

BDO

TAX UPDATE

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1. CIT vs. M/s. Glenmark Pharmaceuticals Ltd. [2010-TIOL-237-HC-MUM-IT]

Even though the third parties carry out work as per the direction of the assessee, the provisions of section 194C will not be applicable as the material required in the manufacture of the article or thing is obtained by the manufacturer from a person other than the assessee. The property in the articles is passed on delivery of the product manufactured. The goods have an identifiable existence prior to delivery and hence the contract between the assessee and the third parties is a contract for "sale" and not for "work".

Assessee is in the business of manufacturing and marketing of drugs and pharmaceutical products. It has entered into agreements with third party manufacturers for manufacturing of certain pharma products. In view of the agreement, assessee provided product specifications and standards. The manufacturer affixes the trademark of assessee on articles produced. Further, the raw materials are purchased by manufacturer on his own account. And the property in goods passed to the assessee on delivery of goods. Hence, based on such facts assessee contended that the contract with the manufacturer is that of 'sale' and not a 'works contract'.

The AO took the view that the contract with the third parties is contract of "work" and assessee should have deducted TDS u/s 194C on the payment made to them. The said view was also affirmed by the CIT(A). However, the Hon'ble Tribunal held that it was a 'contract of sale'. The Tribunal observed that though the products were manufactured as per the specifications of assessee, the manufacturer carried out the process of manufacturing, at its own establishment, engaged its own labour, purchase raw materials at its own cost and choice and paid excise duty and sales tax on the same. The property passed to the assessee only upon delivery.

The Tribunal following the decision of Bombay high Court in the case of BDA Ltd. Vs. ITO [2006] 281 ITR 99 decided the issue in favour of assessee.

Aggrieved by the order of the tribunal, revenue went in appeal before the Hon'ble Bombay High Court. The Hon'ble High Court held as under:

Clause (e) to the Explanation to Section 194C as introduced by Finance Act 2009 contains a positive affirmation that the expression 'work' will cover manufacturing or supplying a product, according to the requirement or specification of a customer, by using material purchased from such a customer.

- Clause (e) has placed the position beyond doubt by incorporating language to the effect that the expression 'work' shall not include manufacture or supply of a product according to the requirement or specification of a customer by using material which is purchased from a person other than such customer.
- In the instant case the materials are purchased by the manufacturer. Hence, the contract does not satisfy the requirements of contract of work.
- The reason that specification or requirement is enunciated by assessee constitutes business expediency. Trademark is associated with assurance of quality of goods marketed traceable to origin of goods. Hence, this will not affect the legal position of the case.
- The property in the articles is passed on delivery of the product manufactured. Until delivery is made, the assessee had no title to the goods. The goods have an identifiable existence prior to delivery and hence, the contract between the assessee and the third parties is a contract for sale and not for 'work'.

2. CIT v. Apar Industries Ltd. [2010-TIOL-255-HC-MUM-IT]

Payment of tax by assessee under section 115JA would, where an assessee is entitled to a credit under provisions of section 115JAA, have to be reckoned before computing liability to pay interest under section 234B.

The issue before the Honorable High Court was whether credit for brought forward MAT is to be allowed before computing interest payable under section 234B of the Act; or whether, as contended by the Revenue, the credit is allowable after the liability to pay interest under section 234B is computed.

The contention of the Revenue was that, prior to the substitution of Explanation (1) to Sec. 234B by the Finance Act, 2006, assessed tax was defined to be the tax on total income determined under section 143(1) or on regular assessment as reduced by the advance tax, tax deducted and collected at source. Consequently, MAT credit could not be reckoned while computing the liability to pay interest under section 234B.

The Court observed that on a combined reading of the provisions of section 140A, 143(1) and 234B(2), it would be clear that tax paid under section 115JA of the Act, is to be reckoned in computing the liability under section 234B. Also, Circular No. 14 of 2006 which explains the amendment to section 234B(1), noted that tax paid under section 115JA was no different from the tax paid in advance. The amendment sought to remove an existing ambiguity in interpretation and was therefore clarificatory or curative in nature and was applicable for previous years also, though it was brought into effect from 01.04.2007.

