ICDS are summarised below:

- Units connected with basic facilities, without linking to peripheral common amenities of club-house, entertainment, etc. will constitute a single project. This will ensure early recognition of revenue on such units, covered within narrower definition of project.
- Revenue recognition of real estate projects will be based on principles of Accounting Standard 9 or 7 depending upon economic substance of project. Where substance is in nature of construction contract; percentage of completion method is adopted. Draft ICDS prescribes similar principles.
- Amongst the conditions to be satisfied for revenue recognition, condition in respect of obtaining critical approval is not considered relevant and thus not incorporated in proposed ICDS.
- The development rights acquired in lieu of rights over existing structure/open land shall be recorded at fair value of such rights acquired.

[Press release dated May 11, 2017]

Furnishing of statement of financial transactions

As per section 285BA of the IT Act read with Rule 114E, specified class of persons are required to furnish statement of specified nature of transactions above prescribed threshold value such as receipt of cash payment for sale of goods or services, receipt in pursuance of issue of shares. The due date of furnishing this statement is extended from May 31 to June 30, 2017 for reportable transactions recorded during fiscal year 2016-17.

It is further provided that the registration of reporting person (ITDREIN registration) is mandatory only when at least one of the specified transaction type is reportable. A functionality "SFT Preliminary Response" has been provided on the e-Filing portal for the reporting persons to indicate that a specified transaction type is not reportable for the year. Accordingly, specified class of persons can file the

[Order dated May 31, 2017 and Press release dated May 26, 2017]

JUDICIAL UPDATES

Income from sub-licensing of shops and stalls treated as income from house property

The Supreme Court dealt with a case of firm taxpayer that had constructed shops and stalls on leasehold rights acquired in a property and had earned income from sub-licensing of same – leave & license fees and service charges for providing incidental services (security etc). The Supreme Court observed that the taxpayer would be treated as deemed owner of premises as per section 27(iiib) r.w.s 269UA of the IT Act (person acquiring lease rights in building/part thereof for more than 1 year) and thus income from sub-licensing should be computed under the head income from house property. Though taxpayer did not dispute on the 'deemed owner' conclusion, it submitted that income from sub-letting should be treated as business income since it was the main business activity. The Court dismissed the contention of taxpayer and noted that merely an entry in the object clause of the business would not be

TAX UPDATES
Direct Tax

the determinative factor to arrive at a conclusion that the income is to be treated as business income. Such a question would depend upon the circumstances of each case.

Apart from relying on object clause of partnership deed i.e. to take premises on rent and sub-letting them; the taxpayer has not produced sufficient material to prove that entire income or substantial income was from letting out of the property which was its principal business activity. Placing reliance on the tax tribunal factual finding, the Supreme Court upheld the order of lower authorities to conclude that sub-licensing income is taxable as income from house property.

[Raj Dadarkar & Associates Civil Appeal No. 6455-6460 of 2017 (Supreme Court)]

Section 14A disallowance applicable to dividend income despite liable to dividend distribution tax

Section 14A of the IT Act provides for disallowance of expenditure incurred to earn exempt income. The Supreme Court dealt with the issue as to whether dividend income that suffers dividend distribution tax (payable by dividend paying company) can be considered as exempt income. The Supreme Court answered the same in affirmative on the reasoning that the plain reading of section would show that income must not be includible in taxable income. Once this condition is satisfied, expenditure incurred in earning the income cannot be allowed to be deducted. The literal meaning of section 14A appears to be wholly consistent with scheme of the Act and therefore, recourse cannot be made to principles of interpretation other than literal view.

