ACCOUNTING, REGULATORY & TAX NEWSLETTER

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The Institute of Chartered Accountants of India (ICAI)

1. **Guidance Note on Audit of Banks (2017 edition):**

   The Auditing and Assurance Standards Board (AASB) of the ICAI issued a Guidance Note (GN) on Audit of Banks. The GN covers the aspects of:

   - Important items on the financial statements of banks and its peculiarities
   - Manner of disclosure in the financial statements
   - RBI prudential norms and directions thereon
   - Audit procedures
   - Reporting on Long Form Audit Reports
   - Ghosh and Jilani Committee requirements
   - Special purpose reports and certificates

   The GN covers the relevant directions / circulars issued by the Reserve Bank of India up to December 31, 2016 for statutory audit of banks / bank branches for the year ended March 31, 2017. It also provides various illustrative formats of Engagement Letters, Audit Reports and Letter of Representations.

2. **Opinion issued by Expert Advisory Committee (EAC) of ICAI:**

   The EAC issued an opinion on 'Capitalization of Cost Incurred towards Replacement of Economizer Coil in a Boiler of a Thermal Power Plant'.

   The company had carried out replacement of economiser coils which enhanced the efficiency of the boiler and minimised the tube leakages in economiser area, resulting in reduced operating cost and had helped in bringing the said boiler into more stable working condition.

   The committee has referred to the capitalization principles laid down in Accounting Standard 10 – Accounting for Fixed Assets and Generally Accepted Accounting Principles. As per the said principles, expenditure on repairs, including replacement cost necessary to maintain the previously estimated standard of performance, is expensed in the same period and only such expenditures that have the effect of improving the previously assessed standard of performance, e.g., an extension in the asset's useful life, an increase in its capacity, or a substantial improvement in the quality of output or a reduction in previously assessed operating costs are capitalised.

   The Committee has taken a view that though the replacement of economiser coils result into the increase in efficiency, minimising the tube leakages and reduction of operating cost but the same is only maintaining/stabilising the level of the performance of the concerned equipment(s) and hence it cannot be considered to increase the future benefits of the concerned equipments beyond the previously assessed standard of performance.

   Accordingly, in view of the Committee, the expenditure incurred on replacement of economiser coil should not be capitalised; rather the same should be expensed in the statement of profit and loss.

REGULATORY UPDATES

SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI):

Participation in Derivatives Market by Mutual Funds:

SEBI vide circular no. DNPD/Cir-29/2005 dated September 14, 2005 mandated positive consent from majority of unit holders for introduction of derivative investments in an existing scheme, whose Scheme Information Documents (SIDs) do not currently envisage such investments.

Based on various representations received and in view of prudent investment norms that are in place for investment in derivatives by Mutual Funds, SEBI vide circular SEBI/HO/IMD/DF2/CIR/P/2017/13 dated February 20, 2017 dispensed the requirement of obtaining positive consent from majority of unit holders.

However, prior to the scheme commencing participation in derivatives, all investors of such schemes shall be given exit option with no exit load for 30 days, as against exit option to only dissenting unit holders mandated earlier.

Mutual fund permitted to invest in Infrastructure Investment Trusts (InvIT) and Real Estate Investment Trusts (REIT)

SEBI inserted the definition of InvIT and REIT in SEBI (Mutual funds) Regulations, 1996 and also amended the Schedule which permits Mutual funds to invest in units of InvITs and REITs subject to following limits:

- No mutual fund under all its schemes shall own more than 10% of units issued by a single issuer of REIT and InvIT; and
- A mutual fund scheme shall not invest –
  - more than 10% of its NAV in the units of REIT and InvIT; and
  - more than 5% of its NAV in the units of REIT and InvIT issued by a single issuer

Provided that the limits mentioned in sub-clauses (i) and (ii) above shall not be applicable for investments in case of index fund or sector or industry specific scheme pertaining to REIT and InvIT.

SEBI exempts requirement of No-objection letter from Stock Exchange for merger of Wholly Owned Subsidiary(WOS) with its Holding Company

SEBI has vide notification dated February 15, 2017; amended regulation 37 of SEBI (Listing Obligations and Disclosure Requirements) (Amendment) Regulations, 2017 to do away with the requirement of obtaining "no-objection letter" on the scheme, from the stock exchanges on which the securities of the Company are listed, provided the Scheme involves pure merger of WOS into its Holding Company, subject to filing of the scheme with respective stock exchange(s) for the purpose of disclosure.