Consequently, the Court ruled in favor of the assessee and held that MAT credit under section 115JAA is to be allowed before computing interest payable under section 234B of the Act.

3. L.G. Electronics India Pvt. Ltd. v. Addl. CIT [2010-TIOL-222-ITAT-DEL]

Collection of sales tax as a part of dealer's price is nothing but a trading receipt.

The assessee was engaged in the business of manufacturing, marketing and sales of electronic and electrical appliances of consumer goods in the state of Uttar Pradesh. The Company had uniform pricing policy called 'dealer's price' which included sales tax. The State Government, to promote industrial development, had granted subsidy in the form of sales tax exemption to the assessee.

During the assessment year 2002-03, the assessee revised its return of income on the basis of a subsequent judgment of ITAT, and claimed the sales tax component as a capital receipt and therefore exempt from tax & contended that it became eligible for sales tax exemption only when it invested in the factory and not otherwise and, therefore, the subsidy was inextricably linked with setting up of the industry and was a capital receipt.

However, the Assessing Officer concluded that the exemption was given to carry out existing and on-going business and therefore, the sales tax collected was revenue receipt and taxable. The decision was upheld by the CIT(A). Before the ITAT, the Revenue stated that, by selling the goods on the same 'dealer's price' in U.P., which included sales tax, the company had received excess price as pay back of investment in the State. This excess price was therefore a trading receipt and was chargeable to tax.

The Honorable Tribunal observed that, neither the certificates issued by the Greater Noida Industrial Development Authority nor the State Government authorises the assessee to collect sales tax from its customers. Also, nowhere in the notification has it been stated that exemption from sales tax was provided for setting up of the eligible unit. Rather, the industry was to be first setup and after it went into production and made the first sale, the assessee became eligible for exemption.

Held, the collection of dealer's price had been made in the ordinary course of trading activities and collection of sales tax as a part of dealer's price constitutes a trading receipt.

International Tax

1. Valentine Maritime (Mauritius) Ltd. [2010-TIOL-195-ITAT-MUM]

The "Duration Test" for constituting Construction PE should not aggregate the number of days relating to other contracts, if the activities carried out therein are not inextricably interconnected or interdependent to form a coherent whole in conjunction with each other.

Valentine Maritime (Mauritius) Ltd. ("the assessee") a company incorporated in Mauritius, possessing Mauritius tax residency certificate, is engaged in the business of marine & general engineering and construction. The assessee had carried out three projects in India as under:

Contracts	Duration
Replacement of Deck	100 Days
Charter of a barge (for accommodation purpose)	137 Days
Charter of barge along with the provision of technical personnel	225 Days

The assessee contended that the income earned from all the contracts are in the nature of "Business Income". Since the duration of each contract is less than nine months, being the threshold limit specified for Construction PE in India – Mauritius Tax Treaty, they do not have PE in India, hence income from those contracts are not taxable in India.

The Assessing Officer ("AO") disagree with the assessee and held that for determining the existence of a PE under the Construction PE Rule, the time spent on all the projects would need to be aggregated. AO further held that the aggregate time spent exceeds the threshold limit of nine months, hence the assessee constitutes Construction PE in India and incomes from those contracts are taxable in India.

The first level appellate authority ruled in favor of the assessee. Aggrieved by this, the Tax Authority appealed before the Tribunal.

The Tribunal while considering the issue on constitution of Construction PE found no findings to the effect that the three contracts are inextricably interconnected, interdependent, or can only been seen as a coherent whole in conjunction with each other. Thus, has held that only the activity of a foreign enterprise on a particular site / project, or supervisory activity connected therewith are to be taken into account and not all the activities in the country as a whole. This is due to the fact that the relevant clause of the India-Mauritius Tax Treaty does not specifically provide for aggregation of time spent on various projects for determining a Construction PE, which in case of Tax Treaties between many other countries has been worded to take aggregate number of days spent on various sites/ projects or activities. Further the OECD and UN Model commentary states that the "Duration Test" applies to each individual site or project.

