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Happy Ganesha Chaturthi

- GST Seminar on

  Sector-wise Impact Analysis

  on **15th October 2016**

- VI Batch of the course on

  "Refresher Course for Accountants"

  – a Management Development Programme

  17th, 18th, 24th, 25th & 26th November 2016

pragathi
Serve to grow Grow to serve

Chairman's Communique . . .

Dear Professional Colleagues,

September is a month of extreme professional pressures and commitments for most of our Members. We CAs are shouldering heavy responsibilities to submit Tax Audit reports and help the assesses file their tax returns. Members in Industry also will be very busy in closing half yearly accounts. As a whole, September month is always a stressful month as 30th Sept will be the dead line to file the returns. Hence we have planned limited Study Circle Meetings for the month of September.

The month that was –August 2016

Apart from Independence Day Celebration on 15th Aug, Study Circle Meetings and Tax Clinics, we had few significant programmes. Every day in all the media, **there is an echo of Hon'ble Prime Minister Narendra Modiji's words on Start Up India, Make in India, Digital India**. Hence, an Investor Awareness Programme with the said theme was organised where CA Gopal Krishna Raju, Regional Council Member, Chennai, and CA Narasimhan addressed the members which was very well received.

The Implementation of GST is expected to bring in new professional opportunities for CAs to serve the community at large. Increased compliance requirement in the form of number of returns required, challenges in transition to the new regime, etc. definitely require a professional hand for adherence where in CAs can play a pivotal role. The provision for Audit under Sec 42 (4) of the Model GST Law echoes the importance of CAs in successful GST implementation and also provides an opportunity for us to prove ourselves as care takers of the financial wealth of the country. Hence IDT Committee, ICAI under the able leadership of CA Madhukar N Hiregange, Chairman of IDT Committee ICAI has requested all the Branches and Regions in throughout the Country to conduct series of Workshops & Seminars on GST. Hence, we Bangalore Branch also conducted one day seminar on GST on 6/8/2016 for which there was a stupendous response. Hon'ble Principal Addl. Director General of Central Excise Intelligence – Shri Nagendra Kumar the Chief Guest of the Seminar inaugurated and delivered the inaugural address and the presentation by all the speakers were in fact a value addition to each one of us. We have planned few more Study Circle Meet and Workshops on GST for the benefit of Members.

The series of Intensive Workshop on International Taxation was concluded on 20th August. On behalf of Bangalore Branch we appreciate the initiative taken by CA Cotha S Srinivas, Vice Chairman SIRC of ICAI and all the speakers for their sincere efforts taken for the conduct of these Workshops.

One day Seminar on "Charitable Trusts and Taxation Issues" was also an educative programme on 26/8/2016. We have to profusely thank CA Phalguna Kumar- Chairman SIRC of ICAI, the very renowned speaker CA M Kandasami & Dr. N Suresh for their unstinted support for the conduct of the Seminar which was of immense value to the delegates.

The Impact Seminar on 31st August at St. Joseph College of Commerce was very well received by the students. The remarkable presentation by renowned speakers would have kindled in their young minds an idea to opt for CA course.

The month ahead –October 2016

We have planned to conduct interactive session with ROC and Director of Income Tax CPC, Bangalore and waiting for their confirmation. Apart from Study Circle and Tax Clinics, we are planning to conduct a Workshop in Oct. on GST. However, e-newsletter will reach you soon and the details of the said programmes will be uploaded in our website bangaloreicai.org.

The International Conference Jnana Yajna - The quest for excellence is fast approaching on 22nd & 23rd Oct 2016 at Hyderabad International Convention centre. President ICAI, CA M Devaraj Reddy has requested the Members to actively participate in this International Mega Event to make it resounding success.

Though Sept is a very busy month for we CAs, it is a month of festivals also. Lot of us celebrate Ganesha Festival with all the fervour. Let Lord Vigneswara bless all of us to keep away from all the obstacles to make us reach newer heights in our Profession and personal lives.

Wish you all a happy Ganesha Festival and Bakrid.

With warm regards

Pampanna B E

CA. Pampanna B E

Chairman

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CALENDAR OF EVENTS - SEPTEMBER & OCTOBER 2016

Date/Day/ Time	Topic / Speaker	CPE Credit
07.09.2016 Wednesday **6.00pm to 8.00pm**	***Study Circle Meet*** Changing role of Internal Auditors **CA. Abdul Majeed** **VENUE:** Branch Premises 	**2 hrs**
13.09.2016 Tuesday **5.30pm to 8.30pm**	***Study Circle Meet*** Decoding IFC for SME Businesses **CA Dayaniwas Sharma**, *Hyderabad* **VENUE:** Branch Premises 	**3 hrs**
14.09.2016 Wednesday **6.00pm to 8.00pm**	***Study Circle Meet*** Using Tally: Beyond Accounting to Assurance **CA. A Rafeq** **VENUE:** Branch Premises 	**2 hrs**
05.10.2016 Wednesday **6.00pm to 8.00pm**	***Study Circle Meet*** An interactive Session with ROC **Shri. M. Jaykumar** *(Confirmation awaited)* *Registrar of Companies, Karnataka* & ROC Annual Filings & Related Matters **CS Vijay Kumar Sajjan** **VENUE:** Branch Premises  	**2 hrs**
12.10.2016 Wednesday	***No Programme***	—
14.10.2016 Friday **6.00pm to 8.00pm**	***Tax Clinic - Direct Taxes*** Transfer Pricing Challenges **CA Amit Prabhu** **VENUE:** Branch Premises	**2 hrs**
15.10.2016 Saturday **09.30am to 5.30pm**	**GST Seminar on Sector-wise Impact Analysis** Delegate Fees: **Rs. 1000/-** **VENUE:** Branch Premises *Details in Page No.: 5*	**6 hrs**
19.10.2016 Wednesday **6.00pm to 8.00pm**	***Study Circle Meet*** GST: Impact on SME Sector **CA M S Keshava** **VENUE:** Branch Premises 	**2 hrs**

EDITOR :
CA. PAMPANNA B.E.

SUB EDITOR :
CA. SHRAVAN GUDUTHUR

Seminar on "Sector-wise Impact of GST"

Organised by **Bangalore Branch of SIRC of**
The Institute of Chartered Accountants of India

6 hrs **CPE**

On **Saturday, 15th October 2016**

Venue: **S.Nararayanan Auditorium**,ICAI Bhawan, Bangalore Branch

Time: **09.45am to 5.30pm**

Timings	Topics	Speakers
09.45am to 10.00am	Inaugural Session	**CA. Rajendra Kumar P** *Past Chairman, SIRC of ICAI*
10.00am to 11.30am	GST India –Implementation & the road ahead	
11.30am to 11.45am	Tea Break	
11.45am to 01.15pm	Impact of GST on Manufacturing Sector	**CA. A Sai Prasad**
01.15pm to 02.15pm	Lunch Break	
02.15pm to 03.45pm	Impact of GST on Service Sector	**Mr. K S Naveen Kumar**, *Advocate*
03.45pm to 04.00pm	Tea Break	
04.00pm to 05.30pm	Impact of GST on Trading Sector	**CA. Madhur Harlalka**

CA. Pampanna B. E
Chairman
Bangalore Branch of SIRC of ICAI

CA. Shravan Guduthur
Secretary
Bangalore Branch of SIRC of ICAI

DELEGATE FEES FOR MEMBERS: ₹ 1000/-
NON-MEMBERS: ₹ 1725/- (INCLUSIVE OF SERVICE TAX)

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Email : **blrregistrations@icai.org** I Website : **www.bangaloreicai.org**

REFRESHER COURSE FOR ACCOUNTANTS

A Management Development Programme (MDP)

Sixth Batch of Refresher Course for Accountants

In the present business scenario, Accountants are involved in a wide range of commercial activities covering functions relating to Accounting, Finance, Costing, Tax laws and Labour laws. The objectives of the Course are to acquaint the participants about the basics of these essential functions which are present in any organization. This is a **Fast Forward Refresher Course** for those who are interested to learn the practical exposure to basic accounting & finance practices and to learn the most important and fundamental tax laws, in order to perform their accounting and finance works more effectively and competently.

For whom:

Accountants, Accounts Executives & Accounts Assistants working in a manufacturing, service or trading organization.

Course Contents:

- Accounting
- Labour Laws & Business Laws
- Income Tax
- Central Excise, Service Tax, GST and VAT
- Cost Accounting
- Banking

Duration:

The VI batch of the course will be conducted on the following days:
17th, 18th, 24th, 25th & 26th November 2016

Timings: 10.00am to 05.30pm_

Fees: Rs. 6,500/- per participant
Cheque/DD should be drawn in favour of **"Bangalore Branch of SIRC of ICAI"** – payable at Bangalore.

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Email: blrprogrammes@icai.org
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CA Pampanna B. E	**CA Gururaj Acharya**	**CA Shravan Guduthur**
Chairman	*Co-ordinadator*	*Secretary*

REFRESHER COURSE FOR ACCOUNTANTS

A Management Development Programme (MDP)

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We hereby nominate Mr./Ms. _____

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Name of the Sponsoring Authority:_____

Company Seal: Signature of the Authority:

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We are enclosing herewith a Cheque / DD drawn on "Bangalore Branch of SIRC of ICAI" payable at Bangalore for Rs._____.

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Website: www.bangaloreicai.org

IMPORTANT DATES TO REMEMBER DURING THE MONTH OF SEPTEMBER 2016

Due Date	Statute	Compliance
5th Sept. 2016	Excise	Monthly Payment of Excise duty for the month of August 2016
	Service Tax	Monthly/Quarterly Payment of Service tax for the month for August 2016
6th Sept. 2016	Excise	Monthly E- Payment of Excise duty for the month of August 2016
	Service Tax	Monthly/Quarterly E- Payment of Service Tax for the month of August 2016
7th Sept. 2016	Income Tax	Deposit of Tax deducted / collected during August 2016.
10th Sept. 2016	Excise	Monthly Performance Reports by Units in EOU,STP,SEZ for August 2016.
15th Sept. 2016	VAT	Payment and filing of VAT 120 under KVAT Laws for month ended August 2016 (for Composition Dealers).
		Quarterly Payment and filing of VAT 100 under KVAT Laws for quarter ended August 2016.
	Provident Fund	Payment of EPF Contribution for August 2016 (No grace days).
		Return of Employees Qualifying to EPF during August 2016.
		Consolidated Statement of Dues and Remittances under EPF and EDLI For August 2016.
		Monthly Returns of Employees Joined the Organisation for August 2016.
		Monthly Returns of Employees left the Organisation for August 2016.
	Income Tax	Payment of Advance tax (45% of tax on total income) for all assessees for the A.Y 2017-18.
20th Sept. 2016	VAT	Monthly Returns (VAT 100) and Payment of CST and VAT Collected/payable During August 2016.
	Professional Tax	Monthly Returns and Payment of PT Deducted During August 2016.
21st Sept. 2016	ESI	Deposit of ESI Contribution and Collections of August 2016 to the credit of ESI Corporation.
30th Sept. 2016	Income Tax	Annual return of income for the assessment year 2016-17 if the assessee (not having any international or specified domestic transaction) is (a) corporate-assessee or (b) non-corporate assessee (whose books of account are required to be audited) or (c) working partner (of a firm whose accounts are required to be audited).
		Declaration in Form-1 under Income Declaration Scheme, 2016, for all persons who have not declared income correctly in earlier years.