Foreign Portfolio Investor (FPI) now permitted to invest in unlisted debt securities and securitised debt instruments

In order to enhance foreign investment in India through FPIs, SEBI made amendments vide notification dated February 27, 2017 to introduce SEBI (Foreign Portfolio Investors) (Second Amendment) Regulations, 2017 as follows:

- The definition of offshore derivative instrument will include unlisted debt securities and securitised debt instruments
- The list of permitted securities for FPIs to invest will also include unlisted non-convertible debentures / bonds and Securitized debt instruments as defined therein.

SEBI (Issue of capital and disclosure requirements) Regulations, 2009 (SEBI ICDR Regulations)

The ambit of Regulation governing preferential issue gives specific exemptions for issue of shares pursuant to certain corporate actions such as schemes for merger, amalgamation, demergers, corporate debt restructuring, etc. under the earlier provisions of the Companies Act, 1956, Sick Industrial Companies provisions and Board of Industrial Financial Reconstruction, etc. As now the provisions of the companies act, 2013 and Insolvency & Bankruptcy Code, 2016 are notified to cover the above provisions, the relevant amendment is being brought in this SEBI ICDR Regulations.

The addition is made to provide for schemes approved under new Act and Regulations considered otherwise as preferential issue i.e. under section 62 and Schemes under section 230 to 234 of the Companies Act, 2013, Insolvency & Bankruptcy Code, 2016 and such provisions does not need to comply with preferential allotment guidelines. Another provision is made by inserting Regulation 111A and 111B to

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provide for fines arising out of contravention of the Act, rules or the regulations which would now give stock exchanges authority to suspend trading, freeze the promoter holding covering, etc.

SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015

Regulation 34(2)(f) of SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015 ("SEBI LODR") requires top 500 listed entities based on market capitalization to submit Business Responsibility Report ('BRR') as a part of its Annual Report (AR).

With the objective to improve disclosure standards, SEBI advised the following, *inter alia*:

- Integrated Reporting (IR) may be adopted on a voluntary basis from FY 2017-18 by top 500 companies which are required to prepare BRR.
- The information related to IR may be provided in the AR separately or by incorporating in Management Discussion & Analysis or by preparing a separate report.
- As a green initiative, the companies may host the IR on their website and provide appropriate reference to the same in their AR.

MINISTRY OF CORPORATE AFFAIRS

Closure of Place of Business by a Foreign Company - Clarification w.r.t. scope of application of Section 391(2) of the Companies Act, 2013 (the Act)

Section 391(2) of the Act states that the provisions of Chapter XX (Winding up) of the Act shall apply mutatis mutandis for closure of the place of business of a foreign company in India as if it were a company incorporated in India. There were clarifications sought on the scope of the applicability of section 391(2).

MCA examined the matter and clarified that sub-sections (1) and (2) of section 391 should be read harmoniously and accordingly, provisions of section 391(2) would apply only in case of a foreign company which has issued prospectus or Indian Depository Receipts (IDRs) in accordance with the section 391(1) of the Act.

Companies (Transfer of Pending Proceedings) Amendment Rules, 2017

MCA has amended the Companies (Transfer of Pending Proceedings) Rules, 2016 w.e.f. February 28, 2017. In accordance with the amendment, in the proviso to Rule 5(1), for the words "sixty days" the words "six months" has been substituted.

This amendment is applicable in case of transfer of pending proceedings of winding up of the Companies on the ground of inability to pay debts. As per this amendment, the petitioner shall submit all additional information required under sections 7, 8 or 9 of the Insolvency Code, including details of the proposed insolvency professional to the National Company Law Tribunal (NCLT) within six months (instead of sixty days).

