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From the Editor-in-Chief

An open letter to Honourable Prime Minister of India – Tax Professionals' wish list – Accountability, Stability, Transparency, Tax-payers' Education and Tax Administration should be made service oriented towards taxpayers

Hon'ble Sir,

We, the All India Federation of Tax Practitioners an apex body of tax practitioners of India, heartily congratulate you on being elected as the Prime Minister of India. Indeed it was a great revolution through democratic process.

Our Federation was established on 11-11-1976 by the blessings of former Chief Justice of India, Hon'ble Mr. Justice J. C. Shah and distinguished Jurist Late Shri N. A. Palkhivala. On the Federation's roll, 121 leading Tax Associations from 16 States and 2 Union Territories are enrolled as association members. Most of the leading Senior Advocates and Chartered Accountants, who are practicing in Direct and Indirect Taxes in different parts of our country are members of our Association. We have around 5,700 individual members who are practicing in Direct and Indirect Taxes. One of the objects of the Federation is to make representations to Central/ State Governments and other concerned authorities on Direct and Indirect Taxes, in the mutual interest of both. Sir, just to recall a memorable event, we are pleased to state that when we made a representation to the then Hon'ble Prime Minster of India, Shri Atal Bihari Vajpayee to release a Commemorative Postal Stamp to pay our tribute in memory of Shri Nani Palkhivala, Hon'ble Vajpayeeji accepted our request and came down to Mumbai on 16-1-2004 and was pleased to release Commemorative Postal Stamp on Shri Nani Palkhivala.

Sir, we are confident that under your dynamic and visionary leadership, our country will achieve even greater heights in all fields and get global recognition. As stakeholders in nation building, tax professionals have a great role to play and are confident that the new government would be more open to objective suggestions from them to make our existing tax laws better and tax administration service oriented. We thus hope that through participatory and consultative approach which the new government seeks to adopt, tax professionals would get more opportunities for direct dialogue on issues concerning them and the nation as a whole.

As a first step in the above direction, we would like to present to the new government, in a nutshell, the following points on its agenda for immediate consideration:

1. Supreme Court Benches in four Zones or e-bench of Supreme Court can be an effective alternative for having four Regional Benches of Apex Court. e-Bench of Apex Court will help

render speedy justice to the litigants thereby saving huge cost incurred on travelling back and forth to New Delhi;

2. Mobile Courts;
3. Mechanism for effective consultation before legislation is introduced;
4. Increase in superannuation age of High Court judges from 62 to 65 years;
5. Allocation of a separate fund for modernisation of judiciary in the Finance Bill;
6. Mechanism to be put in place in respective ministries to discuss and take action on suggestions made by the Apex Court, High Courts and other Judicial authorities;
7. Tax litigation in India – Vision and road map towards speedy justice - Measures to reduce tax litigation;
8. Income-tax Appellate Tribunal which is considered as Mother Tribunal of all other Tribunal deserves better support from the Government;
9. Transparency in appointment of members of Settlement Commission and appointment of professionals as Members of Settlement Commission;
10. Authority for Advance Rulings may be brought under the Ministry of Law and Justice – More Benches may be constituted and scope of applications be broadened – Members of ITAT may be appointed as members of Authority for Advance Rulings;
11. National Tax Tribunal Act, 2004, which is under challenge before the Apex Court may be withdrawn.
12. Important conceptual issues under Direct tax law - Direct taxes code may not achieve the desired results, hence the proposal may be dropped.

Sir, our suggestions above are in the interest of the Nation. Hence, the same may be considered by the Ministry concerned and put up before you for final decision. We, therefore, earnestly plead that opportunity be given to us, to provide to the Government on a continuous basis, suggestions after getting feedback from our members who too are eager to participate and exchange their views.

With great respect and best wishes.

Yours truly,

Dr. K. Shivaram
Editor-in-Chief

Note: Discussion paper is hosted in the website of AIFTP i.e. www.aiftponline.org. Members may send their views to itatbacc@gmail.com or at aiftp@vsnl.com

President's Message

My Beloved Members,

The general feeling I notice everywhere is that our country is satisfied with many expeditious action taken by Hon'ble Prime Minister Shri Narendra Modi. Within hours of taking charge of the office of the PM, he directed Finance Minister Shri. Arun Jaitley to expedite payment of ₹ 50,000 crore due to the States in Form of compensation for the Central Sales Tax cut. Simultaneously, Shri Jaitley has entrusted Revenue Secretary Shri Rajiv Takru with the responsibility of addressing the deadlock over the GST with the empowered group of the State Finance Ministers. As per the fast time frame, Shri Jaitley will meet the State Finance Ministers in the third week of June before presentation of Union Budget, to take forward for implementation of GST.