ACCOUNTING STANDARDS

CA Mohan R Lavi

The Ind AS Transition Facilitation Group of the ICAI has issued four more clarifications recently.

(ITFG) Clarification Bulletin 4

Issue 1

ABC Ltd., which is a manufacturer of TV sets, sells a TV at Rs. 50,000 which includes excise duty of Rs. 5,000. What is the amount to be recognised as revenue? How excise duty should be presented in financial statements? Is there any change in the presentation of excise duty as compared to presentation prescribed in AS 9?

Clarification

Paragraph 8 of Ind AS 18, inter alia, provides that revenue includes only the gross inflows of economic benefits received and receivable by the entity on its own account. Amounts collected on behalf of third parties such as sales taxes, goods and services taxes and value added taxes are not economic benefits which flow to the entity and do not result in increases in equity. Therefore, they are excluded from revenue. Excise duty is a liability of the manufacturer which forms part of the cost of production, irrespective whether the goods are sold or not. Therefore, recovery of excise duty flows to the entity on its own account and the same should be included in the amount of revenue. Accordingly, in the present case, revenue should be recognised at Rs. 50,000/- With regard to disclosure of Excise Duty, explanation to paragraph 10 of AS 9, Revenue Recognition, specifically provides that the excise duty included in the turnover should be shown as reduction from the gross turnover on the face of the statement of profit and loss. Ind 18, Revenue, does not specifically prescribe any guidance for presentation of excise duty. However, under Ind AS reporting framework, revenue from sale of products is presented by including the Excise Duty as discussed above. As per Division - II of Schedule III to the Companies Act, 2013 (i.e. Ind AS based Schedule III) – Note 3 of General Instructions for Preparation of Statement of Profit and Loss, provides that revenue from operations shall disclose separately in the notes: (a) sale of products (including Excise Duty); (b) sale of services; and (c) other operating revenues. In view of above, since the revenue is the gross amount including excise duty, in the statement of profit and loss prepared under Ind AS, the excise duty should be reflected as an expense.

Issue 2

How revenue should be recognised in case Service Tax is collected from customer for rendering of services?

Clarification

Response Paragraph 8 of Ind AS 18, inter alia, provides that revenue includes only the gross inflows of economic benefits received and receivable by the entity on its own account. Amounts collected on behalf of third parties such as sales taxes, goods and services taxes and value added taxes are not economic benefits which flow to the entity and do not result in increases in equity. Therefore, they are excluded from revenue. In view of the above, since service tax collected represents the amount collected on behalf of a third party, viz., the government, revenue should be net of service tax collected.

AUTHORS NOTE

It would be interesting to see if the differential treatment for Excise Duty and Service Tax continues if and when GST is introduced. In the opinion of the author, there cannot be a differential treatment since both the taxes will be subsumed into GST and the fact that Para 8 of Ind AS 18 specifically states that revenue would not include Goods and Service Taxes. Just so as to add to our dilemma, Paragraph 47 of Ind AS 115 (which has been deferred for now) states that only some Sales Taxes will not form a part of Revenue.

Issue 3

Will the following companies with negative net worth need to comply with Ind AS? (a) Company A (listed) having negative net worth of Rs. 600 crore. (b) Company B (unlisted) having negative net worth of Rs. 300 crore.

Clarification

Rule 4(1)(ii) and Rule 4(1)(iii) of Companies (Indian Accounting Standards) Rules, 2015, state as follows: (ii) the following companies shall comply with the Indian Accounting Standards (Ind AS) for the accounting periods beginning on or after 1st April, 2016, with the comparatives for the periods ending on 31st March, 2016, or thereafter, namely: (a) companies whose equity or debt securities are listed or are in the process of being listed on any stock exchange in India or outside India and having net worth of rupees five hundred crore or more; (b) companies other than those covered by sub-clause (a) of clause (ii) of subrule (1) and having net worth of rupees five hundred crore or more; (c) holding, subsidiary, joint venture or associate companies of companies covered by sub-clause (a) of clause (ii) of sub-rule (1) and sub-clause (b) of clause (ii) of sub- rule (1) as the case may be; and". (iii) the following companies shall comply with the Indian Accounting Standards (Ind AS) for the accounting periods beginning on or after 1st April, 2017, with the comparatives for the periods ending on 31st March, 2017, or thereafter, namely:- (a) companies whose equity or debt securities are listed or are in the process of being listed on any stock exchange in India or outside India and having net worth of less than rupees five hundred crore; (b) companies other than those covered in clause (ii) of sub- rule (1) and subclause (a) of clause (iii) of sub-rule (1), that is, unlisted companies having net worth of rupees two hundred and fifty crore or more but less than rupees five hundred crore. (c) holding, subsidiary, joint venture or associate companies of companies covered under sub-clause (a) of clause (iii) of sub- rule (1) and sub-clause (b) of clause (iii) of sub- rule (1), as the case may be: As per Rule 2(1) (f) of Companies (Indian Accounting Standards) Rules, 2015, "net worth" shall have the meaning assigned to it in clause (57) of section 2 of the Act. Section 2(57) of Companies Act, 2013, defines 'net worth' as follows: "net worth" means the aggregate value of the paid-up share capital and all reserves created out of the profits and securities premium account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet, but does not include reserves created out of revaluation of assets, write-back of depreciation and amalgamation; In accordance with above provisions, it is clear that Ind AS will be applicable to companies (both listed and unlisted) from financial year 2016-17, if net worth is Rs. 500 crore or more. Therefore, if the net worth of the listed or unlisted company is negative, then Ind AS will not be applicable from F.Y. 2016-17. Accordingly, Ind AS will not be applicable to Company A (listed) and Company B (unlisted) from F.Y. 2016-17. However, as per the roadmap, Ind AS will be applicable from financial year 2017-18 to all listed companies having net worth less Rs. 500 crore and unlisted companies having net worth Rs. 250 Page 4 of 4 crore or more but less than rupees 500 core. Accordingly, Ind AS will be applicable to Company A (listed) from F.Y. 2017-18, whereas Ind AS will not be applicable to Company B (unlisted) unless net worth criteria being met by Company B subsequently or Ind AS becoming applicable as part of the Group (e.g. holding of Company B is covered under Ind AS) or Company B voluntarily decides to apply Ind AS.

Issue 4

A company covered under Phase I, having net worth of Rs. 600 crores, decides to give comparatives for F.Y. 2015-16 and F.Y. 2014-15. What should be date of transition in this case?

Clarification

Appendix A to Ind AS 101, First-time Adoption of Indian Accounting Standards, defines date of transition as follows: "The beginning of the earliest period for which an entity presents full comparative information under Ind ASs in first Ind AS financial statements" The definition of the date of transition as stated above therefore permits an entity to select its date of transition. However, Rule 4(1)(i) and (ii) of the Companies (Indian Accounting Standards) Rules, 2015, state as under: "The Companies and their auditors shall comply with the Indian Accounting Standards (Ind AS) specified in Annexure to these rules in preparation of their financial statements and audit respectively, in the following manner, namely:- (i) any company may comply with the Indian Accounting Standards (Ind AS) for financial statements for accounting periods beginning on or after 1st April, 2015, with the comparatives for the periods ending on 31st March, 2015, or thereafter; (ii) the following companies shall comply with the Indian Accounting Standards (Ind AS) for the accounting periods beginning on or after 1st April, 2016, with the comparatives for the periods ending on 31st March, 2016, or thereafter, namely…". In the given case, the Company is required to mandatorily

adopt Ind AS from April 1, 2016, i.e., for the period 2016-17, and with comparatives as per Ind AS for 2015-16. Accordingly, the beginning of the comparative period will be April 1, 2015, which will be considered as the date of transition as per Ind AS. Therefore, the date of transition to Ind AS shall be April 1, 2015. The company cannot have the date of transition at April 1, 2014.

Impact of Ind AS

Many listed companies have presented their quarterly financial statements for June 2016 under Ind AS as required by Ind AS 101 and Ind AS 34. Presenting the actuarial gains and losses in Other Comprehensive Income and fair valuation of all financial instruments seemed to be the most popular items of reconciliation. However, in a few cases, the impact of transition to Ind AS was drastic as the reconciliation statement presented by Andhra Sugars Limited that has been reproduced below shows:

Sl No	Particulars	Quarter ended 30th June 2015
		Rs in lakhs
		Amount
	Profit after tax as reported in previous quarter as per Indian GAAP	100.41
1	Other operating income-Government Grant recognised	115.7
2	Remeasurement of defined benefit olbigations recongised in OCI	15.56
3	Fair value of expectd credit loss on Debtors	-8.77
4	Impact of fair value of provisions	-4
5	Fair Valuation of interest subvention loan and deferred sales tax loan	-109.99
6	Effect of depreciation	-586.62
	Net Profit under Ind AS	-477.71
7	Effect of measuring investment at Fair value through OCI	-1803.11
8	Actuarial Gain/Loss on defined benefit plans	-15.57
9	Deferred tax on above Ind AS adjustments	446.6
	Total Comprehensive Income as per Ind AS	-1849.79

From the above, it appears that the company was previously reducing Government Grants for Property, Plant and Equipment from the value of the assets. These have now been shown as income over the grant period hence the depreciation has increased. The company has also had significant losses on fair valuation of financial instruments that was being done for the first time since AS 30, 31 and 32 were never mandated in India. The above results appear to send a message that India can no longer afford to defer accounting standards indefinitely.

RULE 6(3) AMENDED – AN ANALYSIS ON REAL ESTATE SECTOR

CA. N.R. Badrinath, B.Com, Grad CWA, FCA & **CA. Madhur Harlalka**, B.Com, FCA, LL.B

1. Preamble:

A works contract for construction consist of both, taxable and non-taxable / exempt services. Similarly, construction of complex services also consists of taxable and non-taxable services. Accordingly, it is relevant to understand the scope of 'exempt services' in terms of Rule 6 of CENVAT Credit Rules, 2004. This note provides an analysis of relevant provisions of service tax and CENVAT Credit Rules, 2004 to decipher the implications of CENVAT credit reversal on provision of works contract service and construction of complex service provider.

2. Relevant provisions:

Construction of complex services: The service provider registered under the category construction of complex service is liable to pay service tax on the service portion of the contract executed with the customer. In the event the service provider is not able to ascertain the value of services, the abatement to the extent of 60% can be claimed in terms of Notification No. 26/2012 dated 20.06.2012 provided that CENVAT credit of duty paid on inputs is not claimed. In other words, the service provider ascertaining value of taxable services under abatement method is entitled to claim CENVAT credit of service tax paid on input services and duty paid on capital goods. Generally, the abatement method is followed to ascertain the value of taxable services involved in construction of services.

Works contract services: The provider of works contract services is liable to pay service tax only on the value of works contract service provided in terms of Rule 2A of Service Tax Valuation Rules, 2006. In the event the service provider is not entitled to ascertain the value of services, the provisions provide for abatement to the extent of 60% on a condition that CENVAT credit of duty paid on inputs is not claimed.

Reversal of CENVAT credit: Rule 6 of CENVAT Credit Rules, 2004 provides that CENVAT credit shall not be allowed on quantity of inputs or input services used in provision of exempt services.