With respect to another issue of on disallowance, the Supreme Court ruled in favour of taxpayer and allowed full exemption of dividend income, in the absence of any nexus between expenditure disallowed and dividend income. While ruling so, it noted that

- the fact that any part of the borrowings of taxpayer have been diverted to earn tax-free income despite availability of surplus or interest-free funds was not proved
- there was no change in the facts of the case pertaining to the year under consideration vis-a-vis earlier years
- no reasons were recorded by tax officer to show dissatisfaction with the claim of taxpayer that no expenditure was incurred to earn dividend income

For detailed analysis of the ruling, refer BDO India Tax Alert at http://www.bdo.in/en-gb/insights/alerts-updates/section-14a-applicable-to-dividend-income-despite

[Godrej and Boyce Manufacturing Company Limited Civil Appeal No 7020 of 2011 (Supreme Court)]

Reimbursement of salary of seconded employees not fees for technical services

The taxpayer, a joint venture in India, was provided personnel by UK entity for functions relating to management, setting up of business, merchandise team, etc. The tax officer characterised the payment made by taxpayer to UK entity as fees for technical services (FTS) and the payer was treated as taxpayer in default for non-deduction of tax. The Tax Tribunal overruled this order and held that payment is not FTS since technology was not made available to the taxpayer. It further noted that payment was reimbursement of expenses, absent any profit element/mark-up by referring to joint venture and secondment agreement. Accordingly, withholding was not applicable on reimbursement as it was actually a payment to employee deputed in India, but routed through UK entity. The Bombay High Court upheld the order of Tax Tribunal and ruled in favour of taxpayer. It noted that the case involved deputation of employees for promotion of business of taxpayer and that since payment to employees is already subjected to tax in India, payer cannot be treated as taxpayer in default for non-deduction of tax.

[Marks & Spencer Reliance India Pvt. Ltd. ITA No.893 of 2014 (Bombay High Court)]

TAX UPDATES
Transfer Pricing

JUDICIAL UPDATES

Tax Tribunal confirms Penaly for default in filing of Accountant's Report for disclosure of Share issue transaction

The Mumbai Tax Tribunal confirmed penalty under section 271BA of the Act, for the taxpayer's default to file the audit report under section 92E of the Act, with respect of receiving share capital and share premium from its NRI director. The Tax Tribunal emphasized on section 92E of the Act, wherein it has been laid out that it is mandatory for any person entering in an international transaction, to furnish a report from an accountant setting forth the particulars of such international transaction. Further, the Tax Tribunal noted that as per section 271BA of the Act, if any person fails to furnish a report from an accountant, a penalty of by the way of INR 0.1 million shall be levied for such default. The Tax Tribunal relied on the decision of IL&FS Maritime Infrastructure Company Limited (ITA No.4177/Mum/2012) and held that the transaction of share issue falls under the purview of section 92E of the Act and the taxpayer is required to file Form 3CEB. The tax Tribunal also distinguished Vodafone India Services Private Limited [TS-308-HC-2014(BOM)-TP] held that the taxpayer cannot take the shield of this judicial precedent as the case was factually different and did not deal with penalty under section 271 BA.

[BNT Global Private limited ITA No 4111 (MUM) of 2016 (Mumbai Tax Tribunal)]

Impact of delayed AE-receivable subsumed in working capital vis-à-vis comparables

The Delhi High Court held that inclusion of the word "receivables" in the Explanation to Section 92B of the Act, does not mean that every item of "receivable" appearing in the accounts of the taxpayer will be automatically be characterized as an international transaction. The High Court held that the Tax Authorities needs to conduct a proper inquiry by analyzing the statistics over a period of time to discern a pattern which would indicate that the international transaction in any way, benefit the Associated Enterprise (AE). Delay in collection of monies from the AE beyond a stipulated time limit should be analyzed on a case to case basis and the impact of the same on working capital needs to be assessed. The High Court relied on the ruling of EKL Appliances Ltd. [(2012) 345 ITR 241 (Delhi)] and held that the taxpayer had already factored in the impact of the receivables on the working capital and thereby on its pricing/profitability vis-à-vis that of its comparables, and thus, any further adjustment only on the basis of the outstanding receivables would have distorted the picture and re-characterized the transaction. Thus, the case was dismissed as no substantial question of law arose.