FOREIGN EXCHANGE MANAGEMENT ACT ('FEMA') AMENDMENTS

Infrastructure Companies in Securities Market

Vide a Press Note dated February 20, 2017, Department of Industrial Policy & Promotion ('DIPP'), amended the regulations pertaining to Foreign Investment in Infrastructure companies in Securities market. The following restrictions *have been done away with*:

- Foreign Investment by Foreign Portfolio Investors (FPI) & foreign institutional Investors (FII) is permitted only through purchases from secondary market; and
- No Non-resident investor will hold more than 5% of the equity in commodity exchanges;

Foreign Investment, including investment by FPIs will be subject to Securities Contracts Regulations & other relevant applicable SEBI Regulations.

INSURANCE REGULATORY AND DEVELOPMENT AUTHORITY OF INDIA (IRDAI)

Filing of Returns for Foreign to Foreign Reinsurance Transactions

In accordance with the IRDAI circular dated December 07, 2016, reinsurance / Composite Insurance Broking Companies are required to file a return in regards with the reinsurance transactions undertaken between the entities that are domiciled in foreign jurisdictions.

The said return shall be filed with the IRDAI in the format prescribed in the circular within 45 days of end of the half-year beginning from the financial year 2016-17.

RESERVE BANK OF INDIA (RBI)

Frequently Asked Questions (FAQs) on Foreign Investments in India:

RBI has updated FAQs on 'Foreign Investments in India' as on February 13, 2017 to address certain common queries related to modes of receiving foreign investment by an Indian company which covers aspects like instruments of investment, concept of convertible notes, sectors prohibited for foreign investment, repatriation of investments and profits earned in India, foreign venture capital investment, investment in Investment Vehicle, reporting requirements etc.

Frequently Asked Questions (FAQs) on External Commercial Borrowings (ECB):

RBI has updated FAQs on ECB as on February 22, 2017 which relate to ECB framework, eligibility for raising ECB, requirements in respect of currencies of ECB, recognized Lenders / Investors, raising ECBs under Track I and Track II, permitted derivative products for hedging of ECB, requirements for Indian banks to participate in ECB space, etc.

REGULATORY UPDATES

MINISTRY OF LABOUR

Employees' Provident Fund Organization - Compliance under the Employee's Provident Fund & Miscellaneous Provisions Act, 1952 (the EPF & MP Act) in respect of the Employees engaged by or through contractors:

With a view to providing social security benefits to contract employees and in pursuance of the statutory liability of a Principal Employer under the EPF & MP Act, the EPFO has advised the Principal Employers to comply with the following:

- Ensure that the contractor is registered with EPFO before awarding any contract post which the contractor details should be entered in the EPFO portal.
- Payments due to the contractor should be made only after verifying that the statutory PF has been deposited with EPFO.
- If the contractors have separate PF code number, ensure compliance with the EPF & MP Act w.r.t. to deposit of statutory dues with EPFO.

The EPF & MP Act empowers the Principal Employer to deduct EPF dues from the contractor's bill and deposit the same against the contractor's code number or their own code number. Further, an "establishment search option" is available on the official website to verify whether the contractors are regularly depositing Provident Fund Contributions in respect of their employees.

TAX UPDATES
Direct Tax

CIRCULARS/ NOTIFICATIONS/PRESS RELEASES

Clarification for determination of Place of Effective Management (PoEM)

With effect from fiscal year 2016-17, the concept of PoEM is applicable for determination of tax residency of a company (other than Indian company). The Central Board of Direct Taxes (CBDT) has clarified that this test/concept shall not apply to a company having turnover or gross receipts of INR 500Mn or less in a fiscal year.
[Circular No. 8/2017 dated February 23, 2017]

Protocol to India – Israel Tax Treaty

The protocol amending the tax treaty and protocol to India – Israel has been notified. The key features of protocol are summarised below:

- Capital gains: The protocol provides that gains derived by a resident of contracting state from alienation of shares or interest in partnership, trust or other entity, deriving more than 50% of value directly or indirectly from immovable property situated in the other state (at the time of the alienation or at any time during the 12 preceding months) may be taxed in other state.
- Elimination of double taxation: The paragraphs providing for tax credit of 15% and 10% of gross amount of dividend and interest respectively have been omitted.
- Limitation of Benefits: A new article is inserted to provide that benefits of tax treaty shall not be available to a resident, if the main purpose or one of the main purposes of the creation/existence of such resident or of the transaction undertaken by it, was to obtain benefits under this tax treaty that would not otherwise be available.
- The benefit of tax treaty shall not be granted to a person who is not beneficial owner of income.
- The tax treaty shall not prevent a contracting state from applying its domestic law on prevention of tax evasion or tax avoidance.
- Most Favoured Nation (MFN): The provisions of earlier protocol providing for MFN clause in respect of royalties or fees for technical services or interest or dividends have been omitted.