Exempt services as defined in Rule 2(e) means exempt service or services on which no service tax is liable to be paid under Section 66B or exempt part of taxable service on the condition that no CENVAT credit on inputs and input services shall be availed. Further, Explanation 3 to Rule 6(1) clarifies that exempt service under Rule 2(e) shall also include activity which is not a service under Section 65B(44) provided such activity uses inputs or input services. Accordingly, for the purpose of Rule 6, exempt service shall include the following:

a. Services which are not liable to service tax;

b. Part of taxable services which are exempt on the condition that no CENVAT credit on inputs and inputs services are availed;

c. Transfer of title in goods or immovable property;

d. Transfer, delivery or supply of goods which is deemed to be a sale in terms of Article 366(29A) of the Constitution;

e. A transaction in money or claim;

f. A provision of service by an employee to the employer in the course of employment;

g. Fees taken in any Court or tribunal established under any law for the time being in force.

It is apparent from the relevant provisions discussed above that exempt service for the purpose of reversal of CENVAT credit under Rule 6 includes transfer or property in goods and / or immovable property. As such, it can be inferred that CENVAT credit of input services used in provision of services (which includes transfer of property in goods / immovable property) cannot be claimed.

In terms of Rule 6(3A)(b) of CENVAT Credit Rules, 2004 (*as amended*), the service provider engaged in provision of taxable and non-taxable services will be under an obligation to reverse the CENVAT credit attributable to

non-taxable / exempt services on the following input services:

a. Input services utilized for provision of exempt services shall be ineligible;

b. In relation to common input services, the service provider shall identify the input services attributable to exempt services in the following manner:

$$\text{Ineligible CENVAT Credit out of common input services} = \frac{\text{Value of exempted services provided}}{\text{Total Turnover*}} * \text{Common input services}$$

*Total Turnover as given above shall be the sum total of the following:

- Value of taxable services provided;
- Value of exempt services provided;
- Value of taxable goods removed; and
- Value of exempt goods removed.

3. Analysis of implication of reversal of CENVAT credit to provider of service under the category of construction of complex services:

The developer providing construction of complex services generally collects the following amounts from the customer which are not liable to service tax under:

a. Advances towards value of land;

b. Legal charges;

c. Registration charges;

d. Electricity and water deposits;

e. Maintenance deposits, etc.

It is relevant here to analyze whether the above amounts collected from the customers would qualify as exempt services for the purpose of the reversal of CENVAT credit under Rule 6(3A). In terms of the explanation given *supra,* it is apparent that exempt service read with Rule 2(e) and Explanation 3 to Rule 6(1) will not only include the services which are not liable to service tax but also the activities which do not qualify as service in terms of Section 65B(44). Accordingly, it is relevant to understand whether developer is liable to reverse the CENVAT credit attributable to amount received other than construction advances.

For the purpose of reversal of CENVAT credit, it follows that any activity which is not liable to service tax will qualify as 'exempt service'. Accordingly, the person providing construction of complex services may be called upto to reverse the CENVAT credit on input services used in relation to 'exempt services' (activities which are not liable to service tax).

4. Ascertaining the amount of CENVAT credit to be reversed:

The value of exempt services and the taxable value of services provided should be ascertained to determine the ratio of exempt services involved in total turnover. The value of exempt services is a sum of that part of total turnover which is not liable to service tax. Such value of exempt services would depend on the category of services provided by the developer viz., construction of complex services or works contract services.

Construction of complex services:

Particulars	Taxable?	Comments
Advances received towards construction	✓	The service provider in terms of Notification No. 26/2012 dated 20.06.2012 is liable to pay service tax on 30% of the advances received towards construction and land. Accordingly, it is inferred that the taxable value in such a case would be the sum of advances received towards land and construction. Accordingly, the sum of advances received towards constructions and land would be taxable value for the purpose of Rule 6 of CENVAT Credit Rules, 2004. **Accordingly, 70% of the total value may have to be reckoned as exempt services for the purpose of Rule 6 of CENVAT Credit Rules, 2004.**
Advances received towards Land	✓	
Preferential location charges	✓	Preferential location charges are liable to service tax. Accordingly, such charges would for part of the taxable value of services provided for the purpose of Rule 6 of CENVAT Credit Rules, 2004.
Maintenance Charges	✓	Maintenance charges are liable to service tax. Accordingly, such charges would for part of the taxable value of services provided for the purpose of Rule 6 of CENVAT Credit Rules, 2004.

Particulars	Taxable?	Comments
Deposits	×	Recovery of money from the customers towards the amount paid as deposits is not liable to service tax since such amount is not collected as consideration towards provision of services. Despite, such amount is not collected for provision of services, such activity of obtaining connection (electricity and water) for the customer would qualify as exempt services for the purpose of Rule 6 of CENVAT Credit Rules, 2004.
Other charges	✓/×	Any amounts collected from the customer if not liable to service tax, such amount would also qualify as exempt services for the purpose of Rule 6 of CENVAT Credit Rules, 2004.

Works contract services:

Particulars	Taxable?	Comments
Advances received towards construction	✓	In terms of Rule 2A of Service Tax Valuation Rules, 2006, the person executing works contract is liable to pay service tax only on the value of services provided. In other words, the supply of goods in the course of execution of works contract is not liable to service tax. In the event the provider of works contract service is not able to ascertain the value of services, he may claim exemption at the rate of 60% and is liable to pay service tax on 40% of the value of works contract services. 60% of the value of services are provided as exemption since such amount forming part of the consideration represents the consideration not liable to service tax viz., transfer of property in goods. **Accordingly, 60% of the total value may have to be reckoned as exempt services for the purpose of Rule 6 of CENVAT Credit Rules, 2004.**
Advances received towards Land	×	The activity in relation to transfer of immovable property is will not qualify as service in terms of Section 65B(44). Exempt services as defined in Rule 2(e) means exempt service or services on which no service tax is liable to be paid under Section 66B or exempt part of taxable service on the condition that no CENVAT credit on inputs and input services shall be availed. Further, Explanation 3 to Rule 6(1) clarifies that exempt service under Rule 2(e) shall also include activity which is not a service under Section 65B(44) provided such activity uses inputs or input services. This would therefore have to be reckoned as 'exempt services' for the purposes of Rule 6(3) of the CENVAT Credit Rules, 2004.
Preferential location charges	✓	Preferential location charges are liable to service tax. Accordingly, such charges would for part of the taxable value of services provided for the purpose of Rule 6 of CENVAT Credit Rules, 2004.
Maintenance Charges	✓	Maintenance charges are liable to service tax. Accordingly, such charges would for part of the taxable value of services provided for the purpose of Rule 6 of CENVAT Credit Rules, 2004.
Deposits	×	Recovery of money from the customers towards the amount paid as deposits is not liable to service tax since such amount is not collected as consideration towards provision of services. Despite, such amount is not collected for provision of services, such activity of obtaining connection (electricity and water) for the customer would qualify as exempt services for the purpose of Rule 6 of CENVAT Credit Rules, 2004.
Other charges	✓/×	Any amounts collected from the customer if not liable to service tax, such amount would also qualify as exempt services for the purpose of Rule 6 of CENVAT Credit Rules, 2004.

5. Conclusion:

A conjoint reading of Section 65B(44) of the Finance Act, 1994, Rule 2(e), Rule 6 and Explanation 3 to Rule 6 of CENVAT Credit Rules, 2004 suggests that the exempted portion of a works contract services or the construction of complex services should be reckoned as 'exempt services'. Though there are reasons as to why it should not be reckoned as 'exempt services' for the limited purposes of Rule 6(3), this school of thought could be challenged !!!

COMPANY LAW - UPDATES – AUGUST 2016

CA K. Gururaj Acharya

1. MCA Updates

1.1 The Following forms were revised by MCA *[wef: 24-08-2016]*

i. eForm AOC-4	Filing of financial statement and other doc. with ROC.
ii. eForm AOC-4 CFS	Filing of consolidated financial statements and other doc. with ROC
iii. eForm DIR-12	Particulars of appointment of Directors and KMPs and changes among them
iv. eForm FC-2	Return of alteration in documents filed for registration by foreign company
v. eForm MGT-15	Filing of Report on AGM of Listed Co.

1.2 Companies (Share Capital and Debentures) Rules, 2014. *[Amended Rules dtd 12.08.2016]*

Compliance under Co's (Share Capital and Debentures) Rules, 2014 shall NOT apply to rupee denominated bonds issued exclusively to overseas investors in terms of A.P. (DIR Series) Circular No. 17 (dtd 29.09.2015 RBI)

2. ICAI Updates

2.1 Management Committee, at its 12th (Adjourned) meeting held on 7th August, 2016, has constituted a Group for finalizing the format of 'Fit & Proper' Certificate to be issued to Indian CA Firms.

Issuance of Fit and Proper Certificate of the CA Firms will be similar to Good-standing Certificate being issued to the members.

2.2 Exposure Draft issued for comments by Accounting Standard Board reg.

i. Guidance Note on Combined Financial Statements

ii. Amendment in Ind AS 102 (Share Based Payments)

(Last date for comments - 05thSeptember, 2016)

2.3 Implementation Guide on Auditor's Reports under Ind AS for Transition Phase issued by AASB of ICAI on 23rd August, 2016, provides guidance on reporting responsibilities of the auditors for the audit of:

a. Ind AS financial statements prepared for the first year in which Ind AS are applicable to the company.

b. Ind AS financial results prepared by a listed entity under SEBI Listing Regulations during the first year of adoption of Ind AS.

c. Special purpose financial statements for the corresponding period and opening balance sheet as per Ind AS which will be presented by the company as part of its first Ind AS financial statements.

2.4 Implementation Guide (IG) on Audit of Internal Financial Controls over Financial Reporting with specific reference to Smaller, Less Complex Companies issued by AASB of ICAI [dtd 22.08.2016]

The gist of the above is given below:

i. This IG is to be read in conjunction with the GN on Audit of IFC

ii. The IG explains the Characteristic of smaller and less complex companies

iii. This IG is a diluted version of the GN on audit of IFC that can be adopted for audit of Internal Financial Control Over Financial Reporting (IFCOFR) wrt Smaller, Less Complex Companies *(Note – Not to be confused with "Small Co." as per S. 2(85) of Co's Act 2013)*

iv. The IG Explains in simple language with illustration and answers 30 FAQ's

v. The IG gives guidance in dealing with such Co's with limited / less formal documentation and no Segregation of Duties.

vi. Audit Report format which includes IFC report as part of main Audit Report itself by including therein

- Management's Responsibility for Financial Statements and for IFCOFR.
- Auditors responsibility including a Para on IFCOFR with reference to GN on IFCOFR
- Meaning of IFCOFR
- Inherent limitations of IFCOFR
- Including a Para as follows instead of Cross referencing to a separate report in the annexure:

Unmodified

In our opinion considering nature of business, size of operation and organizational structure of the entity, the Company has, in all material respects, an adequate internal financial controls system over financial reporting and such internal financial controls over financial reporting were operating effectively as at 31st March 20XX, based on the internal control over financial reporting criteria established by the Company considering the essential components of internal control stated in the Guidance Note on Audit of Internal Financial Controls Over Financial Reporting issued by the Institute of Chartered Accountants of India.

