TAX CONNECT

SEVENTH ISSUE JUNE 2014

Friends,

The blowout victory in elections of the pro-business BJP has raised hopes that a strong government led by PM Narendra Modi can jump-start commerce at a time when economic activity is expanding at almost the slowest clip in a decade, less than 5% YOY in Q1 of 2014 down from more than 9% in 2011. Inflation has remained high despite the slowdown because of bottlenecks in production and infrastructure, which prevent companies from ramping up output and job creation isn't keeping pace with population growth. A revival of business investment and spending is the need of the hour.

On the taxation front, the ruling party BJP, has committed in its manifesto to *"bring on board all state governments in adopting GST, addressing all their concerns"*. To push the GST, FM Arun Jaitley has expressed keenness to meet state FMs on GST, signaling the Narendra Modi government's positive intent on the subject. Hence, GST can be a reality very soon!

Just to remind you that the last date of payment of the Final Installment without Interest under the Service Tax VCES is 30th June 2014.

The last date for filing for refund of CENVAT Credit paid under Reverse Charge for 1/07/2012 - 30/09/2012 is also 30th June 2014. Please refer to N No. 12/2014–CE (N.T.), Dated : March 03, 2014 for detailed procedure

Further, May has been a month of few important decisions, just to summarize two critical ones-

In the case of **M/s. Hotel East Park & Another vs. Union of India & Others,** the Chhattisgarh High Court, held that Section 66E(i) of The Finance Act, 1994 relating to service tax on the service portion in an activity of supply of articles of human consumption is intra- vires the Constitution.

In **M/s Joyrath Projects Pvt. Ltd. and Another vs. Sales Tax Officer, Alipore Charge and Others,** the Calcutta High Court held that asset purchased for execution of works contract is entitled to issuance of C-Form.

Our endeavor is to keep you updated with emerging market scenario and regulatory reforms in taxation. In case you find our bulletin as a value-add, please do ask your colleagues to join our mailing list to receive copies.

DUE DATE	COMPLIANCE
05-Jun-14	Payment of Service Tax for the month of May, 2014. **(06-Jun-14: Online Payment)**
07-Jun-14	Payment of TDS/TCS
10-Jun-14	West Bengal Sales Tax TDS Payment
10-Jun-14	ER1, ER2 & ER6 Return for May, 2014
15-Jun-14	Provident Fund e-Payment for May, 2014 (Cheque to be cleared by 20-Jun-14)
21-Jun-14	West Bengal VAT/CST/ Entry Tax/ Professional Tax Payment for May, 2014
21-Jun-14	Payment of ESI for the month of May
25-Jun-14	West Bengal Sales Tax TDS Certificate Issue
30-Jun-14	Return by Banks for interest upto Rs.5000 for March Quarter (Form No. 26QAA)
30-Jun-14	**LAST DATE for filing Refund of CENVAT under rule 5B 1/07/2012 - 30/09/2012**
30-Jun-14	**Last Date of Payment of Balance Installment of VCES without Interest.**

Truly Yours

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SERVICE TAX

COURT AND TRIBUNAL DECISIONS

VALUE OF ELECTRICITY SUPPLIED FREE OF COST CANNOT BE ADDED TO TAXABLE VALUE OF SERVICE

In the case **of Inox Air Products Limited vs. Commissioner of Central Excise, Nagpur,** the CESTAT, Mumbai has held that **electricity cannot be considered as an input for providing the services of operation of plant.** It cannot be considered as an additional consideration flowing to the appellant from their client for providing the service of operation of plant and cannot be considered as part of the gross amount charged for the service of operation of the plant.

DEMAND CONFIRMED WITH PENALTY ON SERVICE RECEIVER AVAILING CENVAT CREDIT, WHERE SERVICE PROVIDER HAS NOT PAID SERVICE TAX

In the case of **M/s Dupen Laboratories Pvt Ltd. and Shri Nadiampally Nagendra Varaprasad vs. CCE&ST, Daman,** the CESTAT, Ahmedabad has held that **if it was found that service provider had not paid the tax, service receiver would have reversed the credit in which case they would not be liable to penal action at all.** The fact that service receiver did not make any efforts to locate the service provider nor did they make any effort to intimate the department nor did they debit the amount of credit taken goes against the service receiver and therefore **it has to be held that the invocation of extended time limit for demand in this case is sustainable.** Decision in the case of Lacto Cosmetics (Vapi) Pvt. Ltd. vs. CCE., Daman [2012 (12) TMI 642 – CESTAT, Ahmedabad] followed. **The demand was confirmed with penalty.** Further, individual will not benefit in any way by availing CENVAT Credit by the company. Hence, **levy of personal penalty on employee has been set aside.**