[Notification No. SO 441(E) dated February 14, 2017]

JUDICIAL UPDATES

Payment towards use of global telecommunication facility not fees for technical services

The taxpayer foreign company engaged in business of shipping, was maintaining a global communication facility (Maersk Net System) to help its agents for booking cargo and enable access to transportation schedule, customer information, documentation system, etc. The agents paid

for such system on pro-rate basis. The Supreme Court held that such payments by agents cannot be treated as fee for technical service. It is reimbursement of cost whereby agents have paid proportionate share of the expenses incurred on these systems. No technical services are provided by the taxpayer to the agents.

Further, the Supreme Court held that the system is an integral part of the shipping business and the business cannot be conducted without the same. It is only a facility that was shared by the agents and thus, cannot treated as any technical services provided to the agents. It relied on the judgement of Supreme Court in the case of Kotak Securities Limited 383 ITR 1 which ruled that use of facility does not amount to technical services, as technical services denote services catering to the special needs of the person using them and not a facility provided to all.
[A.P.Moller Maersk A S SLP (C) No. 5980 of 2017 & ors (Supreme Court)]

Tax withholding at lower rate despite non-furnishing of PAN by non-residents, section 206AA does not override tax treaty

Section 206AA of the IT Act mandates deduction of tax at source (WHT) at higher of tax rate as per IT Act or as per tax treaty or 20% if payee fails to furnish tax identification number (PAN) to the payer. The Hyderabad Tax Tribunal - Special Bench considered a question regarding determination of WHT rate from payment of fees for technical services to non-residents, where the payee is resident of the country with which India has tax treaty and payee failed to PAN to the payer. The Tax Tribunal held that non-obstante clause contained in the machinery provision of section 206AA of the IT Act is required to be assigned a restrictive meaning. The same cannot be read as to override the relevant beneficial provisions of the tax treaties, which override even the charging provisions of the IT Act as per section 90(2) of the IT Act (provisions of IT Act or tax treaty, whichever more are beneficial to the taxpayer to be applied).

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The taxpayer cannot be held liable to deduct tax at higher of the rates prescribed in section 206AA of the IT Act in case of payments made to non-resident persons having taxable income in India, despite their failure to furnish PAN.

[Nagarjuna Fertilizers & Chemicals Ltd. IT Appeal Nos. 1187, 1188 (Hyd.) of 2014 (Hyderabad Tribunal)]

Certificate for deduction of tax at lower rate is person specific and application cannot be restricted to the amount

Section 197 of the IT Act provides that if total income of the recipient justifies withholding at lower rate or no deduction, on application by the recipient, the tax officer shall issue such a certificate. Where such certificate is issued, the payer is required to withhold tax as specified therein. The Kolkata Tax Tribunal dealt with a case where tax officer opined that withholding at the rate specified in certificate was valid only in respect of the amount mentioned therein and in respect of the remaining sum, taxpayer ought to have withheld tax at normal applicable rate.

The Tax Tribunal noted that the provision of section 197 does not make any reference to any income specified in such certificate. The IT Rules also provide that the certificate issued will be valid for the year specified in the certificate. There is no reference that payment without withholding or at lesser rate should be on the sums specified as payable in the certificate. Accordingly, the Tax Tribunal held that the provision of section 197 is 'person specific' and cannot be extended to the amounts specified by the recipient of the payment while making an application.