Modified

According to the information and explanations given to me / us and based on my / our audit, the following material weakness/es has / have been identified as at March 31, 20X1:

i. *The Company did not have an appropriate internal control system for customer acceptance, credit evaluation and establishing customer credit limits for sales, which could potentially result in the Company recognising revenue without establishing reasonable certainty of ultimate collection.*

ii. *[list other deficiencies identified]*

A 'material weakness' is a deficiency, or a combination of deficiencies, in internal financial control over financial reporting, such that there is a reasonable possibility that a material misstatement of the company's annual or interim financial statements will not be prevented or detected on a timely basis.

In my / our opinion considering nature of business, size of operation and organisational structure of the entity, except for the effects/possible effects of the material weakness/es described above on the achievement of the objectives of the control criteria, the Company has maintained, in all material respects, adequate internal financial controls over financial reporting and such internal financial controls over financial reporting were operating effectively as of March 31, 20X1, based on "the internal control over financial reporting criteria established by the Company considering the essential components of internal control stated in the Guidance Note on Audit of Internal Financial Controls Over Financial Reporting issued by the Institute of Chartered Accountants of India".

I / We have considered the material weakness/es identified and reported above in determining the nature, timing, and extent of audit tests applied in my / our audit of the March 31, 20X1 standalone financial statements of the Company, and the / these material weakness/es does not / do not affect my / our opinion on the standalone financial statements of the Company.

In this case, definition of 'Material Weakness' & the impact of such modified opinion on the FS of the Co., is to be given.

TAX UPDATES - JULY 2016

CA Chythanya K.K., B.com, FCA, L.L.B., Advocate

VAT, CST, ENTRY TAX, PROFESSIONAL TAX

PARTS DIGESTED:

91 VST – Part 5
92 VST – Part 1
85 KLJ – Part 6

Reference / Description

2016 (85) KLJ 273 (Tri.) (DB): SAP India Pvt. Ltd. v. State of Karnataka **-** In the instant case the question that arose before the Honourable Karnataka Appellate Tribunal is whether the revenue realised under software maintenance service activity undertaken by the assessee is sale of taxable goods as patches and updates within the State so as to attract VAT under the Karnataka Value Added Tax Act, 2003.

The Honourable Karnataka Appellate Tribunal held that software maintenance and repair are in the nature of works contract and are permissible for disintegration. It is only on the services, the service tax is payable and on the goods component when transferred in the execution of the contract, VAT is liable for tax.

Applying the aforesaid principle, the Tribunal observed that in the instant case patches, updates etc, are downloaded electronically from the SAP AG's systems located in Germany. Therefore, the question of works contract being carried out in India need not be examined at all.

Thus, the Tribunal held that the Assessee has acted as only as a service provider in the maintenance of software being downloaded by the end users.

2016 (85) KLJ 345 (Karn. - HC): Pratham Motors Pvt. Ltd. v. State of Karnataka and Others **-** In the instant case the Honourable Karnataka High Court held that discounts issued by way of credit note after the issue of sale invoice are deductible from total turnover under Rule 3(2)(c) of the KarVAT Rules.

While holding so the Court explained the effect of the decision rendered by the Division Bench of the Honourable Karnataka High Court in the case of Southern Motors v. State of Karnataka and others 2014 (79) KLJ 533 (Karn. – HC)(DB) as under:

(a) If a credit note is given under Rule 31 of the KarVAT Rules reducing the tax amount, then it is for the dealer to declare the credit note in the return furnished to the tax authority and claim reduction in tax on such total turnover.

(b) Registered dealers issuing credit notes for discounts are authorised to claim deduction of the discounts from total turnover declared in the month returns filed

(c) Disentitlement is only in regard to claiming the deduction in the computation of taxable turnovers in terms of Rule 3(2) of the KarVAT Rules.

2016 (85) KLJ 355 (Tri.) (DB): ABB Ltd. v. State of Karnataka **-** In the instant case the Honourable Karnataka Appellate Tribunal dealing with the Form 'C' and Form 'I' declaration, held as under:

(a) As per Section 5(3), the penultimate sales in the course of export are exemption if and only if such sales are made after and to comply with a contract/agreement export and the said goods are actually exported.

(b) As per Section 5(4), the exemption contemplated under Section 5(3) is not allowable unless, the selling dealer furnishes the prescribed Form duly filled, signed and issued by the exporter to whom the goods are sold.

(c) Rule 12(10)(a) prescribes that the declaration referred to in Section 5(4) should be in Form 'H'. The rule as it existed earlier to 14.07.2005 required production of documents in relation to the export of goods as certified in Form 'H' declaration. After 14.07.2005, the substituted rule has dispensed with the production of separate documentary proof other than that contemplated along with Form 'H' declarations.

(d) Form 'H' is required to be duly filled, signed and issued by the exporter. The Certificate I of the Form 'H' declaration contains the details of purchase order placed by the exporter, the details of invoice/ Bill No. and date, value of goods exported are sold by the dealer and

thirdly and more importantly the agreement or Order No. and date after and to comply with which, the said goods are sold

(e) If all the details in Certificate I are fully and duly filled, Rule 12(10)(a) read with Sections 5(3) & 5(4) does not contemplate production of copy of the agreement/order of the foreign buyer.

(f) If the required details are not filled up in the Form 'H' declarations, the authorities are at liberty to reject the declaration Forms as incomplete and defective.

(g) In such cases the dealers may produce the copies of foreign buyer's agreement/order in relation to export to establish that the goods are sold after and for the purpose of complying with such order for export.

INCOME TAX

PARTS DIGESTED:

a) 385 ITR – Part 1, 2 & 3
b) 240 Taxman – Parts 1, 2, & 4
c) 47 ITR (Trib.) – Part 7
d) 48 ITR (Trib.) – Part 1
e) 159 ITD – Part 1 to 3
f) 50 CAPJ – Part 1

[2016] 385 ITR 346 (Karn. – HC): CIT and another v. IBC Knowledge Park P. Ltd. **-** In the instant case the assessee had let out building along with elevators, generators and other electrical installations and charged separate amounts for said amenities.

The assessee had claimed deduction on account of depreciation on the aforesaid assets against income received in the form of maintenance fee charged from the tenants of the building, which was offered to tax under the head 'income from business'.

The Assessing Officer disallowed the same by holding that elevators, generators and other electrical installations are part of the building and income from the same is chargeable to tax under 'income from house property'.

On appeal before the Honourable Karnataka High Court, the Court held that the fee for facilities and services provided by the assessee has to be considered as income from business and depreciation would be allowed on cost of assets providing such amenities.

[2016] 385 ITR 346 (Karn. – HC): CIT and another v. IBC Knowledge Park P. Ltd. **-** In the instant case the Honourable Karnataka High Court dealing with block assessment in cases relating to search held as under:

(a) If a search operation does not lead to detection of undisclosed income as defined in Chapter XIV-B of the IT Act, then no purpose would be served in reopening the assessment already completed.

(b) If there is no detection of any undisclosed income, then there would be no need for pending assessment to abate.

(c) When particulars of income declared in the return are already available with the Assessing Officer, such income cannot form part of undisclosed income even if such return is filed beyond the time-limit, but before search, as long as they relate to any year covered in the block.

(d) Thus, a block assessment is justified only on the basis of evidence found during search and the materials or information relatable thereto.

(e) Section 153C is in pari materia with Section 158BD conferring jurisdiction over third parties to a search providing certain conditions before the Assessing Officer having jurisdiction over a third party can assume jurisdiction.

(f) Materials such as books of account, documents or valuable assets found during a search should belong to a third party which would lead to an inference of undisclosed income of such third party.

(g) Such an inference should be recorded by the Assessing Officer having jurisdiction over the searched persons and communicated to the Assessing Officer having jurisdiction over such third party along with the seized documents and other incriminating materials on the basis of which the Assessing Officer having jurisdiction over such third party would issue notice under Section 153C.

(h) On receipt of the aforesaid material, the Assessing Officer having jurisdiction over such third party would proceed against the said third party.

(i) Thus, where no material belonging to a third party is found during a search, but only an inference of an undisclosed income is drawn during the course of enquiry, during search or during post-search enquiry, Section 153C would have no application.

(j) Thus, the detection of incriminating material leading to an inference of undisclosed income is a sine qua non for invocation of Section 153C of the IT Act.

[2016] 385 ITR 408 (Delhi – HC): Technip Singapor Pte Ltd. v. DIT and another **-** In the instant case Assessee, Singapore company entered into contract with Indian company IOCL for installation of Single Point Mooring (SPM) and allied works for setting up offshore crude oil receiving facility for IOCL.

The Authority for Advanced Rulings held that the payment for use of equipment comprised a substantial part of the payment. Since installation was ancillary and subsidiary to the use of the equipment or enjoyment of the right for such use, the payment for the installation would fall under the definition of fees for technical services in terms of Article 12(4)(a) of the Indo-Singapore DTAA.

On writ petition before the Honourable Delhi High Court, the Court held that in accordance with DTAA the income earned by the assessee would be treated as 'royalty' only where it was received as consideration for the use of the equipment.

In other words, for the payment to be characterised as one for the use of the equipment, factually, the equipment must be used by IOCL. The Court observed that in the instant case factually, there was no finding that the equipment had actually been used by IOCL.

The Court held that there is a difference between the use of the equipment by the Assessee "for" IOCL and use of the equipment "by" IOCL. Since in the instant case equipment was used for rendering services to IOCL, it could not be converted to a contract of hiring of equipment by IOCL.

Therefore, the Court held that the impugned consideration for payment of installation does not fall under the definition of fees for technical services in terms of Article 12(4)(a) of the Indo-Singapore DTAA.

[2016] 385 ITR 427 (Raj. – HC): CIT (TDS) v. Rajasthan Knowledge Corporation Ltd. - In the instant case Assessee was imparting computer education to Government employees and students through Franchisees. Franchisees as per the terms of agreement were remitting entire fees collected from students to Assessee and Assessee in turn was sharing the fee with Franchisees and Programme Support Centres.

The Assessing Officer was of the view that the impugned payments are for technical services and hence are liable for deduction of tax at source under Section 194J of the IT Act.

On appeal before the Honourable Rajasthan High Court, the Court held that in the instant case the dominant intention of the parties was to conduct the business of providing e-learning courses in the State of Rajasthan and share the revenue generated by way of fess received from the learners. The transaction between the parties is not of a service provider or service receiver. The relation between the parties is one of collaborators.

Therefore, the Court held that the revenue shared between the parties cannot be said to be payments for technical services rendered by Franchisees and Programme Support Centres to the Assessee.

[2016] 240 Taxman 143 (Bom. – HC); 69 taxmann.com 402 (Bom. – HC): CIT v. Tech. Mahindra Ltd. - In the instant case the Honourable Bombay High Court held that credit which is available to the assessee in view of DTAA relief under Section 90 of the IT Act, is to be taken into account and if there is any excess which assessee has paid into Indian Treasury, then assessee is entitled to refund of the same along with interest in terms of Section 244A of the Act.

[2016] 70 taxmann.com 381 (Cal. – HC); [2016] 240 Taxman (Weekly Browser) Part 1: CIT v. Shaw Wallace Distilleries Ltd. - In the instant case the assessee filed its return declaring certain taxable income. The Assessing Officer completed assessment making various additions.

The assessee filed an appeal raising a plea that the assessment order passed on 31-3-2005 was a nullity because the assessee had merged with 'M' Ltd. pursuant to an order passed by the High Court on 02-03-2003.