[Kusum Healthcare Private Limited ITA No. 765 (Delhi) of 2016 (Delhi High Court)]

Tax tribunal rejects internal CPM for AE export as product utility, geographical markets & value chain was different

The Ahmedabad Tax Tribunal relied on Rule 10B(2)(d) and held that comparability of an international transaction with an uncontrolled transaction has to be judged with reference to, inter alia, conditions prevailing in the market in which the respective parties to the transactions operate, including the geographical location, size of the markets, level of competition and whether the markets are wholesale or retail. The Tax Tribunal further held that sale to the AE was in USA, UK, Australia, China, Brazil, turkey and Korea, while the sale to Non-AE was mostly in India which was nearly monopolistic environment. Thus, the distinction between these markets were so fundamental that the comparison was meaningless. Further, the products sold to the AE was used as inputs for manufacturing / assembling process while those sold to non-AEs were used by the final consumers for repairs & replacements. Thus, the tax tribunal opined that a dealer cannot be compared to a manufacturer, as the end use of the product was different. The tax tribunal relied on Wrigley India Pvt Ltd [TS-453-ITAT-2014(DEL)-TP] wherein it was held that direct methods of determining Arm's Length Price (ALP), including Cost Plus Method (CPM) have an inherent edge over the indirect methods, such as Transactional Net Margin Method (TNMM), but such a preference can come into play only when appropriate comparable uncontrolled transactions can be identified and analyzed. Thus the Tax Tribunal rejected application of CPM, noting the differences in the business models, as products sold to AEs were akin to 'contract manufacturing', while products sold to domestic independent enterprises was a regular business entrepreneurial venture.

[Inductotherm (India) Private Limited Income Tax Appeal No. 3108 (Ahd) of 2010 (Ahmedabad Tax Tribunal)]

TAX UPDATES
Transfer Pricing

Intra- group support service provided by AE not "stewardship Services" if benefit test is demonstrated by the Taxpayer

The Kolkata Tax Tribunal relied on OECD guidelines for determining the ALP of intra-group services. To determine the ALP, there should be an activity performed by one of the Group members which lies within the ambit of definition of activity (the 'activity test') and secondly, the activity should result in a benefit (the 'benefit test') to one or more members of that group of related entities. Further, the tax tribunal noted that the AE had extensive knowledge and expertise and the taxpayer had benefitted substantially by saving in total cost. The services availed from the AE had added economic/commercial value to enhance the commercial position of the taxpayer and thus, the tax tribunal rejected the classification of such services as stewardship services. The tax tribunal relied on Delhi High Court ruling in EKL Appliances Limited [TS-206-HC-2012(DEL)-TP] wherein it was held that the commercial expediency is not to be questioned by the tax authorities. Also, the judicial pronouncement of Cushman & Wakefield (India) (P.) Ltd. [TS-150-HC-2014(DEL)-TP] was referred wherein the High Court observed that the basis for costs incurred, activities for which they were incurred and the benefit accruing to taxpayer from those activities must all be proved, and laid down certain tests to be satisfied in this regard, including the benefit test. Thus, the claim of the tax authorities was rejected and the transfer pricing adjustment was deleted.

[Akzo Nobel India Limited Income Tax Appeal No. 531 (Kol) of 2014 (Kolkata Tax Tribunal)]

TAX UPDATES
Indirect Tax

STATUTORY UPDATES
SERVICE TAX

Exemption to life insurance services under 'Pradhan Mantri Vaya Vandana Yojana'.

Entry 26A of Notification No. 25/2012-ST (mega exemption notification) is amended so as to provide exemption to the life insurance services under 'Pradhan Mantri Vaya Vandana Yojana'.