In the light of above observations, the Tribunal has held that the duration of these projects cannot be aggregated for the purpose of ascertaining constitution of Construction PE and none of the individual contract exceeds the threshold limit for constitution of Construction PE. Hence assessee did not have a PE in India.

International Tax

2. KSPG Netherlands Holding B.V. [AAR No. 818/2009]

Dutch company earning capital gains income from certain proposed India-based divestments would not be subject to tax in India under the provisions of the India-Netherlands tax treaty. Dutch company was the beneficial owner of such gains and could not be considered a mere conduit of its German parent company.

German company having a wholly-owned subsidiary in India sold its entire shareholding in the Indian company to KSPG Netherlands Holdings BV ("KSPG BV" or "Applicant"), a Dutch resident. KSPG BV in turn was subsidiary of another German company. The Indian company now became the wholly-owned subsidiary of KSPG BV. Subsequent to the acquisition, KSPG BV made further investments into its Indian subsidiary with a view to broaden its capital base.

KSPG seeks advance ruling on four question, one of which is whether on facts and in the circumstances of the case, the applicant would be liable to tax in India on the capital gains that may accrue from transfer of shares in Indian Company to another non-resident as per provision of India-Netherlands tax treaty.

KSPG BV relied on the exemption provided in the India-Netherlands treaty for gains arising from the sale of shares of an Indian company. An ordinary interpretation of Article 13(5) of the treaty would suggest that gains derived by a Netherlands resident from the alienation of shares of an Indian company would not be taxable in India if the alienation is made to another non-resident. However the Revenue alleged 'interpolation' of Netherlands Company is a part of the scheme for the avoidance of liability to tax on capital gains.

The department also contended that it is the German parent who beneficially owned the gains that may accrue from the transfer of shares of the Indian company and hence the provisions of India-German DTAA would be applicable in which case the capital gains can be taxed in India

Rejecting the departments contention AAR held that KSPG BV cannot be considered a sham entity deliberately set up to avoid capital gains tax liability. It specifically stated that the Dutch company is not a conduit set up "to siphon off the gains to the ultimate holding company by means of a colorable device contrary to its corporate status." Therefore while declaring the Dutch company to be the beneficial owner of the capital gains the AAR noted that it was a distinct legal entity having its own board of directors and management systems. The obvious fact that KSPG BV initially acquired the shares of the Indian entity on an arm's length basis and had itself made significant direct investments into the Indian company thereafter. Hence, there was nothing to suggest that the beneficial ownership over the gains from the alienation of shares by KSPG BV would vest with its German parent. Thus applicant is not liable to pay tax on capital gains by virtue of the tax treaty provision.

3. ITO (IT) v. Rameshkumar Goenka [ITA No. 3562/Mum/2009]

Indo-UAE Tax Treaty – Expression 'liable to tax' in contracting state as used in Article 4(1) of Indo-UAE-DTAA does not necessarily imply that person should actually be liable to tax in that contracting state.

The assessee is an individual and resident of UAE. During the previous year he earned short term capital gain of Rs. 5,04,89,379/- and claimed that the gain cannot be brought to tax in India in view of Article 13(3) of the Indo-UAE DTAA. As the assessee was resident of UAE, it is only UAE which has a right to tax the capital gain.

The AO, however, rejected the claim of the Assessee on the ground that the Assessee is not paying taxes in UAE as the capital gain in question was admitted not charged to tax. The AO further relied upon the decision of the AAR in the case of Abdul Razak Menon¹ and held that assessee has failed to discharge the onus on it to prove that it is "liable to pay tax in UAE". According to the AO it is not sufficient for a person to claim the benefits of Article 13(3) to be just a "Resident of the other contracting State", but he must also have paid tax on the income in respect of which the benefit of Article 13(3) is claimed.

International Tax

On further appeal, the CIT(A) following the decision passed in case of ADIT (International Taxation) vs. Green Emirate Shipping & Travels² has held that the assessee was entitled to the benefits of Article 13(3) of Indo- UAE treaty and therefore capital gain cannot be brought to tax in India.