On appeal before the Honourable Calcutta High Court, the Court observed that the instant case pertains to the assessment year 2002-03, i.e., financial year which ended on 31.03.2002, whereas the amalgamation took place with effect from November 2002. Therefore, the Court held that it was a liability of the amalgamating company which accrued prior to the amalgamation.

Thus, the Court held that assessment will not become invalid due to amalgamation, as tax liability accrued prior to amalgamation.

TS-418-HC-2016(DEL): CIT v. Ansal Housing and Construction Ltd. - In the instant case the Honourable Delhi High Court relying on its coordinate bench ruling in Ansal Housing Finance & Leasing Co. Ltd. ('AHFL') [2013] 354 ITR 180 (Del), held that levy of income tax in the case of one holding house property is premised not on whether the assessee carries on business as landlord, but on ownership.

While holding so the Court observes that the coordinate bench in AHFL had rejected assessee's plea that flats owned could not be notionally taxed on the basis of their Annual Letting Value as the owner was an occupant and such occupation was in the course of its business by holding that if the assessee's contention were to be accepted, the levy of income tax on unoccupied houses

and flats would be impermissible, which is clearly not the case.

The Honourable Court distinguished the assessee's reliance on SC decision in Chennai Properties & Investments Ltd. [2015] 373 ITR 673 (SC) as the main object of assessee therein was holding the properties and earning income by letting out properties as against assessee's case where letting out of properties wasn't a part of its object.

TS-401-HC-2016(DEL)]: CUB Pty Ltd. v. UOI - In the instant case, the Honourable Delhi High Court held that where assessee, an Australian company, transferred its right, title and interest in trademark namely 'Foster' in India, since it was a case of transfer of intangible asset and, assessee was not located in India at time of transaction, income accruing to assessee from transfer of its right, title or interest in trademark was not taxable in India.

While holding so the Court held that there is no such provision with regard to intangible assets, such as trademarks, brands, logos, i.e., intellectual property rights. Therefore, the well accepted principle of 'mobilia sequuntur personam' would have to be followed. The situs of the owner of an intangible asset would be the closest approximation of the situs of an intangible asset, which is an internationally accepted rule, unless it is altered by local legislation. Since there is no such alteration in the Indian context, the submissions made by assessee that the situs of the trademarks and intellectual property rights, would not be in India has to be accepted.

TS-5341-HC-2016(Karnataka)-O: CIT v. Shri Siddeshwar Co-Operative Bank Limited - In the instant case the Honourable Karnataka High Court held that interest accrued to assessee-bank on non-performing assets could not be brought to tax on notional basis even if assessee had adopted mercantile system of accounting.

TS-5341-HC-2016(Karnataka)-O: CIT v. Shri Siddeshwar Co-Operative Bank Limited - In the instant case the Honourable Karnataka High Court held that amendment made to section 194A(3)(v) has prospective effect from 01.06.2015. Therefore, the Court held that a cooperative bank is required to deduct tax under Section 194A(3)(v) from the payment of interest on time deposits of its members, paid or credited on or after June 1, 2015

TS-5476-HC-2016(Karnataka)-O: CIT v. Bahubali Neminath Muttin - In the instant case the Honourable Karnataka High Court held that High Court is bound to accept factual findings by ITAT unless challenged as being perverse.

TS-419-HC-2016(GUJ): Leena Jugalkishor Shah - In the instant case assessee, a non-resident Indian sold a plot of land situated in India and purchased a residential house in USA out of sale proceeds of land. She claimed benefit under section 54F of the IT Act.

Tribunal held that benefit under section 54F was not available for a residential house purchased/constructed outside India.

On appeal before the Honourable Gujarat High Court, the Court held that there was no condition in Section 54F before its amendment by Finance (No. 2) Act, 2004, which came into effect with effect from 01.04.2015, that in order to get benefit under Section 54F of the Act, sale proceeds arising out of transfer of capital asset should be invested in a residential house situated in India.

TS-517-HC-2016(BOM)-TP: Satpuda Tapi Parisar Sahakari Sakhar Karkhana Ltd. v. Dy. CIT - In the instant case the Honourable Bombay High Court held that expenditure incurred by a sugar co-operative society would not be a 'specified domestic transaction' as Co-operative Society is not one of the entities referred to in Section 40A(2)(b) of the IT Act.

2016-TIOL-1673-HC-DEL-IT: CIT v. Aman Khera - In the instant case the Honourable Delhi High Court held that concept of accural of income would not be applicable when no books of accounts were maintained by the assessee and accordingly it had to be presumed that the cash system of accounting was being followed.

TS-437-SC-2016: Rayala Corporation (P.) Ltd. v. Asst. CIT - In the instant case the Honourable Supreme Court held that where assessee company was having house property and its business was to lease out its property and to earn rent, income so earned as rent should be treated as 'business income', and not as 'income from house property'.

TS-446-SC-2016: Dy. CIT v. Oracle India (P.) Ltd. - In the instant case the Honourable Supreme Court held that proceedings concluded by High Court couldn't be revived due to retro-amendment to Section 201 of the IT Act.

[2016] 71 taxmann.com 6 (Visakha-patnam – Trib.); [2016] Taxman 240 (Weekly Browser) Part 4: Sri Koundinya Educational Society v. Addl. CIT - In the instant case the Honourable Visakhapatnam Tribunal held that provisions of disallowance of expenditure under Section 40(a)(ia) of IT Act for non-deduction of TDS are not applicable, when income is computed under provisions of Section 11 of the IT Act.

[2016] 70 taxmann.com 356 (Hyd. – Trib.); [2016] Taxman 240 (Weekly Browser) Part 4: GSS Infotech Ltd. v. Asst. CIT - In the instant case the Honourable Hyderabad Tribunal held that where assessee was not charging interest on any of receivables outstanding and RBI itself allowed a year for amounts to be realised if they are in foreign exchange, no interest could be levied from assessee for delay in realisation of receipts from AEs.

[2016] Taxman 240 (Weekly Browser) Part 4: Press Release dated 06.07.2016 - ICDS implementation is deferred by one year. Government to apply ICDS from AY 2017-2018 i.e. applicable from 01.04.2016.

[2016] 48 ITR (Trib.) 13 (Chennai): V.R. Venkatachalam v. Asst. CIT - In the instant case the Honourable Chennai Tribunal held that under Section 263 of the IT Act, there should be independent application of mind by the Commissioner himself. He cannot solely act upon the proposal sent by the Assessing Officer so as to rectify any omission on the part of the Assessing Officer since, the Assessing Officer has the remedy to rectify the omission under the Act.

[2016] 49 ITR (Trib) 589 (Kolkata) [SB]: Instrumentarium Corporation Ltd. v. Asst. DIT (International Taxation) - In the instant case the Honourable Special Bench of Kolkata Tribunal held as under:

(a) Under Section 119(1) of the IT Act, it is only orders, instructions and directions that are binding the field authorities.

(b) Circular No. 14 of 2001, explaining the amendments of Finance Act, 2001 is not binding on field authorities as it is neither an order, instruction nor direction.

[2016] 159 ITD 31 (Jaipur – Trib.) (TM): Grass Field Farms & Resorts (P.) Ltd. v. Dy. CIT - In the instant case the Honourable Jaipur Tribunal held that where notice seeking to levy penalty mentioned both offences, i.e. one was concealing particulars of income and second for furnishing inaccurate particulars of income, since assessee was given adequate opportunity to explain both offences, there was no illegality in levying penalty with reference to only one offence.

TS-5748-ITAT-2016(Bangalore)-O: Fibres & Fabrics International Pvt Ltd v. Dy. CIT - In the instant case the Honourable Bengaluru Tribunal held that carry forward of losses cannot be denied for non receipt or belated receipt of Form ITR-V as the Assessing Officer in the instant case had acted upon the return of income filed by the Appellant and hence impliedly condoned the delay in receipt of Form ITR-V.

TS-5733-ITAT-2016(Mumbai)-O: Peepul Tree Properties (P) Ltd v. Asst. CIT - In the instant case the Honourable Mumbai Tribunal held that 'prepayment charges' and 'processing fee' shall form part of the word 'interest' as used in Section 24(b) of the IT Act.

Therefore the Tribunal held that prepayment charges and processing fee made for purpose of availing loans at lower interest cost are allowable under Section 24(b) of the IT Act.

TS-5731-ITAT-2016(Kolkata)-O: Shri Tapan Krishna Pattanaik v. DDIT (IT) - In the instant case the Honourable Kolkata Tribunal held that salary/remuneration from foreign company remitted directly to non-resident assessee's NRE account in India is taxable in India under Section 5(2)(a) of the IT Act.

TS-5754-ITAT-2016(Mumbai)-O: Asst. CIT v. Jenifer Noshir Sanjana - In the instant case the Honourable Mumbai Tribunal held that right to obtain conveyance of immovable property is a capital asset and giving up of the right to obtain conveyance of immovable property amounts to transfer of a capital asset.

Therefore, the Tribunal held that consideration received on sale of rights to get conveyance of a flat is to be treated as capital gains and not income from other sources.

TS-430-ITAT-2016(Mum)]: Credit Suisse Business Analysis (India) (P.) Ltd. v. Asst. CIT - In the instant case the Assessing Officer had taxed share premium money received by the assessee as a trading receipt on the basis that the assessee had used share premium collected for its day-to-day business activities which amounted to violation of Sec. 78 of Companies Act.

On appeal before the Honourable Mumbai Tribunal, the Court observed that the Assessing Officer was not able to substantiate that share premium money was utilized for day to day business. Further, it observed that opening and closing balance of share premium account remained unchanged for the impugned assessment year.

Thus, the Court held that share premium money received by the assessee is not a trading receipt but a capital receipt. It further held that if assessee had violated the provisions of the Companies Act it would be penalized by the provisions of that Act, but it would never turn a capital receipt into revenue receipt or vise-versa.

DIGEST ON RECENT DECISIONS UNDER COMMERCIAL TAX LAWS

CA Annapurna D Kabra

1. **Kirloskar Ferrous Industries Limited, Bevinahalli Village, Hitnal Post, Koppal Taluka and District v. State of Karnataka 2016(85) Kar. L.J. 458 (Tri.) (DB)**

Facts:

The appellant is a manufacturer of Pig iron and grey iron castings and registered under the Act. The First Appellate authority has disallowed input tax credit on the ground that selling dealers have not discharged the output tax. As against this, the appellant has filed an appeal before the Tribunal.

Grounds of Appeal:

The appellant has contended that the First appellate authority has issued the order, stating that the selling dealers have failed to discharge tax on the sales made and have not declared the turnover in Returns. The appellant submits that rejection of input tax credit under section 70 is not supported by facts or as per law. The input tax credit is fully supported by tax invoices obtained from the registered dealers. The appellant has maintained proper books of Accounts and also produced original tax invoices in support of tax credit claimed.

Reasons

The Assessing Authority and First Appellate Authority has not established that the tax invoices are bogus/ fictitious. They have not deliberated on the material evidence adduced by the appellant in depth before disallowing the input tax claim. They have not analyzed the form 100 filed of selling dealer, no information has been procured for the respective LVO'S of selling dealer, payment mode, bank statements and transportation mode.

Judgment:

Orders have been merely passed, without making the applicable findings. Hence, the orders of the lower authorities cannot be held correct and they cannot be justified in holding the reassessment orders. The claim of input tax credit was completely supported by tax invoices and hence, the assessing authority erred in not accepting the contention of the appellant. The appeals of the appellant have been completely allowed. The case has been remanded back to the lower authorities to make accurate findings before passing the orders.