[Twenty First Century Securities Ltd. IT Appeal Nos. 464 & 465 (kol.) of 2014 (Kolkata Tribunal)]

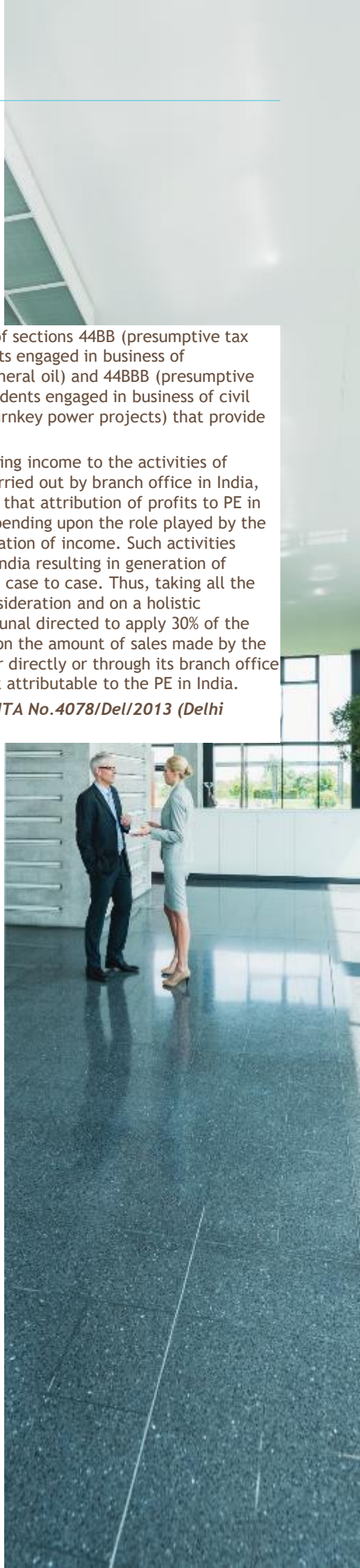
Profit attribution to branch office (permanent establishment) in India

The Delhi Tax Tribunal dealt with a question of attribution of profits to branch (permanent establishment (PE)) of the Singapore Company, engaged in business of trading of medical equipment to and from India. The head office made sales through branch office and also had transactions directly with distributors in India and customers in India. The branch in India performed activities relating to marketing, sales, warehousing, after sales service and technical services on behalf of its head office in India and marketed Nipro brands in India.

The Tax Tribunal rejected the transfer pricing study as also the attribution rate worked out by tax officer and first appellate authority. Applying Rule 10 of the IT Rules (provides mechanism where actual amount of income accruing to non-resident cannot be definitely ascertained), the Tax Tribunal opined that profit of the taxpayer be computed at 10% of the sales consideration to the customers in India, either directly by the head office or through the branch office. In holding so, it drew strength from the prescription of sections 44BB (presumptive tax regime for non-residents engaged in business of exploration, etc. of mineral oil) and 44BBB (presumptive tax regime for non-residents engaged in business of civil construction, etc. in turnkey power projects) that provide for profit rate of 10%.

On question of attributing income to the activities of marketing and sales carried out by branch office in India, the Tax Tribunal noted that attribution of profits to PE in India is fact based, depending upon the role played by the PE in the overall generation of income. Such activities carried out by a PE in India resulting in generation of income, may vary from case to case. Thus, taking all the relevant facts into consideration and on a holistic approach, the Tax Tribunal directed to apply 30% of the profits i.e. 3% (30% of on the amount of sales made by the taxpayer in India either directly or through its branch office as the amount of profit attributable to the PE in India.

[Nipro Asia Pte. Ltd. ITA No.4078/Del/2013 (Delhi Tribunal)]



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JUDICIAL UPDATES

Tax Tribunal rejects capacity utilisation adjustment in the absense of comparable details

The Mumbai High court rejected the taxpayers claim for adjustment towards abnormal expenses arising on account of low capacity utilization. The taxpayer claimed that the operating margins, after adjusting for capacity utilization would be much higher than the comparables. However, the High Court rejected the taxpayer claim in the absence of material data relating to capacity utilization of comparable companies. The High Court relied on the Delhi High Court ruling in Knorr Bremse India Private Limited (TS -558-HC-2015 (P&H)-TP) and held that, the taxpayer's had projected the activities performed and evaluated that the activity performed by themselves should be taken as a benchmark or as a standardized practice, for the purpose of making capacity utilization adjustment. Thus, in the absence of adequate data and as no substantial question of law arose, the case was dismissed by the High Court.
[Royal Star Jewellery Private Limited Income Tax Appeal No 2463 (Mum) Of 2013 (Mumbai High Court)]

Expenses Incurred before grant of Stpi registration held as preoperative and excluded for margin computation