On further appeal by AO, the tribunal held that the expression 'liable for tax' is not to read in isolation but in conjunction with the word immediately following it i.e. 'by reason of domicile, residence, place of management, place of incorporation or any other criterion of similar nature'. In the case of John V. Gladden v. Her Majesty the Queen³, which was quoted with the approval by Honorable Supreme Court in Azadi Bachao Andolan⁴, Federal Court of Canada was observed that "the non resident can benefit from exemption (under treaty) regardless of whether or not he is taxable in his own country. Further, the decision of Green Emirate Shipping & Travel is squarely applicable to the facts of the case and held that the expression "liable to tax" in the contracting state as used in Article 4(1) of Indo-UAE DTAA does not necessarily imply that the person should actually be liable to tax in that contracting state. It is enough if other contracting state has right to tax such person, whether or not such a right is exercised.

¹276 ITR 306

²100 ITD 203

³85 TC 5 188

⁴263 ITR 706

Tax Transparency and Exchange of Information

Government notifies Specified Territories – Can negotiate agreements for exchange of information and prevention of fiscal evasion with these territories

The Income-tax Act, 1961 ("the Act") was amended by Finance (No. 2) Act, 2009 to enable Government to enter into agreements with specified non-sovereign jurisdictions. Pursuant to this amendment, the Government has recently issued two notifications notifying ten Jurisdictions, such as Bermuda, British Virgin Islands, Cayman Islands, Gibraltar, Guernsey, Isle of Man, Jersey, Netherlands Antilles, Macau, Hong Kong, a Special Administrative Region of the People's Republic of China, outside India as the 'specified territories'. Accordingly, the Government can enter into agreements for exchange of information for prevention of fiscal evasion or avoidance of income-tax and assistance in collection of income tax with these specified territories. Details on the scope and coverage of the proposed agreements are yet to be known.

Notification no. 22/2010 dated 8 April 2010 and Notification no. 25/2010 dated 20 April 2010

Transfer Pricing

1. Two International Pvt. Ltd.

The application of Arm's Length Margin cannot be extended to the entire costs/sales of the entity and must be restricted only to the International Transaction for determination of Arm's Length Price.

The Assessee is in the business of sale of finished jewellery to its Associated Enterprises ('AE') and Non-Associated Enterprises. It enjoys 100% tax holiday u/s 10A of the Income tax Act, 1961 ('Act') due to its location in a SEZ. The Assessee has applied 'Cost Plus Method' ('CPM') and claimed that the transaction is at Arm's length since the Gross Profit ('GP') earned from the AE sales is higher than that from the Non-AE sales.

The Transfer Pricing Officer ('TPO') however opined that the Most Appropriate Method ('MAM') to compute Arm's Length Price ('ALP') would be Transactional Net Margin Method ('TNMM'), as the assessee has not provided sufficient data to sustain its calculations under CPM. The TPO also noted that the Non-AE sales were different in character from the AE sales as terms, conditions and risks varied in both situations.

The TPO hence relied on a set of 18 companies comparable to the assessee and computed their Operating Profits to Total Cost Ratio (OP/TC%), and applied the average mark-up to the total costs of the assessee. From this, the Non-AE sales of the assessee were eliminated to arrive at the ALP.

While the assessee agreed to the choice of TNMM as MAM and the mark-up, it contended that the adjustment be made only pertaining to the international transaction i.e. the AE sales and not in totality as effected by the TPO. For this a rectification application was made under Section 154 of the Act, which was rejected by the TPO due to failure of the assessee to provide separate details for GP on sales for AE and Non-AE sales.

On rejection of the application by the TPO, the assessee preferred an appeal to the CIT(A).

CIT(A) held that the TPO made excessive adjustment attributable to application of mark-up to total costs. The CIT(A) accepted the assessee's contention that ALP should be computed in relation to the AE sales only, and not with the third parties. CIT(A) adjudicated a 'No Adjustment' clean chit to the assessee, as application of the average mark-up to the AE cost brought the international transaction in the Arm's Length Range.