2) **Mahesh, Mahendra and Smt. Lalita (Partners), Malu Marbles and Granites, Kalaburgi v. State of Karnataka. -2016(85) Kar. L.J. 484 (Tri.) (DB)**

Facts:

The appellant is engaged in the business of all kinds of marbles and granites. On inspection, it has been noticed that the appellant has short declared sales in its bill books and credit register. On further verification of physical stock, it has been noticed that there is shortage of stock. The Authority has declared an addition in the turnover, treating the same as suppressed turnover, disallowed the deduction of tax collected, and has imposed penalty u/s 72(2) of the Act.

The appellant has been stated that shortage has been declared in the month of September, 2013. The Authority has declared an addition in the turnover, treating the same as suppressed turnover, disallowed the deduction of tax collected, and has imposed penalty u/s 72(2) of the Act. The appellant has referred the matter before the First Appellate Authority who has accepted all the contentions of the appellant except for the increase in turnover by Rs, 71,62,326/- for the month of September, 2013. The appellant has therefore, appealed before the tribunal.

Grounds of Appeal:

The appellant has stated that the inspecting authority has correctly calculated the omitted amount of sales, but the same have been disclosed and tax has been paid, while filing the return for September 2013. The appellant was unable to issue tax invoices in the previous months due to the absence of the accountant, but the same have been issued and declared, in the return of September, 2013. Hence, there has been no suppression of turnover.

The appellant has also contended that the First Appellate authority is justified

in allowing the deduction of taxes collected since the Form VAT 100 and the sales register as well as the tax invoices clearly confirms the fact that the appellant has collected the taxes separately in the tax invoices issued.

Reasons

The main contention of the respondent is that as per Rule 3(2)(c) and Section 29 of the Karnataka VAT Act, 2003, the deduction of tax allowed is not in order as the sales invoices were not issued when the sales were effected, but as per the convenience of the dealer. Hence, the deduction of tax allowed by the First Appellate Authority is erred, and must be restored.

Also, the respondent has stated that due to the absence of the accountant, the appellant has not issued tax invoices, but instead estimate bills/ credit register has been used to record the sales.

Judgment:

The reason given by the appellant is not convincing or legally correct. Hence, the Authority's order in making an addition to the turnover for the tax period of September, 2013 is upheld. The appeal of the appellant has been dismissed and the cross appeal against the First Appellate Authority has also been dismissed.

3) Gulbarga Auto Links, Lahoti Garden Station Road, Gulbarga v. Sate of Karnataka.-2016(85) Kar. L.J. 502 (Tri.) (DB).

Facts:

The appellant is an authorized dealer of LPG Auto Gas of Hindustan Petroleum Corporation Limited (HPCL). The gas had been purchased form interstate and transported form Telangana through M/s Pandiyan Transport. During the transport, it was inspected by the officer that the buyer's TIN number had not been mentioned in the sale invoice issued by the HCPL. Hence, the assessing officer issued a notice and levied penalty for violation of Section 53(2)(b) of the KVAT Act, 2003 read with Rule 29 of the KVAT Rules, 2005. Aggrieved by the said order, the appellant has filed an appeal before the Tribunal.

Grounds of Appeal:

The appellant has stated that the error of mentioning the TIN No. in the sales invoice by HCPL is due to an ERP error while generating the invoice through their computer.

Reasons

Further, the mere non-mentioning of TIN is only a technical error, and there is no intention of evasion of taxes. Hence, the Authority has failed to appreciate the inter-state movement of goods while the goods were under transportation, and is therefore, not justified in levying penalty.

Judgment:

The appellant has referred to the case of Time Tech India Private Limited, Bangalore v. State of Karnataka to urge that Section 53 of the Act is not applicable in the case of inter-state movement of goods. The appeal of the appellant is allowed and the penalty levied is directed to be refunded.

4) Damodar Lime Chemical, Mahadwar Road, Belgaum v. State of Karnataka. -2016(85) Kar. L.J. 598 (Tri.) (DB).

Facts:

The appellant deals in the sale of Lime. The appellant has been subjected to reassessment orders wherein, there is a levy of tax on the transportation charges which are collected in the tax invoices. The sale has been made to sugar factories within the state. Along with the tax on such charges, penalty and interest has also been levied. Aggrieved by the said order, the appellant has appealed before the tribunal.

Grounds of Appeal:

The appellant has contended that the transportation charges have been collected as part of the additional business owned by the appellant i.e. of a carrier of goods. The transportations charges paid after the delivery or before the delivery of goods should make no difference. Apart from that transportation charges are a result of a transport service being provided and does not result in the transfer of property in goods. Hence, VAT cannot be levied on the same.

Reasons

The respondent has stated that the appellant has not produced any material evidence before the lower authorities, in spite of having given several opportunities to produce evidence and being heard. On verification of accounts, it has been noticed that the freight/ transportation charges are **presale expenses** and thus, forms part of the sale consideration.

Judgment:

Even the freight charges attract service tax, the freight charges are presale expenses as the appellant has delivered the goods to the buyers as evident from the payment vouchers. The freight charges are part of the taxable turnover since the dealer is under the obligation

to transport goods and to deliver them at the destination stations. All the appeals filed by the appellant were dismissed.

5) Hindustan Unilever Limited, Bangalore v. State of Karnataka. -2016(85) Kar. L.J. 515 (HC) (DB).

Facts:

The appellant company manufactures, processes, packing and trading activities which involves purchase of taxable and exempted goods, exports, dispatching of goods outside the state via stock transfer, imports etc. Hence, due to the above purchases the appellant is required to calculate input tax credit as per Section 11, 14, 17, of the KVAT Act, 2003 read with Rule 131(3) of the KVAT Rules, 2005. The Appellate Authority has issued a notice, disallowing input tax pertaining to the portion of exempted turnover, under the above mentioned sections, contending that the amount towards non-deductible input tax has been incorrectly calculated.

Grounds of Appeal:

The assessee has contended that they have not claimed any input tax against the units of exempted turnover. All inputs which have been taken, has a common input and eligible input tax has been claimed based on a common formula. The appellate authority has contended using an illustration wherein the company has a bakery division namely M/s Modern Bakeries, Bangalore, wherein the manufacture of bread, buns, cakes etc. take place. For manufacture of these goods, it has effected purchases of taxable goods and input of the same has been claimed. Hence, the contention of the assessee is not acceptable.

The appellate authority has also referred to the Commissioner's circular cited supra in which it is stated that if the application of common formula does not state the correct amount of input available to the dealer, then in such a case, the departmental officer would specify a special formula to be applied as per Rule 131(5) of the KVAT Rules. Hence, since the appellant's business consists of multiple type of transactions which makes it impossible to maintain day-to-day accounts, therefore, the authority was correct in calculating the amount of non-deductible credit by applying the formula as per Rule 131(3).

The appellant has stated that though the appellants transaction are many and attract partial rebating, they have maintained classified and detailed accounts of purchases, use and disposal of every input purchased, and hence, non-deductible input tax shall be calculated based on their books of accounts, and not using the formula. Also, the appellant contended that the research activity, on which the input is being disputed, is made exclusively for the products which are being manufactured by the petitioner.

Reasons

The Respondent has made reference to the circular which states that even if a specified formula on account of the nature of transaction has to be applied, it is the duty of the appellant to move to the commissioner and get the its formula approved. If the assessee has applied the formula, prior to the approval, for preparation of books of accounts, then the assessee runs the risk. Also, the research activity of the appellant does not fit into the definition of 'Business' under the KVAT Act. The goods purchased are not utilized is the course of business but was used for conducting research.

Judgment:

The appeals filed by the appellant have been dismissed, since, neither the appellant has moved to the Commissioner for getting the formula approved, and the input claimed towards the research activity is incidental to its main business and is not used in the operations of the business and therefore input towards the same cannot be claimed as credit.

6) Indian Cane Power Limited, Anekonda, Davanagere v. State of Karnataka. -2016(85) Kar. L.J. 611 (Tri.) (DB).

Facts:

The appellant deals in the manufacture of sugar and generation of electricity, using the by-product of Bagasse, generated while producing the main product of sugar. Further, the cement purchased is used in the sugar unit of the plant for construction work. The cement is purchased against 'C' Form from outside the state. The officer has levied penalty for the reason that the appellant has purchased cement, A.C. pipes etc. from outside the state by utilizing 'C' forms and availed a concessional rate of tax, while such goods have not been mentioned in the CST registration certificate of the appellant, and were neither utilized in the main business. The proceeding authority has contended that the purchase of the above materials is used for the construction of office premises, roads etc. and therefore, such interstate

purchase is not eligible under 'C' forms. Also, the purchases made from outside the state have no corresponding sales in the returns filed in Form VAT 100. Thereby, penalty has been levied at the local rate of tax applicable for violation of Section 10(d) of CST Act also for invoking the provisions of Section 10-A(1) of the said Act. Aggrieved by the said order, the appellant has filed an appeal before the Tribunal.

Grounds of Appeal:

The appellant has contended that the construction materials like cement, steel, pipes, and its fittings, electrical and electronic goods, etc., which were purchased from outside the state against 'C' Form and used in the construction activity were mentioned in its Registration Certificate and was intended only to be used for the construction and running the plant for the production of goods and this activity was integrally connected with the ultimate production of goods.

Further, the appellant stated that, at the time of issuing the Registration Certificate the proceeding authority did not question as to the inclusion of building materials in the Registration Certificate even though the proceeding officer had the power to question into the activity of the appellant before issuing the registration in Form 'B'. Hence, having the permission granted to the appellant for purchasing the building materials, steel, pipes, etc., now cannot hold that the appellant has contravened the provisions of the CST Act by misusing the 'C' Form.

It is contended by the appellant that in terms of said provisions, one of the essential ingredients to constitute the offence under section 10(d), is to the effect that there is no reasonable excuse for failure to use the goods for purpose referred to in the clause. Thus on this ground the appellant contends that the penalty is unsustainable and has to be set aside.

Judgment:

The appeal of the appellant has been allowed in parts. It was held that the penalty levied has been set aside in respect of the impugned order passed under Section 10-A(1) of CST Act and also in respect of cement but confirming the penalty in respect of Bagasse which was not enlisted in the nature of goods permitted to be purchased from outside the state against 'C' Form in the Registration Certificate issued by proceeding authority.

SERVICE TAX DECISIONS

PARTS DIGESTED – STR VOLUME 43: PARTS 3 & 4

CA. A. Saiprasad

Circulars

Clarification issued w.r.t. service tax applicability in case of hiring of goods without transfer of right to use the same.

Circular No.198/08/2016 – Service Tax dt.17.8.16

Clarification issued w.r.t. services provided to government, local authority or a governmental authority with regard to water supply.

Circular No.199/09/2016 - Service Tax dt.22.8.16

Clarification issued w.r.t. service tax on freight forwarders on transportation of goods from India.

Circular No.197/7/2016 – Service Tax dt.12.8.16

Case Laws

Whether levy of service tax on admission and access to entertainment event and amusement facility is liable for service tax?

History: Admission to entertainment events or access to amusement facility was one amongst the negative list of services u/s 66D(j). The said entry was omitted from negative list wef 1.6.15.