TRANSPORTER TRANSPORTING GOODS WITHOUT CONSIGNMENT NOTE IS NOT A GOODS TRANSPORT AGENCY (GTA)

In the case of **M/s. Nandganj Sihori Sugar Co. vs. CCE. Lucknow,** the CESTAT, New Delhi, held that when the transports did not issue consignment notes or GRs or Challans or any documents containing the particular as prescribed in Explanation to Rule 4B of the Service Tax Rules, 1994, the Transporters cannot be called 'Goods Transport Agency' and, hence, in such cases, the service of transportation of goods provided by the transporters would not be covered by Section 65(105)(zzp). In view of this it is held that **there will be no service tax liability on the service receiver, where they have not received the service from a Goods Transport Agency.**

NO DEMAND OF SERVICE TAX TOWARDS SHORT PAYMENT DUE TO ADJUSTMENT OF EXCESS TAX IN ANOTHER PERIOD

In the case of **Computer Age Management Services Pvt. Ltd. vs. Commissioner of Central Excise & Service Tax, LTU, Chennai,** it is held that **where intimation was not made to the adjudicating authority by the assessee, it cannot demand tax along with interest towards tax short paid due to excess adjustment.** If assesses have Centralized Registration and they have taken a definite stand in their reply to SCN, assesses should be given an opportunity to produce the evidence before the adjudicating authority in the interest of justice. Assessee appeal was allowed by way of remand.

NO SERVICE TAX ON TECHNICAL TESTING AND ANALYSIS AGENCY SERVICE RENDERED TO FOREIGN CLIENTS WHERE CONSIDERATION RECEIVED IS IN FOREIGN CURRENCY

In the case of **Commissioner of Service Tax, Mumbai-III vs. M/s. SGS India Pvt. Ltd.,** the Tribunal held that where Technical Testing and Analysis Agency Service is rendered to the clients located abroad and the consideration received for the service rendered is in foreign convertible currency, it is termed as "export of service"**.** In these circumstances, the Tribunal takes a view that **if services were rendered to such foreign clients located abroad, then, the act can be termed as 'export of service'. Such an act does not invite a service tax liability.** Further, **Bombay High Court held that** the view taken by the Tribunal therefore, cannot be said to be perverse or vitiated by an error of law apparent on the face of the record. **If the emphasis is on consumption of service then, the order passed by the Tribunal does not raise any substantial question of law.**

CONSTITUTIONAL VALIDITY OF SECTION 66E(i) FOR SERVICE TAX ON SALE VALUE OF THE FOODS & DRINKS IN HOTEL, RESTAURANT AND BAR

In the case of **M/s. Hotel East Park & Another vs. Union of India & Others,** the Chhattisgarh High Court, held that Section 65B(44)(ii) of the 1994-Act shows that supply of goods that is deemed to be sale under Article 366(29A) is not included in service. Article 366(29A)(f) of the Constitution does not indicate that the service part is subsumed in the sale of the food; it rather separates sale of food and drinks from service. Section 65B (44) as well Section 66E(i) only charges service tax on the service part and not on the sale part. It indicates that the sale of the food has been taken out from the service part as was interpreted by the Supreme Court in the Associated-Hotel case and the Northern-Caterers case. **Section 66E(i) of The Finance Act, 1994 relating to service tax on the service portion in an activity of supply of articles of human consumption is intra- vires the Constitution.**

RECOMMENDATIONS:

There is no provision in the VAT-Act to bifurcate the amount. The State Government will do well to frame such rules to this effect. These rules may be in conformity with the bifurcation as provided under the 1994- Act or ensure that the Commercial Tax authorities do not charge VAT on that part of the value of the food and drink on which the service tax is being assessed. The State Government will be well advised to issue a clarification/ direction in this regard and will ensure that the consumers are not unnecessarily doubly taxed over the same amount.

DENIAL OF REFUND CLAIM WHEN PAID UNDER THE MISTAKE OF LAW

In the case of **M/s Andrew Telecom (I) Pvt. Ltd. vs. Commissioner of Customs & Central Excise, Goa,** the Bombay High Court held that where the assessee has paid service tax on export of services which was not imposable or leviable and relying on the clarification made by the Department, he claimed the refund of duty or service tax, this was squarely a case falling within the provisions of the Central Excise Act, 1944 and therefore, the rule of limitation under Section 11B was applied which was applied when the application for refund was made invoking Section 11B of the Central Excise Act, 1944. There is no doubt that when this was the provision invoked, same applies with full force including the rule of limitation prescribed therein. If the matter was outside the purview of Section 11B, then, the rule of limitation prescribed therein could not have been applied.