The Revenue aggrieved by this order of the CIT(A), appealed to the Tribunal.

The Tribunal agreed with the assessee's contention that the application of average mark-up should be restricted only to the International Transactions, but differed the CIT(A) as regards the 'No Adjustment' stand. Attention was drawn to Rule 10B of the Income-tax Rules, 1962 ('Rule'), wherein if TNMM is used as the MAM for computation of ALP u/s 92C of the Act, it refers to the use of net profit margin and, therefore, in that strict interpretation, there is no scope for reducing interest or any other overheads. There was no clarity whether the OP/TC% taken by the TPO referred to Operating margin or Net margin.

On these grounds the Tribunal set aside the order of the CIT(A), and remitted the matter back to the Assessing Officer to confirm the factual details of the case and to simply compute the adjustment by providing direction to follow TNMM in the manner laid down in the Rule i.e. application of net profit rate as against OP/TC % used by the TPO.

This ruling may have taken a very narrow interpretation of the guidelines laid down in the Rule, but has upheld the decision in case of *IL Jin Electronics (I) Pvt. Ltd.*, which had also restricted the purview of adjustments only to the International Transactions.

All India Value Added Tax

Maharashtra

Area	Description
Adjustment of excess credit of F.Y. 2009-10 to F.Y. 2010-11 <u>Trade Circular No. 15 T of 2010 dated April 15, 2010</u>	Refund is generally claimed at the end of the FY and claim for the previous FY cannot be carried forward to the next FY. However, considering the difficulties faced by the trade, it is now administratively decided to permit such adjustment only for the FY 2009-10. Dealers who have claimed refund for the year 2009-10 in the return for the period ending on 31st March 2010 can adjust it towards the returns to be filed for the current FY 2010-11. In case any dealer has already filed the claim of refund for the period/periods of 2009-10, such a dealer will not be allowed to carry forward the credit to the next financial year 2010-11 and their refund claims shall be processed as per existing procedures. It is to be noted that this facility is provided only for the dealers who have excess credit less than Rs 1 Lac, in the return, for the period ending on 31 March 2010. It is also to be noted that this facility is provided only for the current year.

Delhi

Area	Description
Restrictions and conditions governing tax credit <u>Notification No. F.3(23)/Fin.(T&E)/2009-10/JS/Fin/287 dated 1st April, 2010</u>	Input Tax Credit on closing stock available at the end of every tax period shall be carried forward to the next tax period or the following tax period or periods, as the case may be, till such stock is sold by the dealer. This sub rule shall not prevent the claim or refund of a dealer for sales already effected during the relevant tax period or to a dealer who makes sales in the course of exports out of India, or in the course of Inter State Trade or Commerce, or in such cases where the dealer being a manufacturer is required to make purchases of raw materials taxable at a higher rate of tax, while the sale of goods manufactured by him (not being goods exempted under section 6 as specified in the First Schedule to the Act) are taxable at the lower rate under the Act.

Service Tax

Notifications

Notification no. 23/2010 - Service tax dated April 29, 2010

Exemption to services offered on Modular Skills courses by a vocational trainer

Services of offering on Modular Employable Skills courses as approved by National Council of vocational training, provided by a Vocational training provider registered with Directorate General of Employment and training, Ministry of Labour and employment, under the Skill Development Initiative scheme are exempt from whole of the service tax leviable thereon.

Circulars

Circular No. 122/03/2010 – ST dated April 30, 2010

The circular provides clarification with regard to availment of credit of service tax paid on input services by associated enterprises and in cases where payment for service tax is not made in full by the service receiver.

- a) As per Rule 4(7) of CENVAT Credit Rules, 2004, the CENVAT credit on input services is available only on or after the day on which the payment of the value of input service and service tax is made. Also, the provision of section 67(4) of the Finance Act, 1994, provides that the gross amount charged includes the payment made by issue of debit/credit note or by entries in the books of accounts where there is transaction with any associated enterprise.