With the PM along with FM working overtime day-in and day-out, there is a new sense of purposefulness in Government. Many of the immediate steps taken by Shri Modi, reflect his CEO style of functioning in Gujarat. He does not believe in endless meetings and number of committees of ministers and, thus, buck-passing. His whole approach is based on results and that too fast. It is heartening to note that he has already given a strict message to his party members to improve upon their knowledge and come well-prepared in Parliament to participate in the discussion. He stressed the need for them to do hard work since this opportunity they got to show their mettle.

It is now certain that Direct Tax Code may not be implemented in the new budget, but there is every likelihood that soft measures will be contained for the middle class and particularly for common masses including agriculturists as the economic condition and resources available with the Government are very limited.

Our Editor and Editorial Board are also working on to have a dialogue with Hon'ble PM and FM and they have formulated certain constructive suggestions on behalf of the AIFTP for presentation to them.

On 28th and 29th June, 2014, I will be attending a two-day National Tax Conference at Chennai and I wish great success for the said conference. Already, Dr. Anita Sumanth and her team have done excellent work for the success of the same

With best wishes and regards.

J. D. Nankani
National President

Goods and Service Tax
Dual GST vs Ideal or Single GST

Mukul Gupta,
Advocate

After recent change in Political Scenario of this great country having deep roots of democracy, why not we the people of India thrive for a unified single GST which is an ideal GST rather than comprising for the dual GST along with IGST which the erstwhile Government was propagating ?

People of India have given a majority mandate with the concept that Government in power must take decisions in the best national interest without any rider or limitations of any kind. People of India have high expectation for improved/stable economic situation which could be largely and positively effected by the ideal GST if it is adopted and implemented by the new Government in place at Central.

Considering the growing stature of India in the Global Economy, we need to adopt the best tax systems to grow and maintain competitive advantage. Introduction and implementation of GST will have major positive impact on all enterprises and stake holders in India. The key benefits of GST:

i) Removal of Cascading Effect of Taxation.

ii) Abolition of Multiple Tax Laws.

iii) Reduction in Cost of Payment and Collection of Tax.

iv) Clarity and Homogeny in Taxing System.

v) Reduced cost of Production/Export of goods and services by increasing efficiency.

vi) Faster Assessment and Reduced Litigation.

vii) Consumption based internationally accepted taxation.

viii) Removal of Distortions and Simplification of the tax system,

can only be achieved with the ideal GST which is administered by one single Agency either the Central Government or State Governments.

Presently, the Constitution of India enshrines financial independence to every state and thus the power to collect Indirect Tax on sale of goods have been provided to the States. The 115th Constitution Amendment Bill which was presented in erstwhile 15th Lok Sabha and considered by the Parliamentary Standing Committee on Finance have lapsed.

A new Constitutional Amendment Bill have to be drafted, framed and presented before the new Lok Sabha. The new Empowered Committee of Finance Ministers for GST has to be created. The adoption and implementation of new system of collection of Indirect Tax by introduction of unified/single GST should also be considered with a new thought and energy rather than adopting a compromised formula of the previous Congress Government with a fractured mandate. We must think with an absolutely open mind in the changed atmosphere for adopting and implementing ideal GST in the best national interest. If we start working with this new philosophy we can certainly find ways to adopt ideal GST with the motto of the political ideology in power i.e. "we can and we will do".

One can reasonably consider and compare the expected benefits of GST in this country with the experience of the other countries only if we implement ideal GST as apple can be compared with the apple and not otherwise.

Further, with the matured thinking we should also re-visit the basic issue that why GST has not been implemented in the most developed economy of world USA ? USA also have federal nature of governance through democratically elected representatives like in our country. USA had already examined the introduction of GST in their Federal structure of the country, but USA have not yet implemented the GST neither they intend to implement GST, even they are globally accepted business leaders.

It is to be considered with emphasis that dual GST model along with IGST will not give similar or equivalent benefits to the Indian economy as ideal or single GST, so why not, we sought for best i.e. the single/ideal GST.

It is time to firmly stand and be the torch bearers, so that Government and the policy makers of GST must give a deep thought on this important issue.

