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CONTENTS

CASES

Excise

➢ LDs not to form part of transaction value under excise laws

➢ Cenvat credit of canteen services admissible in proportion to the cost borne by the manufacturer in relation to such services

➢ Proportionate availment of cenvat credit of common services basis the turnover of dutiable goods – No violation of rule 6 of the CCR, 2004

Sales tax

➢ Whether there is transfer of right to use goods in a franchise agreement

Service tax

➢ Service tax leviable on the service portion of a composite contract for construction

➢ Simultaneous penalty under section 76 and section 78 of the Finance Act not imposable for the period prior to May 05, 2008

Others

➢ Income in relation to incidental technical services in a turnkey contract for lump sum consideration - cannot be treated as FTS separately

➢ Taxability of a joint venture created for the specific purposes

➢ Whether import of new version of master copy having short life would be construed as revenue expenditure

➢ Whether depreciation could be claimed on goodwill and whether buyback of shares is a revenue expenditure

➢ Consideration received under the license agreement for allowing the use of
the Software is not royalty

- Payment received in providing IPLC are liable to treat as 'royalty'

**NOTIFICATION & CIRCULARS**

- Amendments in Central Excise Valuation Rules
- Reduction of threshold limit for mandatory e-payment of excise duty

**CASES**

**Excise**

**LDs not to form part of transaction value under excise laws**

In this case deduction was claimed by the buyer as compensation (LDs) for the delay in the supply of the goods by the manufacturer. The question before the Tribunal was whether the manufacturer is liable to pay excise duty on such LDs.

The Tribunal held that the Taxpayer, as per the terms of the contract and on account of delay in delivery of manufactured goods received a lesser amount. This was the generically agreed price as a result of a clause in the agreement, stipulating variation in the price on account the liability to "liquidated damages". Thus, the resultant price would be the transaction value and the manufacturer would not be required to discharge excise duty on the LDs so paid to the buyer.

*Commissioner of Customs & Central Excise, Hyderabad – IV v. Victory Electricals Ltd. 2013-TIO-1794-CESTAT-MAD-LB*

**Cenvat credit of canteen services admissible in proportion to the cost borne by the manufacturer in relation to such services**

Revenue denied the cenvat credit availed by the Taxpayer on the service tax paid on “canteen services” and “travel agency services”.

Tribunal held that in light of the settled judicial precedents, cenvat credit of “canteen services” was admissible to the Taxpayer. However, such credit would only be admissible to the extent of the cost borne by the Taxpayer. The cenvat credit in respect of any amounts charged/recovered from the employees would not be admissible.

*Crompton Greaves Ltd. v. Commissioner of Central Excise and Service Tax,*
**Proportionate availment of cenvat credit of common services basis the turnover of dutiable goods – No violation of rule 6 of the CCR, 2004**

Taxpayer was engaged in manufacturing of electronic goods. Taxpayer was also undertaking trading activities in respect of the imported electronic goods. Taxpayer had availed the cenvat credit of various input services such as freight and transportation, insurance, advertising, security, courier services, recruitment etc. Since these services were being used by the Taxpayer for both excisable goods and trading activities, Taxpayer was taking the Cenvat credit on a proportionate basis vis-a-vis the turnover of manufacturing activities.

Revenue alleged that the Taxpayer had not maintained separate accounts in respect of dutiable and exempted goods, thus the Taxpayer was liable to pay duty in terms of rule 6(3) of the CCR, 2004. Taxpayer contended that it had not availed any Cenvat credit in respect of input services used for the trading activities, thus rule 6(3) of the CCR, 2004 was not applicable.

Tribunal observed that rule 6 (3A) of the CCR, 2004 provides for proportional reversal of credit on input services attributable to exempted goods based on the turnover. In the instant case, the Taxpayer had ab initio not availed any credit in respect of the input services attributable to exempted goods. Thus there was no violation of the rule 6 of CCR, 2004 by the Taxpayer. Accordingly, the demand against the Taxpayer was set aside.