[Notification No. 17/2017-Service Tax dated 04.05.2017]

CENTRAL EXCISE

Availing unavailed CENVAT Credit under GST in respect of services provided by way of assignment of the right to use any natural resource

A proviso to Rule 4 of CENVAT Credit Rules, 2004 is being inserted to provide that unavailed CENVAT Credit in respect of services provided by the Government, local authority or any other person by way of assignment of the right to use any natural resource on the day immediately preceding the 'appointed day' may be availed of in full on that very day.

'Appointed day' means the date on which the provisions of the Central Goods and Services Tax Act, 2017 shall come into force'.

[Notification No. 15/2017-Central Excise (N.T.) dated 12.06.2017]

CUSTOMS

Extension of time period for furnishing the final Mega power project certificate and the period of validity of security

The CBEC increased the term for fixed deposit receipt in case of imports for a project for Mega Power Project from 66 months to 126 months. It further provided relief to the importer by increasing the period for furnishing the Final Mega Power Status Certificate from 60 months to 120 months.

[Notification No. 20/2017-Customs dated 16.05.2017]

Procedure for streamlining the processing of manual BOEs

The Central Board of Excise and Customs has devised a detailed procedure for streamlining the processing of manual Bills of Entries ('BOE') in order to link them with a system generated challan for enabling electronic payment of Customs duty in the e-payment portal i.e. ICEGATE. The gist of the procedures is as follows:

- Upon receipt of permission for filing manual BoE the basic details thereto shall be entered by the Noting Section in ICES 1.5 and a Job Number shall be assigned to such BoE;
- Job Number shall then be approved by the concerned Authorities after recording reason in writing for manual filing resulting in generation of a six digit BoE number;

- The importer shall then file the manual BoE by quoting the said six digit number assigned to it for further process for assessment on paper by the concerned Authority;
- A challan of duty amount to be paid by the importer, post adjustment in license, etc., (if any) would then be generated in the system and be available for payment in the e-payment portal ICEGATE and bank;
- Upon payment, the same will be automatically integrated in in the System (no manual challans would henceforth be allowed); and
- Upon clearing of goods, the docket shall be forwarded to the Noting Section, which shall enter the remaining details including examination report of that Bill of Entry using MBE role.
- The detailed procedure is available in Circular No. 6/2017. The Circular shall come in effect from 15 June 2017.

[Circular No. 6/2017-Customs dated 02.06.2017]

FOREIGN TRADE POLICY

Linking of IEC to the GST registration

The Director General Foreign Trade vide Trade Notice no. 09/2017 amended the Import – Export Code ('IEC') with the introduction of GST registration. IEC will be the PAN (10 digit alpha-numeric code) of the entity instead of the 10 digit numeric code issued presently. With the implementation of the GST the existing importers/exporters will be migrated to their PAN as their IEC. Going forward IEC holders shall be required to quote their PAN (in place of existing IEC) in all their future documentation, w.e.f. the Notified Date. For new applicants, w.e.f. the Notified Date, application for IEC shall be made to DGFT and applicant's PAN shall be authorized as IEC.

[Trade Notice 09/2015-2020 dated 12.06.2017]

TAX UPDATES
Indirect Tax

CASE LAW HIGHLIGHTS
SERVICE TAX

For services by overseas entity, credit exigible to Indian arm when assessee is the same

Assessee is engaged in providing taxable output service viz. broadcasting services. In this regard, assessee has been availing CENVAT credit on input services used for providing broadcasting services. Further, during the course of audit it was observed by the Revenue that, assessee is not having any physical establishment in India for provision of broadcasting services in India and that the channels are telecast from satellite situated outside India. Assessee obtained Service Tax registration w.e.f. July, 2012 for provision of broadcasting services and did not have any physical establishment in India for provision of broadcasting services in India. Indian arm of assessee who actually availed credit did not had any organizational set up or human resources to undertake actual activities so as to provide taxable output service, and that invoices indicating provision of service were issued by assessee located in Singapore indicating registration no. of its Indian entity;

CESTAT allowed CENVAT credit of input services, such as IPL broadcasting rights, service by BCCI, program production services, etc. received by assessee located outside India (i.e. Singapore) for discharge of service tax liability of output broadcasting services, in India. Rejected Revenue's plea that, CENVAT credit was ineligible to Indian arm as services were provided by assessee (from Singapore), therefore, Indian entity has neither provided any service nor was required to obtain registration or pay service tax.