In view of the above provisions in the law, Board has provided clarification on the issues as below:

Rule 4(7) of the CENVAT Credit Rules provides that, credit shall be allowed on or after the date on which payment is made. It does not refer to the specific mode of payment neither it restricts any form of payment. Moreover, Section 67 of the Finance Act provides that book adjustment by way of debit notes/credit notes as deemed payment and as such availment of credit cannot be denied by giving and extended meaning to the word 'payment'.

Hence, in the case of associate enterprises, credit of service tax can be availed of when the payment has been made to the service provider by issue of credit notes or debit notes or by entries in the books of accounts.

- b) Receiver of service reduces the amount mentioned in the invoice/bill/challan and makes discounted payment, then it should be taken as final payment towards the provision of service and the invoice stand amended to this extent and the amount of credit taken would be equivalent to the amount that is paid as service tax subsequent to the lesser/discounted payment of the invoice.

Judicial Rulings

Tribunal Decisions

No Service Tax payable

Service Tax is not payable on services rendered by one constituent unit of a Hindu Undivided Family (HUF) to another constituent unit since they are part of the HUF which is one legal entity.

CCE v. Universal Travels (2010 (18) STR 157) (Bangalore)

No Interest Payable

Interest is not payable on a mere wrong availment of CENVAT Credit when such credit has not been utilized.

Dineshchandra R. Agarwal Infracon Pvt. Ltd. v. CCE (2010 (18) STR 39) (Ahmedabad)

CENVAT Credit

Goods transport agency services

The appellant was a dealer in motor cycles and also had a service station. He paid Service Tax on "Goods transport agency services" for transporting new motor cycles from the location of manufacturer to its showroom from where they were sold. The Service Tax paid on Goods Transport Agency services was availed and utilized as CENVAT Credit against payment of Service Tax on "Authorized station

Service Tax

services". The CENVAT Credit was denied on grounds that "Goods transport agency services" are related to sale of vehicles and not towards providing servicing services. The Tribunal allowed the credit holding that unless vehicles are received and sold there cannot be any servicing of the same.

CCE v. Shariff Motors (2010 (18) STR 64) (Bangalore)

CENVAT Credit on Service Tax paid on mobile phone bills given to employees for business purpose is allowable.

A show cause notice was issued to appellant denying availment of cenvat credit of service tax paid on mobile phone given to employees on the basis that the same is being used for both business as well as personal purposes. The tribunal held that from the face of the bill it cannot be determined that for what purposes the mobile phones are used and there are no findings by the adjudicating authority except from the bills that that these mobile phones are not used by business employees for business purpose only. The appellant has given these mobile phones to their employees for the use of business purpose only, which was never contravened by adjudicating authority through any evidence. Therefore, CENVAT Credit of service tax paid on mobile phones given to employees was allowed to appellant.

Sidel India Pvt. Ltd Vs CCE (2010 (18) STR 273) (Mumbai)

CENVAT Credit on Service Tax paid on Construction service, repair and maintenance service, manpower recruitment service and cleaning service provided at residential colony is not allowable.

The assessee was disallowed CENVAT Credit of service tax paid on construction service, repair and maintenance service, manpower recruitment service (recruitment of security guards) and cleaning service, all of these services were provided at residential colony outside the assessee's factory. Based on the Supreme court judgment in Maruti Suzuki V. CCE (2009 240 ELT 641), in which it was held that service which does not satisfy the requirement of having been used in or in relation to manufacture or clearance of final product, whether directly or indirectly, will not qualify to be an input service. Accordingly, the tribunal observed

that as the assessee has not established nexus between any of the four input services and the manufacture and clearance of excisable goods, the benefit of CENVAT credit in respect of such services cannot be allowed.

CCE, Nagpur vs. Manikgarh Cement Works. (2010 (18) STR 275) (Mumbai)

Central Excise & Customs

Judicial Rulings

Tribunal Decisions

Credit is admissible on the HR sheets used for manufacture of storage tanks used in the factory

HR sheets and steels for manufacture of storage tanks and machinery parts are considered as inputs and credit is admissible on them as input includes goods used in the manufacture of capital goods which are further used in the factory of the manufacture.