As per Entry No.62 of State List (VII Schedule to the Constitution), States have the power to impose tax on luxuries, including taxes on entertainments, amusements, betting and gambling.

By removing the entry no. (j) u/s 66D from negative list, did parliament entrench on exclusive field assigned to the State? Does Union have the power to levy service tax in the aforesaid case?

The High Court held that parliament did not trench on Entry No.62 of State List by removing entry no. (j) u/s 66D.

HC held that amusements are covered under entry no.62 of State List but aspect of "service" when facilities for amusement is offered for price can be taxed by Union.

The service provided is the object of taxation and it is imposed on the admission fee which is a permissible measure of tax and the incidence is at the time when a person pays the admission fee to enter the park.

The HC held that object of taxation and measure employed should not be mixed up, which at times may provide indication as to nature of tax but would never determine the same.

HC held that the two aspects taxed by the respective legislatures are 'service' (entry no.97 of union list) and 'amusement' (entry no.62 of state list).

The tax imposed by the union is in pith and substance one on services offered. The incidental overlapping, if at all, is to be ignored (due to SC decisions on pith and substance).

Kanjirappilly Amusement Park & Hotels Pvt Ltd V. UOI, 2016 (43) STR 323 (Ker)

Is arranging finance an input service for a manufacturer?

The Karnataka HC held that service tax paid on management consultancy service procured for infusing finance in manufacturing company, undoubtedly relates to manufacturing activity since arranging funds is one of the steps required to achieve ultimate result of manufacture.

CCE V. Sanmar Specality Chemicals Ltd, 2016 (43) STR 347 (Kar)

Cost sharing by group companies whether liable to service tax?

The appellant company had entered into contractual agreements with participating group companies to procure certain services on their behalf so as to share cost among participating companies.

The expenses incurred by the appellant company in procuring the specified services on behalf of participating companies would be separately charged to and reimbursed by participating companies.

As per the agreement, the participating companies would pay a fixed fee of Rs.1 Crore p.a. as remuneration to appellant company for acting as manager and carrying out activities envisaged in the agreement.

The HC held that such reimbursement of cost/ expenses cannot be regarded

as consideration towards taxable service. HC held that no taxable service was provided by the appellant, hence demand was unsustainable.

(The period of dispute in this case was prior to 2008-09. The Appellant had paid service tax under support service of business or commerce since 2008-09)

Reliance ADA Group Pvt Ltd V. CST, 2016 (43) STR 372 (T)

Whether nexus of inputs/ input services in manufacture of final product is to be established to claim refund?

The Tribunal held that while one to one co-relation of inputs with manufactured products may not be possible for a particular quarter, a nexus of inputs/ input services in manufactured product is required to be established.

Tribunal held that services availed during the year 2004, 05, 06 was not capable of being used in manufacture of goods exported in 2007 since services are immediately consumed and not capable of being stored.

Renfro India Pvt Ltd V. CCE, 2016 (43) STR 385 (T)

Would wrong payment of tax absolve the tax liability of the assessee?

The Tribunal held that discharge of VAT on sale of SIM cards would not relieve appellant of tax liability under service tax law. Tribunal however held that since the issue related to interpretation, there existed no intention to evade tax and hence there was no scope either for invoking extended period of limitation.

Another issue of the same appellant - A few other entities had merged with the Appellant. Credit was claimed by the appellant, though duty paying documents were in the name of erstwhile merged entities. Tribunal held that onus vests on the appellant to evidence receipt of such service at such premise as are pertinent to taxable service being rendered. Tribunal held that mere amalgamation of an entity with appellant would not suffice for claiming credit u/r 9(2) of CCR, 04 without evidence of place of receipt of service.

Whether Cenvat Credit reversal as per formula method (R.6(3A), CCR, 04) available only on intimation to the department?

The Tribunal held that non-compliance of procedure for exercising option under R.6(3A) does not take away the said option, when appellant reversed proportional credit as per formula method but without prior intimation in writing to the department. Tribunal held that failure to intimate in writing for availing the formula option would not take away the option to reverse credit on formula method.

Aster Pvt Ltd V. CCE, 2016 (43) STR 411 (T)

Whether excess service tax paid can be suo-moto adjusted by the assessee?

Tribunal held that excess service tax may be suo-moto adjusted as per R.6(1A) of STR, 94, without any monetary limit. The Tribunal held that assessee is given an option to adjust excess amount paid towards future service tax liability by R.6(1A). It was held that when assessee opts for adjustment so as to eliminate hassles of refund of excess tax paid by foregoing interest, since denying adjustment would amount to unjust enrichment to the revenue, hence excess service tax paid may be suo-moto adjusted by an assessee.

CCE V. State Bank of Hyderabad, 2016 (43) STR 415 (T)

Whether Cenvat Credit of GTA paid on transportation of goods from factory to port can be claimed as refund u/r 5 of CCR, 04?

Tribunal held that eligibility of cenvat credit depends on place of removal. That in case of exports, place of removal was port.

Tribunal held that concept of transfer of property in goods and provision of Sale of Goods Act was necessary to determine place of removal.

Tribunal held that in case of export of goods, responsibility in goods remain with exporter till handing over to the goods to the custodian at port. Hence port is the place of removal for exporter.

CCE V. Lucas TVS Limited, 2016 (43) STR 418 (T)

Also see: Circular No. 999/ 6/ 2015 – CX dt.28.2.15, Circular No. 97/ 8/ 2007 – ST dt.23.8.07 and Circular No. 988/ 12/ 2014 – CX dt.20.10.14

Specific Services provided by a sports person whether taxable?

The HC of Calcutta held that:

1. Remuneration received for activity of writing for newspapers or sports magazines of any other form of media is not liable to tax under Business Auxiliary Service/ Business Support Service.
2. Remuneration received for anchoring TV show is not liable for BAS/ BSS service since such activity not undertaken with the object of enhancing any business or commercial interest.
3. Activity of promotion of brand by the sports person would be taxable

post inclusion of brand promotion service wef 1.7.10.

4. Wearing apparel during matches containing brands/ marks of franchisee/ sponsors does not amount to brand promotion service since sports person what not an independent worker but an employee of the franchisee and was bound to wear whatever apparel provided to the entire team by the franchisee.

5. CBEC Instruction No. 42/ Comm (ST)/ 2008 dt.26.7.10 instructing levy of service tax on composite fee paid to IPL players for paying matches and for participation in promotional activities, if bifurcation was not available was held to be clearly ultra vires since CBEC was not empowered to impose its views on quasi-judicial authorities to interpret a particular statute in a particular manner.

6. HC held that when petitioner was prompt and diligent in responding to all notices issued by the department seeking information and when there was full and sufficient disclosure, it could not be said that the petitioner had suppressed information, more so when SCN issued on the basis of information provided by petitioner. Hence extended period of limitation not invokable.

Sourav Ganguly V. UOI, 2016 (43) STR 482 (Cal)

Whether exclusion of service from one taxable service would mean exclusion of the said service from all other taxable services?

The HC held that exclusion of repair services of roads and airports from commercial or industrial construction service would not mean that said services were excluded from other taxable services.

HC held that legislature though it fit to bring the aforesaid service under management, maintenance and repair service and hence there was no scope for the court to interpret the provision in any other manner as its language was clear and there was no scope for redundancy.

D.P. Jain & Company Infrastructure Pvt Ltd V. UOI, 2016 (43) STR 507 (Bom)

Whether refund of credit can be denied on the basis of service not being taxable?

The department had denied refund of the accumulated cenvat credit on the basis that export of software to SEZ was not liable to tax prior to 16.5.08. The Tribunal held that aforesaid ground for rejection was not sustainable.

The Tribunal held that when appellant was granted registration for developing software for export as well as domestic clearances and when appellant had paid tax on software domestically cleared, then department cannot have two standards, one for accepting payment of service tax and second for grant of accumulated cenvat credit refund.

Cognizant Technology Solutions V. CCE, 2016 (43) STR 576 (T)

Penalty imposable when taxability of service a contentious issue?

Tribunal held that issue whether activity of renting of immovable property is subject to levy of service tax was a contentious one at that material time. Hence appellant had bona fide not paid tax. Appellant failed to avail benefit of S. 80(2) as they failed to pay interest. However since no tax was payable and there was no allegation of fraud, suppression etc, imposition of penalty u/s 77 and 78 was not sustainable.

Sree Kanya Combines V. CCE, 2016 (43) STR 604 (T)

Whether limitation period prescribed under the statute applicable for service tax paid erroneously?

The Tribunal held that every case of refund is for tax paid but which was not payable. It was held that plea of the appellant that limitation period was not applicable since taxes cannot be retained without authority of law was not acceptable since it would render the provisions prescribing limitation period redundant. Tribunal held that it functioned under the Customs/ Excise Act and could not go beyond the statue and relax limitation of time period as prescribed by the statute.

Benzy Tours & Travels Pvt Ltd V. CST, 2016 (43) STR 625 (T)

CA - RANK HOLDERS FROM BANGALORE

IPCC MAY 2016 EXAM

Sl. No.	Registration No.	Name of the Student	Marks Obtained	Rank
1	SRO0550448	**KAVYA S**	487	25
2	SRO0523352	**VIJETA LAGUDUVA**	461	48

PASS-THROUGH COSTS IN TRANSFER PRICING

CA Sachin Kumar B P and CA A Omar Abdullah

Introduction

Ever since transfer pricing (TP) regulations have been introduced under the Income-tax Act, 1961, vide Finance Act, 2001 one can observe continuous increase in the TP adjustments made by the Income-tax department. The TP adjustments in 2005-06 amounted to INR 1,220 crores and in the year 2014-15 amounted to INR 46,666 crores after peaking to INR 70,016 crores in the year 2012-13. There have been various petitions before the Central Government for more clarity on transfer pricing provisions by the industry. The current Government has taken positive steps in this regard, for example, the introduction of arm's length range concept in the Indian transfer pricing regulations vide Rule 10CA of the Income-tax Rules, 1962.

The exercise of complying with the transfer pricing regulation is an art as well as a science. The method chosen for benchmarking a related party transaction from the list given as per the provisions of Sec. 92C depends on the facts of the case. There are various concepts under each prescribed method which can be applied to a situation to make the benchmarking process more meaningful. It is often observed that the Transaction Net Margin Method (TNM Method) is one of the most commonly used method for benchmarking. In this Article we will be discussing the concept of pass-through costs which can be applied in a transfer pricing exercise where transaction net margin method is used.

Generally, the TNM Method examines the net profit relative to an appropriate base (e.g. costs, sales, assets) that a taxpayer realises from a controlled transaction. Thus, a transaction net margin method operates in a manner similar to the cost plus method and resale price methods. This similarity means that in order to be applied reliably, the transactional net margin method must be applied in a manner consistent with the manner in which the resale price or cost plus method is applied. This means in particular that the net profit indicator of the taxpayer from the controlled transaction should ideally be established by reference to the net profit indicator that the same taxpayer earns in comparable uncontrolled transactions, i.e. by reference to "internal comparables". Where this is not possible, the net margin that would have been earned in comparable transactions by an independent enterprise may serve as a guide. A functional analysis of the controlled and uncontrolled transactions is required to determine whether the transactions are comparable and what adjustments may be necessary to obtain reliable results. Further, the other requirements for comparability must be applied as mentioned in Paragraphs 2.68-2.75 of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD TP Guidelines).