Further observed that Revenue proceeded on wrong assumption that, entities of assessee in Singapore and India are two different entities; both entities are same, and service provider is same company even though service was provided from different location but registration was obtained on Indian address at Mumbai. Also observed that Revenue granted registration despite knowing assessee's status and without raising any objection, remarks, "once registration was granted by the department and the service tax was collected consequent CENVAT credit cannot be denied".

Moreover, even though services are initiated by uplinking from Singapore but services are provided in India by decoding, downlinking, broadcasting, therefore, provision of service takes place only in India, therefore, in present case, not only services are provided in India, but also consumed in India, hence, registration taken by assessee is absolutely in order. Further, CESTAT asserted that, "If the contention of the department is accepted that the appellant cannot be treated as service provider then in the such case payment made by the appellant should not be treated as payment of service tax, accordingly it amounts to reversal of CENVAT credit availed by them, for this reason also demand of CENVAT credit does not exist".

[MSM Satellite (Singapore) Pte. LTD and Others V. The Principle Commissioner, Service Tax -Vi, Mumbai - Ts-123-cestat-2017-st, Mumbai Cestat]

Tax on dealer's commission for auto-finance under 'BAS' - upheld by Supreme Court

Assessee, an authorized dealer of Maruti Suzuki India Limited (MSIL), sells cars manufactured by MSIL. In the course of business, Maruti Finance, a unit of Maruti Udyog Limited (MUL) paid certain amounts of commission to assessee. Revenue alleged that, the commercial activity underlying this transaction falls within description of 'Business Auxiliary Service' u/s 65(105) of Finance Act, 1994 and therefore, service tax is payable by assessee. Accordingly, proceedings were initiated against assessee demanding service tax along with interest for the period February 2004 to March 2006 and also appropriated certain sum which was deposited by the assessee during pendency of the proceedings. Thereafter, Revenue vide order dated September 25, 2007 directed the assessee to pay the balance amount. Being aggrieved, the assessee approached the High Court.

High Court dismissed assessee's writ petition rejecting his plea that, since Maruti had already deposited service tax amount, hence, it (i.e. assessee) cannot be asked to satisfy outstanding demand as same would amount to 'double taxation'. In this regard, High Court observed that, service tax liabilities discharged by Maruti would refer to amounts constituting proportion of 'commission' it retains and discloses as consideration/service received, for which tax is to be paid and there is no positive assertion that amount or portion of commission received by assessee is also deducted in service tax.

Perusing procedural history, High Court stated that, assessee had several statutory remedies and if in reality it possessed proof to show that Maruti or someone else had discharged liability on its behalf, its inaction in availing those remedies implies that, matter attained finality earlier. Further, stating that, assessee's previous two writ petitions did not succeed, High Court remarked that, assessee's present attempt - a third one to seek same relief but by presenting a different dimension is clearly misconceived if not an abuse of process of court.

TAX UPDATES
Indirect Tax

Being aggrieved, assessee filed the SLP whereby Supreme Court dismissed the same and upheld levy of service tax on commission received by automobile dealer from Maruti Finance, under BAS u/s 65(105) of Finance Act, 1994.