M/s Subramaniya Siva Co-Op Sugar Mills Ltd Vs CCE, Salem (2010 TIOL 481) (Madras)

Supply of goods under CT-3 certificate does amount to clearance under exemption

The goods cleared by the appellants against CT-3 Certificate (for 100% Export Oriented Unit's) to the fertilizer manufacturers cannot mean that sulphuric acid is exempted product or chargeable to nil rate of duty.

M/S The Dharamsi Morarji Chemical Co Ltd Vs CCE, Raigad (2010 TIOL 586) (Mumbai)

CENVAT Credit cannot be denied merely because balance was not shown in ER-1 Return

CENVAT Credit cannot be denied assuming that appellant is not eligible for credit because they failed to show it in the ER-1 return. Also, it is not necessary that credit should be taken immediately on receipt of the inputs or on payment of service tax to the service tax provider; credit to be eligible at all times, if paid.

M/s Shri Jagdamba Polymers Ltd Vs CCE, Ahmedabad (2010 TIOL 522) (Ahmedabad)

Customs

Judicial Rulings

Tribunal Decisions

Relinquishment of title in goods after payment of duty but before an order for clearance for home consumption entitles taxpayer to refund of duty paid earlier

The importer ordered a consignment of bearing and filed declarations at the port of import based upon the specification in the documents received from the supplier. The bill of entry was also filed on that basis and duty was assessed and paid by the importer. However, examination of goods (prior to clearance) indicated that the goods so imported are completely different and as such worthless. The taxpayer immediately relinquished its title in the goods and claimed a refund of duty already paid. The claim was denied and the importer appealed before the Tribunal. The Tribunal concluded that relinquishment of title is possible anytime before an order for clearance for home consumption is given and in that situation since goods never crossed the customs frontiers duty cannot be demanded and accordingly allowed the refund claim.

C. K. Enterprises vs CC (2010 TIOL 482) (Mumbai)

Evidentiary value of Chartered Accountant's certificate for proving non-applicability of bar of unjust enrichment

The importer in the instant case filed a refund claim, which was examined and disposed off by the adjudicating authority as allowed on merits but due to bar of unjust enrichment a direction was issued to credit the amount so refundable to the consumer welfare fund. Factually, the importer had filed its financial statements depicting the amount so claimed under refund as a part of its balance sheet and additionally, it submitted a Chartered Accountant's certificate for non-applicability of unjust enrichment in its case; the same, however, were not given due cognizance. The Tribunal held that refund could be granted to the importer on

Central Excise & Customs

basis of the Chartered Accountant's certificate so filed amongst other documentary evidences for unjust enrichment.

Global Ventures vs CC (2010 TIOL 360) (Chennai)

No interest payable on failure to fulfill export obligation due to natural calamity

The importer imported capital goods under the EPCG scheme tagged with an export obligation. Due to cyclone, the importer suffered financial losses and inter-alia was unable to fulfill the export obligation. The importer, however, paid the applicable duty on the capital goods so imported and requested the Settlement Commission to forego interest. The Settlement Commission agreed and interest was waived. On subsequent appeal, the High Court held that waiver of interest judicious in light of application of the implied principle of Force Majeure.

This ruling is, however, an exception to other precedents which have held that the Settlement Commission is not vested with the power of waiver of interest once the tax liability is admitted. The High Court in this connection observed that restoring the Revenue petition will not serve any purpose since the Commission has no power to enforce a contract which is frustrated (ie impossible to perform due to reasons beyond control of parties involved thereto).

Union of India vs. CCESC (2010 TIOL 01) (Mumbai)

No interest is payable on duty paid on de-bonding of capital goods

The importer was registered as a STP unit and was engaged in BPO operations. It procured various capital goods duty free and as per regulations bonded the entire premises where such procurements were kept/ used/ installed. On opting to exit from the STPI scheme, the importer applied for de-bonding of the units. The permission was granted and the importer removed the capital goods on payment of appropriate customs /excise duties but no interest. The department contested the position and the Tribunal referred to the Notification No 132/2004-Customs of

November 25, 2004, which specifically exempted the interest accrued on the customs duty payable by an EOU/ STP unit and also, to Section 61 of the Customs Act, 1962 which provided an exclusion from liability to pay interest for a period of five years from the date of bonding. Relying on other decisions in this regard the Tribunal held that interest is not payable on the duties levied at the time of de-bonding.