FORTHCOMING PROGRAMMES

Date & Month	Programme	Place
28-6-2014	National Executive Committee Meeting	Chennai
28, 29-6-2014	National Tax Conference (Southern Zone)	Chennai
16, 17-8-2014	Justice Dr. B. P. Saraf National Tax Moot Court Competition (Eastern Zone)	Kolkata
22-8-2014	National Executive Committee Meeting	Nagpur
23, 24-8-2014	National Tax Conference (Western Zone)	Nagpur
6-9-2014	One Day Tax Conference (Western Zone)	Anand
4 to 6-10-2014	3rd Residential Refresher Course (Western Zone)	Goa

Interpretation of Taxing Statutes

D. H. Joshi, *Advocate*

1. Whilst on the subject, I would like to share with our readers as to how I developed keen interest after reading various judgments of the Supreme Court delivered by Justice Krishna Iyer, and, in particular, the judgment in *Aluminium Corporation of India Ltd. v. Union of India AIR 1975 SC 2279*. In this case, the court was concerned with exemption notification issued under the Central Excise Act. In fact in a taxing statute it is often repeated that there must be simplicity in drafting legislation including rules and notifications affecting the people. However, Justice Krishna Iyer, in the context of the excise notification observed as under in the aforesaid judgment: –

> *"There is hardly any part of our national life or of our personal lives that is not affected by one statute or other. The affairs of local authorities, nationalised industries, public corporations and private commerce are regulated by legislation. The life of ordinary citizen is affected by various provisions of the statute book from cradle to grave. The rule of law is the cornerstone of democracy and how can there be a rule of law if the society members, the bulk of whom are too poor to buy legal services, cannot decode the legislature's law and therefore obey it. Incomprehensible law annoys the administration and estranges the citizen at a time when quick justice and less sterile litigation are the *desiderata (the things wanted, needed or necessary). The command of the law can claim the *allegiance (the loyalty that citizens owe to their country) of the law only by simplicity in legislation."*

* *The meaning of the above word is explained immediately in the bracket provided.*

2. We live in an age of legislation, and most new law is statutory law. Law is doing of a purposive activity which aims at continuous striving to solve the basic problems of social living or society. The work of a judge is the interpretation of text produced by a democratic institution i.e. State Assembly or Parliament. No approach to interpretation is self-justifying and there is no good general theory of how to interpret texts. Debates over interpretations are institutional – they raise issues about who should make what sorts of decisions and about minimising the discretion of the various institutions. Any approach requires a justification and depends on judgments and commitments that are independent of texts themselves.

3. Fransis Bennion, an authority on statutory interpretation in his foreword to the Irish Statute Book : 'A guide to Irish Legislation' by Brain Hunt has remarked thus:

> *"The citizen needs, and the state must provide, adequate information, in lay terms, about what the law enacts. The citizen must not be encouraged to go direct to an Act of Parliament for information because, as I have said, no Act is complete in itself. It must be read in context, and the context for every Act is the whole of the law. An individual Act is the single part that must fit into the mechanism of the Swiss watch and assist its efficient working. It is the legal experts who know about that – or should do."*

The same kind of opinion is expressed by Lord Summer –

> *"The way of taxpayers is hard and the Legislature does not go out of its way to make it any easier."*

4. Taking the same philosophy about taxes forward Justice Holmes valiantly tried to make taxes less odious by means of felicitous definition. Taxes, he said, "are what we pay for civilised society." He further remarked, "I like to pay taxes. With them I buy civilisation."

5. Justice *Dua in Nand Lal Hira Lal v. The Punjab State (1965) 16 STC 967 at Page 972 (Pun.)* observed as under: –

> *"In our Republic, taxing statutes are designed to see that the burden of taxation falls equally and uniformly, avoiding as far as possible, unjust or unreasonable results. It must never be forgotten that the long range objective of all tax measures is the accomplishment of good social order and for a welfare democratic state revenue is its very blood."*

6. As back as 1986 Jha, Judge, in *Fedders Lloyd Corpn. Pvt. Ltd. v. CST (1986) 62 STC 216 (All.)* at Page 218 observed as under: –

> *"This Dept. has been created to realise revenue and not to cause harassment to the people in general. The present case is a living instance of harassment and, therefore, no lenient view can be taken in the matter."*

7. About the most important duty of the Union Government and the State Governments of making available updated laws, Justice Dua in *Gulzarilal Bhargava and Anr. v. Chief Commissioner, Delhi, & Ors. (1966) 19 STC 389 at Page 398* observed as under: –

> *"…….. I would be failing in my duty if I do not point out to the authorities concerned that in this Republic, which is ruled by law, it is of the utmost importance that the provisions of law which the citizens are expected to obey and which affects and controls their daily life and activities, must be easily ascertainable and those provisions must not be kept hidden in a secluded corner of the secretariat. The professional lawyers, the courts and the citizens concerned are entitled to demand that books containing laws in force in this Republic are made easily available to those who may desire to acquire knowledge of those laws, whether in the market or elsewhere…….. the State must see that books on law are rendered within their reasonable reach. This, in my opinion, is the bounden duty of all democratic States of our pattern."*