OECD view on TNM Method and Pass-through Costs

In applying the TNM Method taxpayers adopt the Net Profit as the numerator which is weighted against either assets, sales, or costs (denominator). As per the OECD TP Guidelines only those items that (a) directly or indirectly relate to the controlled transactions at hand and (b) are of an operating nature should be taken into account in the determination of the net profit indicator for the application of the transactional net margin method. As far as the selection of denominator goes, it should be consistent with the comparability (including functional) analysis of the controlled transaction, and in particular it should reflect the allocation risks between the parties (provided said allocation of risk is arm's length). For instance, capital-intensive activities such as certain manufacturing activities involve significant investment risk even in those cases where the operational risks (such as market risks or inventory risks) might be limited. Where a TNM Method is applied to such cases, the investment-related risks are reflected in the net profit indicator if the latter is a return on investment (e.g. return on assets or return on capital employed). Such indicator might need to be adjusted (or a different net profit indicator selected) depending on what party to the controlled transaction bears that risk, as well as on the degree of differences in risk that may be found in

the taxpayer's controlled transaction and in comparables.

The denominator should be focused on the relevant indicator(s) of the value of functions performed by the tested party in the transaction under review, taking account of its assets used and risks assumed. Typically, and subject to a review of the facts and circumstances of the case, sales or distribution operating expenses maybe an appropriate base for distribution activities, full costs or operating expenses base for a service or manufacturing activity, and operating assets maybe an appropriate base for capital-intensive activities such as certain manufacturing activities or utilities. Other bases can also be appropriate depending on the circumstances of the case.

While adopting the TNM Method we have discussed the net profit (numerator) can be weighted to either assets, sales or costs (denominator). Pass-through costs gain relevance when under TNM Method the Net Profit is weighted to costs. As per the OECD TP Guidelines net profit should be weighted to costs only in those cases where costs are a relevant indicator of the value of the functions performed, assets used and risks assumed by the tested party. In addition, the determination of what costs should be included in the cost base should derive from a careful review of the facts and circumstances of the case. Where the net profit indicator is weighted against costs, only those costs that directly or indirectly relate to the controlled transaction under review should be taken into account. Accordingly, an appropriate level of segmentation of a taxpayer's accounts is needed in order to exclude from the denominator costs that relate to other activities or transactions and materially affect comparability with uncontrolled transactions. Moreover, in most cases only those costs which are of an operating nature should be included in the denominator.

In applying a cost-based TNM Method, fully loaded costs are often used, including all the direct and indirect costs attributable to the activity or transaction, together with an appropriate allocation in respect of the overheads of the business. The question can arise whether and to what extent it is acceptable at arm's length to treat a significant portion of the taxpayer's costs as pass-through costs to which no profit element is attributed (i.e. as costs which are potentially excludable from the denominator of the net profit indicator). This depends on the extent to which an independent party in comparable circumstance would agree not to earn a mark-up on part of the costs it incurs. The response should not be based on the classification of costs as "internal" or "external" costs, but rather on a comparability (including functional) analysis. (Para 2.93 of the OECD TP Guidelines)

Where treating expenses as pass-through costs is found to be at Arm's Length, a second question as to the consequences on comparability and on the determination of the arm's length range. Because it is necessary to compare like with like, if pass-through costs are excluded from the denominator of the taxpayer's net profit indicator, comparable costs should also be excluded from the denominator of the comparable net profit indicator. Comparability issues may arise in practice where limited information is available on the breakdown of the costs of the comparables.

Pass – Through Costs in Indian Transfer Pricing Scenario

In the Indian TP Regulations, there has been no reference made to the treatment of the pass-through costs. However, the Indian judiciary has made a reference to the concept of pass-through costs which is in accordance with the OECD view in several case laws. In this article the author has discussed to case laws the first being where the assesse is an advertising agency service provider and the second case law covers a situation of an assesse being a contract manufacturer.

1. **Deputy Commissioner of Income-tax vs. Cheil Communications India (p) ltd., (2010) 29 CCH 0853 DelTrib**

In this case law the Hon'ble Delhi Tribunal held observed as follows, *the assessee has applied TNM method to determine arm's length price, which has also been accepted by the Revenue authorities. The comparables cited by the assessee has also been accepted by the TPO as appropriate. It is also found that in the regular financial accounts maintained by the comparable companies, the comparables recognize revenue on a net basis. The assessee has also recognized revenues on a net basis in its financial account, which had been duly audited by the auditor. The assessee has computed the margin of operative profit on the total cost on the basis of net revenue by way of mark-up received from the associate concern. The payment made by the assessee to third party vendor/ media agencies for and on behalf of the principal has not been included in the total cost for determining the profit margin, though, on the other hand, the TPO has included the payment reimbursed by the assessee's associate enterprise to the assessee on account of payment made to third party vendor/media agencies. It is not in dispute that the assessee is engaged in undertaking advertising services for its customers/AEs in the capacity of an agent. As part of its business operation, the assessee facilitates placement of advertisement for its associated enterprise in the print/electronic etc.*

media and for that purpose, the assessee is required to make payment to third parties for rendering of advertisement space on behalf of its customers or associated enterprises. It is, thus, clear that the assessee's business is not sale of advertising slots to its customers or associate concern. For performing the functions for and on behalf of associated enterprises, the assessee is remunerated by its associated enterprises on the basis of a fixed commission/charges based on expenses or cost incurred by the assessee for release of a particular advertisement. It is also to be noted that advertising space (be it media, print or outdoor), has been let out by third party vendors in the name of ultimate customers and beneficiary of advertisement. The invoices and purchase orders from third party vendors contain customers' name, and all the terms of advertisement are finalized after taking the approval from the customers. The assessee simply acts as an intermediary between the ultimate customer and the third party vendor in order to facilitate placement of the advertisement. The payment made by the assessee to vendors is recovered from the respective customers or AEs. In the event customer fails to pay any such amount to the advertisement agency, the bad debt risk is borne by the third party vendor and not by the advertising agency i.e. the assessee. It is, thus, clear that the assessee has not assumed any risk on account of non-payment by its customers or associated enterprises. As per ITS 2009 Transfer Pricing Guidelines accepted by the OECD, when an AEs is acting only as an agent or intermediary in the provision of service, it is important in applying the cost plus method that the return or mark-up is appropriate for the performance of an agency function rather than for the performance of the services themselves, and, in such a case, it may be not appropriate to determine ALP as a mark-up on the cost of services but rather on the cost of agency function itself, or alternatively, depending on the type of comparable data being used, the mark-up on the cost of services should be lower than that would be appropriate for the performance of the services themselves. In these type of cases, it will be appropriate to pass on the cost of rendering advertising space, to the credit recipient without a mark-up and to apply a mark-up only to the costs incurred by the intermediary in performing its agency function. In the light of ITS 2009 Transfer Pricing Guidelines, it would be clear that a mark-up is to be applied to the cost incurred by the assessee company in performing its agency function and not to the cost of rendering advertising space on behalf of its AEs. Further, the method adopted by the assessee while submitting transfer pricing study based on net revenue has been accepted by the Department in earlier year and, therefore, there is no reason to depart from that stand already accepted by the Department in earlier year.

2. **Johnson Metthey India Private Limited vs. Deputy Commissioner of Income-tax, (2015) 94 CCH 0067 DelHC**

The background facts are that the Assessee Johnson Matthey India Private Limited ('JMIPL') is engaged in the business of manufacture and sale of automobile exhaust catalysts. 90% of the shares of the Assessee Company are held by **Johnson Matthey** Plc. UK ('JMUK') through Matthey Finance, BV, Netherlands. JMIPL's manufacturing unit is located at IMT, Manesar in Haryana. Maruti Udyog Limited ('MUL') is a major customer of JMIPL accounting for most of its sales.

The Delhi High Court with reference to the assessee's plea on the grounds of the concept of Pass-through costs ruled in favour of the assesse and made the following observation, *the clauses of the agreement between JMIPL and MUL which have been extracted hereinbefore indicate that JMIPL's profit margin is dictated by its negotiations with MUL. The clauses do bear out the submission of JMIPL that it is obliged to procure the raw material on instructions of MUL at a price dictated by MUL from the source selected by MUL. JMIPL is entitled to a per unit fixed manufacturing charge over and above the actual cost of the raw material. The submission of JMIPL that entire cost of raw materials comprising of precious metals and substrates is passed on to or recovered from the ultimate customer without any mark-up has not been able to be countered by the Revenue. In other words, the contention of JMIP that its profit is not at all affected by the cost of raw materials remains uncontested. The submissions of the Revenue as to what are true pass through costs fail to acknowledge the actual arrangement between JMIPL and MUL as reflected in the clauses of the agreement as well as in other documents and letters placed on record.*

Conclusion

The Transfer Pricing audit season is once upon us as we approach the November 31st deadline. There are numerous concepts in the science of transfer pricing where adjustments can be made to the Arm's Length Price to make the comparison more meaningful. In this article, we have discussed one of those lesser known adjustments possible, as India is host to a multitude of outsourced manufacturing facility of global multinationals owing to our keen price advantage. The concept of pass-through cost might find application in such cases during the transfer pricing exercise.

Independence Day Celebration

Flag Hoisting

Chief Guest
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Former Regional Council
Member, SIRC of ICAI

CA. Pannaraj S.,
Regional Council
Member,
SIRC of ICAI

Invocation
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Patriotic Speech by
Ms. Sanjana
Revankar

Patriotic Speech by
Ms. Ashwini H
Pandit

Patriotic Speech
by Mr. Himanshu
Bhutani

Patriotic Speech
by Mr. Anjan
Babu

Patriotic Song
by CA Abdul
Majeed

Distribution of Scholarship to the deserving students

Distribution of Scholarship to the deserving student

Participants

Investor Awareness Programme

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Addl .Chief Secretary
to Govt. Commerce &
amp; Industries Dept.
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One Day Seminar on GST

Inauguration

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Chairman, Indirect
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Chief Guest
Dr. Nagendra Kumar,
Hon'ble Principal
Addl. Director General of
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Bangalore

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CA. Jatin A
Christopher

CA. Vishnumurthy S

CA. Deepak Kumar Jain

Participants

One Day Students Seminar on Tax Audit

Inauguration

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President, Karnataka
State CA Association

CA. Naveen
Khariwal G

CA. Rani N R

CA. Tarun Jain

CA.Vinay Sanji

Participants

Quiz & Elocution

One day Seminar on Charitable Trusts

Inauguration

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CA. Geetha A B., Vice –Chairman, B'lore Br. of SIRC of ICAI

CA Kandasami. M, Chennai

Dr. CA Suresh N

Seminar on GST

CA. Dayananda K

CA. Kalyan Kumar K

CA. N. R. Badrinath

CA. Vishnumurthy S

Participants

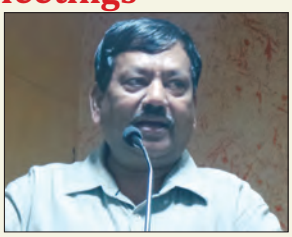
One Day UGC National Level Seminar

Speakers at Study Circle Meetings

Mr. H L Narendra Bhatta

CA K L Prashanth

CA D S Vivek



CA. D R Venkatesh

Mr. Anil Prem D'Souza

Intensive Workshop on International Taxation

CA. S Ramasubramanian

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