The Pune Tax Tribunal accepted the taxpayer's contention to exclude expenses such as rent, employee cost, administrative cost etc. as preoperative, since these expenses were incurred before the STPI registration was granted to the taxpayer. The terms of agreement between assessee and its Associated Enterprise ("AE"), for reimbursement of cost would become effective only after grant of STPI registration and thus, expenses incurred prior to such registration were considered for establishment of business and were considered as pre-operative.
[Amberpoint Technology India Private Limited ITA No. 266 (Pun) Of 2012 (Pune Tax Tribunal)]

Prefers RPM over Cup/tnmm in case of reseller of goods

The Delhi Tax Tribunal rejected Comparable Uncontrolled Price Method (CUP) selected by the taxpayer to benchmark its international transaction of import of crystal and crystal components and observed that functional similarity is essential for adopting CUP method, after taking into account adjustments that could be made for bringing a similar product to the rank of an identical product. The Delhi Tax Tribunal held that, if the goods in the international transaction do not exactly match with the goods in comparable uncontrolled transactions, then the method loses its charm and becomes inapplicable as it cannot properly reflect the ALP of the goods purchased by the assessee from its AE. Further, the Tax Tribunal illustrated that an apple cannot be compared with an orange, although some difference in the quality of apples in the international transaction and comparable uncontrolled transaction can be adjusted.

'Further, the Tax Tribunal relied on Rule 10B(1)(e) of the IT Rules and rejected Transactional Net Margin Method (TNMM) selected by the Tax authorities as there were certain inconsistencies in the mechanism applied by the tax authorities. The tax authorities had averaged the gross margins and net margins of the comparable companies, used foreign comparable companies, operating in different line of business as compared to the taxpayer. Thus, TNMM was out rightly rejected by the tax tribunal as the mechanism followed by the tax authority was alien to Rule 10B(1)(e)

The Tax Tribunal then relied on Rule 10B(1)(b) and advocated the use of Resale Price Method (RPM) as the most appropriate method, where property is purchased from an AE and sold to third party customer, without any value addition to the goods before resale.
[Swarovski India Private Limited ITA NO. 5621 (DEL) OF 2014 (Delhi Tax Tribunal)]

Considers raw materials provided by the AE as pass through Cost for computing the Gross Profit margins

The Delhi Tax Tribunal upheld the approach followed by the Tax Authorities of treating cost of raw materials from the AE, as pass through and excluded the same from the operating cost as well as operating revenues for computing the Gross Profit under the Cost Plus Method (CPM). The taxpayer had imported certain material kits from its AE and re-exported them back after assembling and partial testing, thus returning the kits in their finished forms to the AEs. The tax tribunal held that the cost of raw material imported from the AE would neither form part of the direct and indirect cost, nor form part of the revenue. Such cost would be in the form of some services availed or some material supplied by the other enterprise for the purposes of use in the rendering of services or manufacturing of goods by the assessee, noting that, such cost of services or material cost is reimbursed as it is without any profit margin.

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Thus, in this case, the taxpayer should be compensated only for the services rendered in the manufacture of ultimate goods and not on the cost of specific material supplied.
[Akon Electronics India Private Limited ITA NO. 4837 (DEL) OF 2009 (Delhi Tax Tribunal)]

OTHER TRANSFER PRICING REGULATORY UPDATES

Advance Pricing Agreements Signed by Central Board of Direct Taxes Touch 140

Central Board of Direct Taxes (CBDT) has signed 10 more APAs including 2 bilateral APAs with UK and Japan, involving issues relating to payment of royalty fee, trading in goods, ITeS, software development services, marketing support services, clinical research services, non-binding investment advisory services, payment of interest on ECB, etc. The APAs pertains to Telecom, Pharmaceutical, Banking & Finance, Steel, Retail, Information Technology sectors etc. The total number of APAs concluded now stands to 140 (includes 10 bilateral and 130 Unilateral APA), 7 of these have rollback provisions.