**Mirc Electronics Ltd. v. CCE, Thane-I, 2013-TIOL-1761-CESTAT-MUM**

**Sales tax**

**Whether there is transfer of right to use goods in a franchise agreement**

In this case, the Taxpayer entered into a franchise agreement with a third party giving them as exclusive right to use their trademark, good will etc. at certain outlets. The question in the present case was whether the Taxpayer transfer the right to use goods under the Franchise Agreement and was liable to sales tax.

The HC observed that under the franchise agreement there was consensus ad idem as the identity of incorporeal /intangible goods. Further, the third party was allowed to use the trademark exclusively in respect of a particular outlets for a period of 10 years. Therefore, based on the above fact HC held that the Taxpayer had transferred the right to use the trademark to the party and sales tax was leviable on the franchise agreement.
M/s Vitan Departmental Stores & Industries Limited v. The State of Tamil Nadu, 2013-TIOL-897-HC-MAD-CT

Service tax

Service tax leviable on the service portion of a composite contract for construction

Taxpayers challenged the validity of various notifications issued under the Finance Act, providing for abatement to “Commercial and Industrial Construction Service” and “Construction of Residential Complex Service”. The challenge was in respect of the explanation to the abatement notification which provided that gross amount charged for services would include the value of goods and material, while computing the abatement.

Taxpayers contended that above notifications sought to impose service tax on goods, which was beyond the legislative competence of the Central Government.

The HC observed that it was within legislative competence to impose service tax on the service portion of a composite contract. The computation of the service portion in a composite contract is procedural and a matter of calculation, thus the same would not effect the validity of imposition of service tax.

The HC further observed that the abatement notifications were optional and alternative for the Taxpayers. Thus, if the Taxpayers were to take the benefit of the notification, then all the conditions of the abatement notification were required to be satisfied.

GD Builders and others v. UOI, 2013-TIOL-908-HC-DEL-ST

Simultaneous penalty under section 76 and section 78 of the Finance Act not imposable for the period prior to May 05, 2008

Taxpayer challenged the imposition of simultaneous penalties under section 76 and section 78 of the Finance Act for the period prior to May 05, 2008.

Revenue relied upon the judgement of the Kerala HC in Assistant Commissioner of Central Excise v. Krishna Poduval, 2006-TIOL-77-HC-Kerela-ST, wherein simultaneous imposition of the penalties under section 76 and section 78 of the Finance Act were upheld. Taxpayer relied upon the judgement of P&H HC in C.C.E. v. First Flight Courier Ltd., 2011 (22) S.T.R. 622 (P&H,) wherein it was held that imposition of penalties under the both section 76 and section 77 of the Finance Act would amount to double jeopardy.
Tribunal observed that the Delhi bench of the Tribunal fell within the jurisdiction of P&H HC and consequently was bound by its decision. Thus, relying upon the judgement of P&H HC the Tribunal held that simultaneous penalties under section 76 and section 78 of the Finance Act were not impossible.

*Surya Consultants v. CCE, Jaipur, 2013-TIOL-1717-CESTAT-DEL*

**Others**

**Income in relation to incidental technical services in a turnkey contract for lump sum consideration - cannot be treated as FTS separately**

Taxpayer, a non resident company, had entered into a turnkey contract with EIL for laying and foundation of three pipeline projects in Mumbai High North Field for a lump sum consideration. Taxpayer offered its income for presumptive taxation under section 44BB of the IT Act. Revenue alleged that Taxpayers was also rendering technical services as part of the contract with EIL and thus income in respect of such technical services were taxable as FTS in terms of section 9(1)((vii) of the IT Act.

Tribunal observed that when a contract consists of a number of terms and conditions each condition does not form a separate contract. The turnkey contract had to be read as a whole. Tribunal held that the contract of the Taxpayer with EIL was a turnkey contract for a lump sum consideration. Thus, the entire income of the Taxpayer was taxable under section 44B of the IT Act.