PAYMENT RELATING TO EPF, ESIC, ETC. COLLECTED BY MANPOWER SUPPLY AGENCY/ SECURITY SERVICES INCLUDIBLE IN THE VALUE FOR THE PURPOSE OF SERVICE TAX

In the case of **Bombay Intelligence Security (I) Ltd vs. Commissioner of Service Tax, Mumbai II,** the CESTAT, Mumbai held that in the case of security services, it is not disputed that payments like salary of the security guards, provident fund, ESIC etc. are being collected/charged by the appellant/assessee from their customers. The said amount is being recovered by the appellant/assessee from the service receiver in addition to their own service charges. Under the circumstances there is no hesitation in holding that **the said amount will form part of the assessable value as has been consistently held by this Tribunal in large number of judgements. Even after the introduction of Service Tax (Determination of Value) Rules 2006, the reimbursement cannot be considered as pertaining to reimbursement as a pure agent as security guard is integral part of service and all charges pertaining to him will form part of the value.** These do not satisfy the conditions of pure agent. **It is therefore considered that salary, EPF, ESIC etc. will form part of the taxable value.**

REMINDER

LAST DATE OF PAYMENT OF THE BALANCE INSTALMENT OF VCES WITHOUT INTEREST IS 30TH JUNE, 2014

CENTRAL EXCISE

NO DEMAND OF DUTY ON CAPTIVE CONSUMPTION OF GLYOXAL IN THE MANUFACTURE OF DRUG INTERMEDIATES

In the case of **M/s Manish Organics India Ltd. vs. CCE Surat II,** the CESTAT, Ahmedabad held that **manufacturing exempted drug intermediates from unstable Glyoxal 20% is not marketable and on which no duty is thus payable.**

DENIAL OF REFUND CLAIM OF DUTY ON PRICE VARIATIONS

In the case of **M/s Munjal Auto Industries vs. CCE&ST., Vadodara,** the CESTAT, Ahmedabad held that **mere subsequent reduction in price on the basis of some understanding arrived at between the parties cannot affect the duty liability in terms of the price disclosed in the invoice.** Only exception to this is in a case where the manufacturer collects additional price by issuing a supplementary invoice. There is no provision under the law for issuance of supplementary invoices reducing the price. **The law requires that duty should be paid based on the price disclosed in the invoice issued at the time of clearance of the goods. Therefore, refund claims of the appellants are not maintainable where lower duty is payable on the goods cleared at a price, when**

subsequently a lower price is settled due to price variations.

NO DEMAND OF DUTY ON GOODS RECEIVED FOR REPACKING IN ABSENCE OF EVIDENCE OF REPROCESSING OF GOODS

In the case of **M/s Varun Coatings vs. Commissioner of Central Excise, Thane-II,** the CESTAT, Mumbai held that where the appellant received the goods from their principal manufacturer for only repacking of the goods from retail packs to bulk packs and there is no evidence on record that the appellant has reprocessed the goods and having any facility at their unit for reprocessing of the same, then in the absence of any evidence, merely on the basis of words "sent for reprocessing" cannot be taken as evidence for ascertain the fact that the appellant has taken the goods for reprocessing of the goods. Therefore, **it is held that the appellant has done only the repacking from retail packs to bulk packs of the impugned goods which does not amounts to manufacture during the impugned period. Therefore, the demand of duty is not sustainable, consequently, penalty is also not sustainable.**

VALIDITY OF SECTION 11D ON DUTY DEMAND

In the case of **Hindalco Industries Ltd. and Another vs. Assistant Collector, Central Excise and Others,** the Delhi High Court held that three conditions are necessary before Section 11D could apply:

- there must be a liability to pay excise duty in respect of the goods manufactured by the petitioner;
- an amount in excess of the duty assessed/determined ought to have been collected by the petitioner; and
- collection of the excess amount should be representative of the duty of excise.

Section 11D(1) has specific reference to a person who is liable to pay duty under the Act. In the present case, it is Hindalco which is that person. Hindalco's liability to pay duty is in respect of the aluminium manufactured by it inasmuch as a duty of excise is a duty on manufacture and not on the sale of any product. Insofar as aluminium is concerned, the price charged for it is by virtue of the Aluminium Control Order. The duty leviable on aluminium based on such price has been collected and paid by Hindalco. There is no excess on this account. Therefore, the question of invoking Section 11D would not arise.