Business Process Technologies (I) Private Limited vs. CC (2010 TIOL 155) (Bangalore)

Period of limitation under the Act not applicable to cases of commitment for performance

The importer imported goods under exemption from duty under condition of re-export (in 6 months of extended period if allowed), by giving a surety bond and a bank guarantee as security towards fulfillment of the re-export condition. The importer, however, failed to re-export the goods in stipulated period due to goods being destroyed in fire. A demand of duty and interest was made (after normal limitation period) but the importer pleaded for remission of duty, which request was rejected. Before the Tribunal the taxpayer raised the ground that the demand was time barred being raised beyond prescribed limitation period. The Tribunal held that the present case was not that of non-levy, short levy or erroneous refund covered by the provisions of Section 28 of the Customs Act, 1962 but one of breach of commitment mentioned in the surety bond so given by the taxpayer and accordingly concluded that, reference to the limitation period under Section 28 is not relevant in present case and inter-alia rejected the taxpayer's appeal.

Shasun Chemicals and Drugs Limited vs CC (2010 TIOL 403) (Madras)

Notification No FEMA 205/2010-RB, dated April 7, 2010 – Pricing Guidelines for issue of shares to non-resident investor.

The RBI has now amended the FEMA Regulations to mandate that every Indian company shall issue shares to non-resident investors at a minimum floor price, which shall not be lower than:

- the price worked out in accordance with the applicable SEBI guidelines, if the shares of the Indian company are listed on a recognized stock exchange in India;
- the fair valuation of shares to be undertaken by a SEBI registered Category I Merchant Banker or a Chartered Accountant, as per the Discounted Free Cash Flow ('DFCF') method, if the shares of the Indian company are not listed on a recognized stock exchange in India; and
- the price as applicable to transfer of shares from an Indian resident to a non-resident investor, as per the pricing guidelines laid down by the RBI from time to time, where the issue of shares is a preferential allotment.

The RBI has also amended the FEMA Regulations with respect to rights issues by Indian companies to non-resident investors. As per the said regulation, the offer price for issue of shares on rights basis shall be:

- in the case of shares of a company listed on a recognized stock exchange in India, at a price as determined by the company;
- in the case of shares of a company not listed on a recognized stock exchange in India, at a price which would not be lower than that at which the offer is made to Indian resident shareholders.

A. P. (DIR Series) Circular No. 49, dated May 04, 2010 ('the Circular') - Pricing guidelines for transfer of equity shares and equity convertible instruments between residents and non-residents.

RBI has recently issued the Circular amending the pricing guidelines that are applicable to transfer of Indian equity shares/ equity convertible instruments from Indian residents to persons resident outside India ('non-residents') and vice-versa. As per the said circular, the minimum price for transfer of shares between resident to non-resident and vice-versa would be determined as under:

Transfer of equity shares and equity convertible instruments from resident to non-resident

In such cases of transfer of equity shares / equity convertible instruments of an Indian Company, the price at which the transfer will take place, shall not be less than:

- the price at which a preferential allotment of shares can be made in accordance with the applicable SEBI guidelines, if the shares of the Indian company are listed on a recognized stock exchange in India.
- In case of shares of an unlisted Indian company, the fair value determined by a SEBI registered category-1 Merchant Banker or a Chartered Accountant as per the discounted free cash flow (DCF) method. Earlier in such cases, the valuation had to be done as per pricing guidelines provided by Controller of Capital Issues (CCI).

Transfer of equity shares and equity convertible instruments from non-resident to resident

In such cases of transfer of equity shares / equity convertible instruments of an Indian Company, the price at which the transfer will take place, shall not be more than the price at which the transfer of shares can be made from a resident to non-resident (as outlined in paragraph above).

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