[Competent Automobiles Company LTD V. Commissioner Of Service Tax - Ts-127-sc-2017-st, Supreme Court]

CENTRAL EXCISE

In the absence of thorough examination of issues, High Court quashes order denying SSI exemption

Assessee was availing the benefit of SSI Exemption Notification No. 1/93 during the period 1995-1996, 1996-1997 and 1997-1998, while clearing manufactured electric furnaces. On specific intelligence that the SSI exemption limit of Rs. 30 lakhs had been crossed, the factory premises of the assessee were inspected by the Revenue. On the scrutiny of records, it was concluded that assessee had raised invoices of three kinds-

- Invoices concerning the manufactured goods which was carried out at the specific request of the customers;
- Trading Invoices for bought out goods; and
- Invoices for Labour Charges.

Revenue aggregated the turnover and concluded that the exemption limit for each of the relevant years had been exceeded. Resultantly, a Show Cause Notice (SCN) was issued demanding duty along with interest and penalty. The adjudication order sustained the demand in entirety, against which assessee approached the Commissioner (Appeals) and the CESTAT thereafter. Since it did not succeed before the lower authorities, assessee approached the High Court.

High Court allowed assessee's appeal and set aside the CESTAT order which denied SSI exemption on ground that turnover exceeded turnover limit prescribed under Notification No. 1/93. Assessee's plea was accepted that aggregate value of clearance of manufactured products was not correctly computed and that Revenue failed to discuss vital issues such as whether bought out items were subjected to processes, and whether furnaces transported to customers' sites in CKD condition were goods or not. Also found that show cause notice invoking extended limitation period alleging fraud / suppression by Jt. Commissioner was without authority absent approval from Commissioner u/s 11A(1) of Central Excise Act. High Court concluded that despite ground of jurisdiction being specifically raised by assessee, lower authorities including CESTAT failed to discuss the same, which in fact goes to root of matter.

[Thermo Electric Furnaces v. Commissioner of Central excise, Chennai - TS-131-H-2017(mad)-exc, Madras High Court]

High Court held that 'Settlement Commission' is not an 'adjudicating authority', and writ jurisdiction cannot set-aside conditions imposed thereto

Assessee is engaged in the manufacture of sponge iron falling under Chapter Sub-heading 72031000 of the Central Excise Tariff Act, 1985. Revenue issued a show cause notice proposing to confiscate about 111.5 metric tonnes of sponge iron on the basis of the interception of 4 lorries coming out of the factory of the assessee and order in original was also passed in this regard. Thereafter, it issued another show cause notice on the basis of certain statements allegedly recorded forcibly from the assessee. In this regard, assessee filed an application before settlement commission and the Settlement Commission permitted the settlement of case subject to few conditions. Being aggrieved by the imposition of terms and conditions for the settlement of the case assessee filed a writ petition before High Court.

High Court dismissed the writ and refused to set aside the order passed by Settlement Commission's u/s 32E of Central Excise Act, 1944, which recorded certain findings about clandestine removal of goods, and accepted settlement application by imposing certain conditions. Assessee's submission was rejected that Commission's order was passed based on report of Jurisdictional Commissioner (JC), copy of which was not furnished to assessee, thus amounting to violation of principles of 'natural justice'.

It was remarked that although order speaks of JC report, it also narrates the course of hearing of petition before Commission and that all contentions raised by assessee virtually challenge JC's report. Held that Commission is not an adjudication authority and its role is to arrive at an amicable settlement of dispute between parties and observed that "if the Settlement Commission is also converted into an adjudicating body, then the very purpose of having a Commission will be lost… assessees who have excellent cases, may be entitled to fight out their cases in the normal channel of remedies available under the Act".

It was concluded that scope of writ jurisdiction under Article 226 of Constitution as against Orders-in-Original is circumscribed and is much more rigorous in respect of Commission's orders, further, scope of jurisdiction to interfere with or set aside those conditions on ground of violation of 'natural justice' is extremely limited, and present case is not fit enough to undertake that exercise.

[RAV's Steel Private Ltd v. Customs, Central Excise & Service Tax And ANR - TS-132-HC-2017(AP)-EXC, Andhra Pradesh High Court]

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