CLASSIFICATION OF RICE PAR-BOILING MACHINERY

The CBEC vide **Circular No. 982/06/2014-CX dated 15.05.2014** stated that the par-boiling machine and dryer are self-contained machines which are designed to be installed independently and which perform their respective functions independently. Therefore, though they may be installed in a rice mill to work in conjunction with the milling machinery, the par-boiling machine and dryer do not appear to satisfy the requirements of Section Note 3 to be called composite machines/multifunction machines meriting classification under CETH 8437. Further, par-boiling machinery does not constitute grain dampening machine as the end result of par-boiling of rice is reduction in the moisture of paddy. In view of the above, **rice par-boiling machine and dryer would merit classification under CETH 8419 as per Note 2 to Chapter 84.**

INCOME TAX

SUPREME COURT

1. **With reference to Section 80HHC, sale proceeds of scrap is not "turnover".** The intention behind enactment of Section 80HHC was to encourage export so as to earn more foreign exchange. The Hon'ble Apex Court is of the view that once the Government decided to give some benefit to someone who is helping the nation in bringing foreign exchange, **the Revenue should also make all possible efforts to encourage such traders or manufacturers by giving such business units more benefits as contemplated under the provisions of law to bring in foreign exchange.** [CIT vs. Punjab Stainless Steel Industries (Supreme Court)]

2. **Despite pronouncement of verdict in open court & signing of draft judgement, judges are entitled to alter verdict until judgement is signed & sealed.** *[Kushalbhai Ratanbhai Rohit vs. State of Gujarat (Supreme Court)]*

3. **Important principles on distinction between "*contract for sale of goods*" and "*works contract*":**
   - the works contract is an indivisible contract but, by legal fiction, is divided into two parts, one for sale of goods, and the other for supply of labour and services;
   - the concept of **"dominant nature test"** or, for that matter, the **"degree of intention test"** or **"overwhelming component test"** for treating a contract as a works contract is not applicable;

- the term “works contract” as used in Clause (29A) of Article 366 of the Constitution takes in its sweep all genre of works contract and is not to be narrowly construed to cover one species of contract to provide for labour and service alone; and
- once the characteristics of works contract are met with in a contract entered into between the parties, any additional obligation incorporated in the contract would not change the nature of the contract. *[Kone Elevator India Pvt. Ltd. vs. State of Tamil Nadu (Supreme Court-5 Judge Bench)]*

HIGH COURT DECISIONS

1. **Commission paid to the agent for services rendered abroad is not liable to tax in India** and there was no obligation on the part of the assessee to deduct the tax at source at the time of making of payment. Moreover, **any payment by way of reimbursement of expenses are also not taxable in India.** [DIT vs. Wizcraft International Entertainment Pvt. Ltd. (Bombay High Court)]

2. **Assessee is bound to furnish a return in response to a Section 148 notice.** The reasons for reopening can be given only thereafter. **The writ remedy being a discretionary remedy, the discretion can be exercised in favour of the writ petitioner only if his conduct has been in conformity with law.** If it is not, the Court may refuse to exercise the discretion in favour of the writ petitioner. *[Adobe Systems Software Ireland Ltd. vs. ADIT (Delhi High Court)]*

3. Section 14A provides that if there is any income which does not form part of the income under the Act, the expenditure which is incurred for earning the income is not an allowable deduction. Hence, in the absence of any tax free income, the corresponding expenditure could not be worked out for disallowance. Thus, **Section 14A & Rule 8D disallowances could not be made if there is no tax-free income.** *[CIT vs. Shivam Motors (P) Ltd. (Allahabad High Court)]*

4. With reference to Section 147, **reopening the assessment proceedings, even within 4 years, solely on the basis of a clarificatory retrospective amendment is not permissible.** *[Sadbhav Engineering Ltd. vs. DCIT (Gujarat High Court)]*

5. With reference to Section 147, **strict guidelines are laid down to streamline the procedure for reopening of assessment.** *[Sahkari Khand Udyog Mandal Ltd. vs. ACIT (Gujarat High Court)]*

6. In the absence of strict approach by the judiciary, the Revenue is possibly encouraged in filing Appeals to challenge essential findings of fact and with regard to matters which should stand concluded at the level of the authorities. As a result a number of appeals get filed and remain pending because these officers do not take any further responsibility. Both the Revenue Collection and assessees get affected adversely. This benefits no one and rather defeats public interest. **Hence, High Court imposes costs of Rs. 50,000 on AO for filing frivolous appeal & wasting public money & judicial time.** *[CIT vs. Sairang Developers and Promoters Pvt. Ltd. (Bombay High Court)]*

ITAT DECISIONS

1. With reference to Section 32, **assessee (Bank) is entitled to depreciation on assets given on lease.** *[ICICI Bank Ltd. vs. JCIT (ITAT Mumbai)].*