*ADIT v. Valentine Maritime (Gulf) LLC (VMGL), 2013-TII-204-ITAT-MUM-INTL*

**Taxability of a joint venture created for the specific purposes**

In case a JV comes together only for the purposes of bidding for a contract, and thereafter, undertakes the work separately, then the income would be assessed in the hands of the individual members. It has also been observed by the Tribunal that such a treatment would be predicated on the JV not retaining any profits within itself.

*DCIT Circle v. M/s Madhucon Sino Hydro, Hyderabad, 2013-TII-199-ITAT-HYD-INTL*

**Whether import of new version of master copy having short life would be construed as revenue expenditure**

In this case, the Taxpayer entered into an agreement with the parent company to obtain right to duplication and imports of master copy. The question was whether the
expenditure so incurred would qualify as a revenue expenditure. The Assessing Office applied the enduring benefit test and held the expenditure to be that of a capital nature.

The Tribunal on appeal by the department, held that for it to be a capital expenditure, an asset should be capable of use over the long term, and also, capable of being depreciated. In the present case, it was found that the asset had a high rate of obsolescence, being a software which after every upgrade rendered the previous versions obsolete. Hence, the Tribunal held such expenditure to be in the nature of revenue expenditure.

*CIT v. Oracle India Pvt Ltd, 2013-TIOL-957-HC-DEL-IT*

**Whether depreciation could be claimed on goodwill and whether buyback of shares is a revenue expenditure**

The Taxpayer claimed depreciation on goodwill as well as treated the expenditure on buy back of shares as revenue expenditure.

The Tribunal relying on the decision of *CIT v. Smifs Securities Ltd* held that depreciation would be allowed on goodwill. Further, relying on the Tribunal judgment of *CIT v. Hindalco Industries Ltd*, the HC held that the buyback of shares would not in any manner enhance the capital of the Taxpayer, thus, buyback of shares was liable to be allowed as revenue expenditure and not as capital expenditure.

*Aditya Birla Nuvo Ltd v. ACIT, 2013-TIOL-1001-ITAT-MUM*

**Consideration received under the license agreement for allowing the use of the Software is not royalty**

Taxpayer was engaged in the business of developing and manufacturing customized software used by the customers for designing highways, railways, airports, ports, mines, etc. Taxpayer opened a branch office in India to perform services involving installation of software and providing training to the customers.

Revenue issued SCN and taxed the receipt shown by the Taxpayer from sale of licensing software as “royalty”. Taxpayer relied upon *Tata Consultancy Services v. State of Andhra Pradesh – 2004-TIOL-87-SC-CT-LB* and contended that software sold were goods and accordingly, only net profit would be chargeable to the PE as business income under Article 7 of the India-USA DTAA.

HC held that the consideration received from the Taxpayer on grant of licenses for use of software would not qualify as royalty under the Article 12 of India-USA
DTAA. The license granted by the taxpayer was limited to those necessary to enable the licensee to operate the software program. HC also clarified that in order to treat the consideration as royalty paid by the licensee, there should be a transfer of all or any right (including the granting of any license) in respect of copyright of a literary, artistic or artistic work. Therefore, consideration paid for “copyrighted” article is distinguishable from copyright or even right to use copyright. Further, it has been held that allowing the use of the software doesn’t mean transferring the copyright or right to use copyright but a limited right to use the copyrighted material which doesn’t give rise to royalty income.

*Director of Income Tax v. Infrasoft Ltd, 2013-TII-50-HC-DEL-INTL*

**Payment received in providing IPLC are liable to treat as ‘royalty’**

The Taxpayer was providing IPLC services for effective end-to-end communication across various customer entities located across the globe. In India, the Taxpayer had associated with along VSNL to provide its services to the customer entities, locally. The income received by the Taxpayer was sought to be brought to tax by the Revenue as “royalty” under the Income tax laws read with the India-Singapore DTAA.