8. Some years ago may be in 2003, in a foreign newsletter, commenting upon the consistent pattern of criticism by the House of Lords, the following response from a drafter of law was quoted: –

"How nice to be a learned judge,
Who never writes a law.
He sits all dressed up everyday
And feels quite free to pour
The greatest scorn upon the work
of those who drafts the Bill.
He thinks it fun to say that their
Mistakes causes all ills
That make the people go to law.
But he should never smirk
The drafter fault are just the things
That keep the courts at work."

9. Nonetheless, the truth of the matter is that judicial interpretation is evolving. The three rules – literal rule, golden rule and mischief rule are no longer sole guiding factor in statutory interpretation. The plain meaning approach, words in total context approach and purposive approach are gaining acceptability. The 'interpretation' covers not merely the general approach to the problem but also the question of what materials written outside the statute itself may legitimately be used for the purpose of ascertaining the intent of the Legislature. It is believed that the great majority of legal disputes centre around the interpretation and operation of statutes.

10. The leading theories of interpretations may be broadly divided into four categories: (i) intentional, (ii) purposive, (iii) textual and (iv) dynamic. The Anglo-American legal tradition emphasises intentionalism. Intentionalists view statutory interpretation as an exercise in finding out what the legislatures intended. When a statute is applied to a particular set of facts, the judge should ask – "How would the Legislature have wanted this case decided?" Statutory text seems to make a good starting point but it need not be

the end point: legislative history (which includes committee reports, speeches and the like) may also be taken into consideration. Otherwise, the Judge may interpret the statute in such manner so as to achieve the general intend it embodies, which is called "perposivism".

11. In taxation statutes, it is an admitted position that the authorities created under the statutes are functioning as a *quasi-judicial* authorities and must be fair in their duties. Therefore, it is necessary that they should be allowed their independence to function as such. However, sadly, the superior authorities do interfere in their working. Recently, two instances of this kind have come to our notice: (1) The Chief Secretary of Maharashtra Government *vide* his urgent DO letter dated 8-3-2010 directed to the various revenue earning Heads of the Dept. to ensure that in their Departments, the Appellate Authorities should insists for a deposit of 50% of the demand raised by the Assessing Authorities. This DO letter was written and circulated to the concerned Heads of the Departments for implementation, though it had no approval from the Law & Judiciary Department and (2) In income tax matters, the Chairman of the CBDT, directed to all the Commissioners of Income Tax that tax collected in their respective jurisdictions will have bearing on transfers and promotions of Chief Commissioners. This directive from CBDT was a clear violation and interference in the *quasi-judicial* duties performed by the Assessing/ Appellate Authorities in the Income Tax Dept. Of course, this matter was taken up before the Bombay High Court in appeal filed by Nishidh Madanlal Desai, in whose appeal before the CIT, he refused to stay the demand of more than ₹ 45 Lakh. The High Court therefore directed the Commissioner to decide the appeal within 3 months ignoring the instructions of the CBDT (Source: ET dt. 23-3-2012). The same view has been taken by the Gujarat High Court and has issued notices to the Chairman of CBDT and Chief Commissioner of Income Tax Dept. in the State on a petition challenging CBDT's 'Tax Mop-up' decision to link promotions and postings of Officers with tax collection made by them (Source: ET 26-3-2012).

12. To conclude my comments, there is a thinking going around in legal circles, do we need to update the General Clauses Act, 1897?

13. A statute speaks through words. Words are medium and no medium ever carry the message perfectly. Hence, the need for interpretation. A Central Act i.e. the General Clauses Act, 1897 lays down rules for the interpretation of all Central Acts. The object of the General Clauses Act is as follows: –

(i) to shorten the language of the Central Acts;

(ii) to provide for as far as possible the uniformity of expression in Central Acts by giving definitions of a series of terms in common use;

(iii) to state explicitly certain convenient rules for the construction and interpretation of Central Acts;

(iv) to guard against slips and oversights by importing into every Central Act certain common forms of clauses, which otherwise ought to be inserted expressly in every Central Act. Thus, the General Clauses Act, 1897 makes provisions as to the construction of general acts and other laws of all India application.