2. **A disallowance u/s 14A could not be made if prima facie the assessee has made out a case to show that no expenditure has been incurred for maintaining long term investment in subsidiary companies and joint-ventures.** The AO has not brought out any contrary fact or material to show that the assessee has incurred any expenditure for maintaining these investments or portfolio of these investments. **Rule 8D disallowance also could not be made for investment in shares of subsidiaries and joint ventures.** *[JM Financial Limited vs. ACIT (ITAT Mumbai)]*

CBDT ANNOUNCES AMBITIOUS NATIONAL JUDICIAL REFERENCE SYSTEM PROJECT (NJRS)

The CBDT has announced the setting up of a “National Judicial Reference System” (NJRS).

The NJRS comprises of two components, the “Appeals repository and Management System” and the “Judicial Research and Reference System”.

The Appeals repository is a database of all appeals pending in the ITAT, High Court and Supreme Court. The system will enable the status of the appeals to be tracked with an alert system. The big advantage of this database is that the entire litigation history of a tax payer will be available at the press of a button.

The Judicial Research and Reference System is a database of all decisions of the ITAT, High Courts & the Supreme Court. The cases will be indexed, searchable and cross-linked. The database will also have the relevant statutory enactments, circulars etc.
There are several other interesting aspects of the NJRS which can be referred in the CBDT’s letter dated 29.04.2014. It is expected that the NJRS will go-live by November/ December 2014.

VAT

CIRCULAR

TRADE CIRCULAR NO. 8 OF 2014 DATED 13.05.2014 : ONLINE ISSUANCE OF CENTRAL DECLARATION FORMS BY NAGALAND

The Government of Nagaland has made it mandatory for online issuance of statutory forms under the CST Act, 1956 as per following table:

Form No.	Effective date of compulsory online issuance
CST Form "C"	1.10.2013
CST Form "F"	1.4.2013
CST Form "H"	1.4.2013

All manual forms have been declared obsolete and invalid from the corresponding date cited as above. Verification of the online forms mentioned above, issued from the state of Nagaland can be done through the department's web portal www.nagalandtax.nic.in. Every selling dealer of West Bengal making sales to registered dealers of Nagaland should file details of all such CST Forms in the website of the Directorate following Trade Circular No. 9/2012 dated 16.07.2012.

HIGH COURT DECISIONS

In the case of **M/s Joyrath Projects Pvt. Ltd. and Another vs. Sales Tax Officer, Alipore Charge and Others,** the Calcutta High Court held that where the certificate of registration issued to the assessee under the Central Sales Tax (Registration & Turnover) Rules 1957 depicts the nature of business as "works contract", inter-state purchases for the execution of the works contract forms an integral part. **The Court is with the view that asset purchased for execution of works contract is a transfer and the assessee, therefore, is entitled to issuance of C-Form for effecting the inter-state purchase.** It does not concur with a view of the department that the sale and purchase of the asset which are required for execution of the "works contract" and in fact, involved in such work does not amount to transfer. The Court, therefore, set aside the order of the assessing authority and directs the said authority to consider the case afresh.

QUERY

Whether provisions of ESI Act are applicable to a CA firm in West Bengal, employing more than 10 staff?

CA B.K.Newatia, Partner, S. Jaykishan

REPLY

A. Section 1(4) & 1(5) of ESIC Act 1948 lay down the applicability of the Act as follows –

> **(4)** It shall apply, in the first instance, to all factories (including factories belonging to the government) other than seasonal factories:
>
> **PROVIDED** that nothing contained in this sub-section shall apply to a factory or establishment belonging to or under the control of the government whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act.
>
> **(5)** The appropriate government may, in consultation with the Corporation and where the appropriate government is a State Government, with the approval of the Central Government, after giving six months' notice of its intention of so doing by notification in the Official Gazette, extend the provisions of this Act or any of them, to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise:
>
> **PROVIDED** that where the provisions of this Act have been brought into force in any part of a State, the said provisions shall stand extended to any such establishment or class of establishments within that part if the provisions have already been extended to similar establishment or class of establishments in another part of that State.

B. As per WB Shops & Establishments Act 1963 –

- Shops mean any premises for the wholesale or retail sale of commodities and services.
- Establishment means commercial establishment or an establishment for public entertainment or amusement.

Further as per FAQs issued by Shops & Establishments Directorate, Dept. of Labour, Govt of WB, it is clearly laid down that Chartered accountant firms have been held as neither shops nor establishments.

Hence in West Bengal, the provisions of ESIC Act shall not apply to CA Firms.