Taxpayer contended that revenue earned could not be considered as ‘royalty’ paid for the use of the equipment under the IT Act. The Taxpayer submitted that the customers had no knowledge of the equipment/network used by the Taxpayer for the provision of services. Also, customers did not have the control with reference to the usage of the equipment/network used for rendering the services. The agreement between the Taxpayer and the customers being one for rendering of services by the Taxpayer, the payment could not be termed as ‘royalty’.

HC held that in any event, in a virtual world, the physical presence of an entity has become insignificant. The presence of the equipment of the Taxpayer, its rights and responsibilities vis-à-vis the customer and the customers’ responsibilities clearly showed the extent of the virtual presence of the Taxpayer. Taxpayer operated through its equipment placed in the customer’s premises through which the customer had access to data, and an undertaking for performance vis-à-vis the speed and delivery of the data and voice from one end to the other. The HC observed that “the traditional concepts relating to control, possession, location on economic activities and geographic rules of source of income recede to the background and are not of any relevance in considering the question under Section 9(1)(vi) read with Explanation 2” of the Income Tax Act. Hence, the payment received was for the use and the right to use of the equipment. Thus such payments qualified as ‘royalty’.

*Verizon Communications Singapore Pte Ltd v. The Income Tax Officer, 2013-TII-48-HC-MAD-INTL*
NOTIFICATION & CIRCULARS

Excise

Amendments in Central Excise Valuation Rules

CBEC vide Notification No. 14/2013-CE(NT) dated November 22, 2013 has amended rule 8, rule 9 and rule 10 (“the amended rules”) of the Central Excise Valuation Rules. Under the amended rules, when the goods are partly sold to related parties/interconnected undertakings and partly to unrelated buyers, valuation would be as under:

- Under rule 9 or rule 10 of the Central Excise Valuation Rules for transactions with related parties / interconnected undertakings
- Under section 4 of the Excise Act for goods sold to unrelated buyers

Similarly, in case of partial captive consumption of goods and partial sale to unrelated buyers, the valuation would be as under:

- Under rule 8 i.e., 110 percent of the cost of production, for captive consumption of goods
- Under section 4 of the Excise Act for sale to unrelated buyers

Notification No. 14/2013-CE (NT) dated November 22, 2013

Reduction of threshold limit for mandatory e-payment of excise duty

E–payment of excise duty has been made mandatory for Taxpayers who have paid excise duty of rupees One Lakh or more in the preceding financial year.

Notification No 15/2013 CE(NT) dated November 22, 2013

GLOSSARY OF TERMS

<table>
<thead>
<tr>
<th>CBEC</th>
<th>Central Board of Excise and Customs</th>
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<tbody>
<tr>
<td>CCR, 2004</td>
<td>Cenvat Credit Rules, 2004</td>
</tr>
<tr>
<td>Central Excise Valuation Rules</td>
<td>Central Excise (Determination of Price of Excisable Goods) Rules, 2000</td>
</tr>
<tr>
<td>DTAA</td>
<td>Double Taxation Avoidance Agreement</td>
</tr>
<tr>
<td>EIL</td>
<td>Engineers India Limited</td>
</tr>
<tr>
<td>Excise Act</td>
<td>Central Excise Act, 1944</td>
</tr>
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<td>Term</td>
<td>Description</td>
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<tr>
<td>Finance Act</td>
<td>Finance Act, 1994</td>
</tr>
<tr>
<td>FTS</td>
<td>Fee for technical services</td>
</tr>
<tr>
<td>HC</td>
<td>High Court</td>
</tr>
<tr>
<td>IPLC</td>
<td>International Private Leased Circuit</td>
</tr>
<tr>
<td>IT Act</td>
<td>Income Tax Act, 1961</td>
</tr>
<tr>
<td>JV</td>
<td>Joint Venture</td>
</tr>
<tr>
<td>LD</td>
<td>Liquidated Damages</td>
</tr>
<tr>
<td>P&amp;H</td>
<td>Punjab and Haryana</td>
</tr>
<tr>
<td>SC</td>
<td>Supreme Court</td>
</tr>
<tr>
<td>SCN</td>
<td>Show Cause Notice</td>
</tr>
</tbody>
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