The progress of the APA Scheme strengthens the Government's resolve of fostering a non-adversarial tax regime. The Indian APA programme has been appreciated nationally and internationally for being able to address complex transfer pricing issues in a fair and transparent manner.
[CBDT press release dated February 28, 2017]

OECD's CBCR peer review to evaluate countries on confidentiality, legal & Exchange of Information framework

OECD released documents outlining terms of reference and methodology which will form basis of peer review process for Action 13 Country-by-Country Reporting (CbCR). Each member country will be assessed against a set of 3 key criteria namely - (a) domestic legal and administrative framework (b) exchange of information framework and (c) the confidentiality and appropriate use of CbC Reports. Peer review process will take place in 3 phases from 2017 to 2019 with the first phase commencing in early 2017 which will focus on domestic legal and administrative framework and certain aspect of confidentiality. Phase II (starting in 2018) will focus on exchange of information framework and appropriate use of information while Phase III (starting in 2019) will cover all 3 criteria. All documents relating to peer review process will be treated as confidential and shall not be made publicly available. Further annual report will be treated as confidential, but will be made public if Inclusive Framework decides to declassify it.
[BEPS Action 13 on Country-by-Country Reporting dated February 2017]

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STATUTORY UPDATES
SERVICE TAX

No service tax on services by way of treatment of effluent from 01.07.2012 to 31.03.2015

The operators of Common Effluent Treatment Plant were not paying the service tax during the period 01.07.2012 to 31.03.2015 according to a practice that was generally prevalent. Now, it has been clarified that service tax on services by way of treatment of effluent provided by the said operators during the said period, shall not be required to be paid.
[Notification No. 08/2017 - Service Tax dated 20.02.2017]

No service tax on services by way of admission to a museum from 01.07.2012 to 31.03.2015

The service tax on services by way of admission to a museum was not paid during the period 01.07.2012 to 31.03.2015 according to a practice that was generally prevalent. Now, it has been clarified that service tax on services by way of admission to a museum during the said period, shall not be required to be paid.
[Notification No. 09/2017 - Service Tax dated 28.02.2017]

Exemption for services rendered only to specified educational institutions w.e.f 01.04.2017

Entry No. 9(b) of Notification No. 25/2012-ST provided an exemption for services rendered such as transportation, catering, security etc. to an educational institution. Now, a proviso is inserted to the said entry to provide that such exemption is applicable only when the mentioned services are rendered to pre-school educational institutions and higher secondary schools or equivalent. This would come into force with effect from 01.04.2017.
[Notification No. 10/2017 - Service Tax dated 08.03.2017]

No service tax on the services by way of transportation of goods by a vessel from a place outside India to the customs station in India w.r.t goods intended for transshipment to any other country

Representations were made seeking clarifications on levy of service tax on the services by way of transportation of goods by a vessel from a place outside India to the customs station in India w.r.t goods intended for transhipment to any country outside India. It has been clarified as below:

- Goods landing at Indian ports which are destined for any other country are allowed to be transhipped through Indian territory without payment of customs duty subject to the conditions and safeguards.
- Service tax is leviable on the services provided or agreed to be provided in the taxable territory.

  Whether a service is provided or agreed to be provided in the taxable territory or not, is determined as per Section 66C of the Finance Act, 1994 and the Place of Provision of Services Rules, 2012.
- In terms of the applicable rule 10 of the POPS Rules, 2012, the place of provision of services of transportation of goods by air/sea (other than by mail or courier) is the destination of the goods.
- With respect to goods imported into a customs station in India intended for transhipment to any country outside India, the destination of goods is a place other than India, if the same is mentioned in the import manifest or the import report. Thus, place of provision is outside India and the said services are not taxable in India.

[Circular No. 204/2/2017 - Service Tax dated 16.02.2017]

CASE LAW HIGHLIGHTS
SERVICE TAX

Turnkey contract undertaken for Delhi Metro cannot be vivisected, thereby service tax cannot be levied

Siemens Ltd had applied for refund of service tax on the ground that tax was inadvertently paid on the invoices issued to Delhi Metro Rail Corporation Ltd. for the turnkey contract. Revenue rejected the refund claim.

CESTAT held that service tax is not leviable on the turnkey contract awarded for completing the project of Delhi Metro Rail Corporation Ltd. It referred the earlier CESTAT ruling in the case of Afcons Infrastructure Ltd. where in respect of identical contract awarded by DMRC, service tax levy was set aside, in view of specific exclusion to 'Railways' from scope of 'commercial and industrial construction service', stating that there is no distinction between a monorail or metro rail or any kind of rail.

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Further, CESTAT accepted the company's contention that issue is now squarely settled in Larsen & Toubro Ltd., wherein Supreme Court has specifically laid down that, in works contract, there cannot be, vivisection and calculation of tax under various categories of services.
[SIEMENS LTD V. Commissioner Of Service Tax, Mumbai - Ts-596-cestat-2016-st, Mumbai Cestat]

CENTRAL EXCISE

Capital goods removed after use cannot be said to be 'clearance as such' and duty paid is available for refund

Montage Enterprises Pvt Ltd is engaged in the manufacture of printed plastic laminated films, pouches etc. The Company debited the duty portion for clearance of capital goods under CENVAT Credit Rules, 2004, upon revenue's identification during the course of audit. A SCN was issued subsequently stating that the fact of removal was noted at the time of audit and that the company have suppressed the facts with intention to evade the payment of duty, thereby interest and penalty was proposed by extending the period of limitation. The demand was confirmed by Commissioner (Appeals).

CESTAT held that removal of capital goods after a period of 'use' is not 'removal as such', therefore, CENVAT credit taken at the time of acquisition need not to be reversed. The Company contended that since capital goods have been removed / cleared after period of use, no duty / CENVAT credit is reversible by relying on the various High Court rulings in the cases of Cummins India Ltd., Raghav Alloys Ltd., Harsh International Pvt. Ltd., and also contended that amount deposited by way of reversal of duty, pursuant to audit-objection is illegal.

CESTAT pursued the relevant provisions of CENVAT Credit Rules containing provision for payment of duty on transaction value on removal of capital assets as waste and scrap introduced w.e.f. May 16, 2005 and provisions relating to proportionate depreciation introduced vide Notification dated November 13, 2007. Further, it relied upon Madras High Court ruling in the case of Lakshmi Machine Works Ltd and accordingly, held that the issue is squarely covered by various High Court rulings. Thus, CESTAT directed for refund of amount deposited by company, i.e. duty paid on transaction value.
[Montage Enterprises Pvt Ltd. V. Commissioner Of Central Excise, Noida - Ts-592-cestat-2016-exc, Allahabad Cestat]

CUSTOMS

CBEC rationalizes procedure for duty Drawback for exporters who have been accorded Authorized Economic Operator (AEO) certificate (Tier II & Tier III)

The CBEC has decided that those exporters who have been accorded Authorized Economic Operator (AEO) certificate (Tier II & Tier III) in terms of Circular No. 33/2016-Customs dated 22.07.2016 are being exempt from the requirements of drawal of samples for the purpose of grant of drawback, except in case of any specific information or intelligence.
[Circular No. 5 /2017 - Customs dated 28.02.2017]

CESTAT upholds duty where machine imported under EPCG licence not installed, depreciation benefit unavailable

The facts of the case are that the appellant had imported one digital printing machine from M/s Xeikon N.V. Belgium. The bill of entry was filed and goods were cleared by paying concessional rate of 5% in pursuance to the EPCG Licence. The appellant could not install the machine in their factory and could not discharge their export obligation. As appellant failed to discharge their export obligation, a show cause notice was issued to demand duty on the said machine for non-fulfilment of export obligation under EPCG Scheme. Thereafter, the adjudication took place and the demand of duty was confirmed alongwith interest and redemption fine was imposed to the tune of INR 25 lakhs and penalty of INR 10 lakhs was also imposed. Aggrieved from the said order, the appellant preferred an appeal before CESTAT.

After going through the rival submissions, CESTAT rejected appellant pleas that duty is payable on "depreciated value" of machine, distinguishing CESTAT decision in Suvarna Aqua Farm & Exports and hold that Duties are payable on the value of the machines imported.

Further CESTAT observed that there was no malafide or deliberate intention to mis-use benefit of concessional duty rate and relying upon CESTAT decision in Tauraus Novelties Limited, sets aside imposition of redemption fine and penalty.
[Age Of Enlightenment Publications V. The Commissioner Of Customs (Air Cargo Export), New Delhi - Ts-587-cestat-2016-cust, Delhi Cestat]

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