14. The need to amend, revise or codify the above Act was highlighted in the 60th Report and 183rd Report of the Law Commission of India. The analysis of the subject is exhaustive and the text of the two reports of the Law Commission are available on the website of the Law Commission of India. (http://lawcommissionofindia.nic.in)

15. In other International Jurisdiction, the interpretation acts have been updated. The U.K. Interpretation Act, 1978 (http://www.legislation.gov.uk); the Australian Interpretation Act, 1901 as amended in 1984 (http://www.austlii.edu.au); the New Zealand Interpretation Act, 1999 (http://www.legislation.govt.nz) and the Irish Interpretation Act, 2005 (http://www.irishstatutebook.ie).


Rule of consistency in Transfer Pricing ["TP"] assessments

CA P. B. Chappgar and CA Ketan K. Ved

1. Introduction

One of the most common arguments taken in income-tax litigation at various stages by the taxpayer is that the view adopted/sought to be adopted by the tax department for a particular year is inconsistent with the stand/decision taken while deciding matter(s) in the earlier and/or subsequent year(s) in the case of the same assessee and that this is not permissible. This is referred to as the principle of *res judicata*, which in simple language means that a decision taken on a particular set of facts and law for an earlier year cannot be disturbed unless the facts change or the law prevailing on the subject undergoes a change. The tax authorities, however, do not agree with this proposition by holding that the rule of *res judicata* does not apply to tax assessments and that each assessment year is separate and proceed to re-examine the issue for each year independently irrespective of merits of the claim(s) for each of the year involved.

Taxpayers have, at various occasions, put to use the following two landmark decisions of the Apex Court to drive home the point that even though the principles of *res judicata* do not apply to tax proceedings nonetheless if the facts and law are the same a contrary view cannot be taken in the subsequent years: refer *Radhasoami Satsang v. CIT (1992) 193 ITR 321(SC) and CIT v. Shivsagar Estate (2002) 257 ITR 59 (SC)*

2. Common arguments

In TP assessments too, the taxpayers have sought to bring into play the argument of the rule of consistency by arguing that the following determinative factors are constant and hence the decision taken in an earlier year cannot or should not be disturbed in a subsequent year:

- Nature of the international transaction;
- Terms of the contract;
- Functions performed and risks assumed by the parties;
- Methodology of computing the arm's length price.

Reference is also made to the proviso to Rule 10D (4) of the Income-tax Rules, 1962 which *inter-alia* provides that where a transaction (international or specified domestic transaction) continues for a period of more than a year, fresh documentation need not be maintained separately in respect of each year, unless there is any significant change in the:

- Nature or terms of the transaction;
- In the assumptions made, or
- In any other factor which could influence the transfer price.

The tax authorities, however, have taken an adverse view for a subsequent year by trying

to demonstrate that the position taken in an earlier year was incorrect on account of the fact that the issue was not examined correctly and completely and hence a different view is possible and can and should be taken. The short proposition being "that to perpetuate an error is no heroism, to rectify it is the compulsion of the judicial conscience" by placing reliance on the decision of the Apex Court in the case of *Distributors (Baroda) (P.) Ltd. v. UOI (1985) 155 ITR 120 (SC).*

3. Recent rulings on the subject

The following recent TP cases wherein the aforesaid "Rule of Consistency" has been tested are worthwhile noting – *there are decisions both for and against the taxpayer and hence it is very important that the facts of the case are properly mastered before the argument is taken and the appellate authorities are called upon to adjudicate on a particular TP adjustment following the principle of consistency:*

Decisions against the tax payers

1. The Hon'ble Delhi High Court in the case of *'Li and Fung India Pvt. Ltd. v. CIT' (in ITA No. 306/2012)* refused to follow the rule of consistency when the manner of examination of facts in the year under consideration was not considered/discussed at all in the earlier years.

2. The Delhi Bench of the Income-tax Appellate Tribunal ("ITAT") in the case of *'Sumitomo Corporation India (P.) Ltd. v. DCIT' (2013) 32 taxmann.com 85* has addressed the argument of the taxpayer on the Rule of Consistency as under:

> *29. Now we come to argument of the assessee that there is no change in the operating model or the business activity of the assessee company, hence, rule of consistency should be followed and hence no adjustment is warranted. In this regard we are of the opinion the* res judicata *is not applicable to taxation cases. Moreover, as held by Apex Court in Distributors (Baroda) (P.) Ltd. (supra) that to perpetuate an error is no heroism. To rectify it is the compulsion of the judicial conscience.*

It is important, however, to note that there does not appear to be any discussion on why the decision taken in the earlier years was incorrect prompting the tax department to take a different view.

3. The Delhi Bench of the ITAT in the case of *DCIT v. Sumi Motherson Innovative Engineering Ltd. (2014) 42 taxmann.com 242 (Delhi - Trib.)*. In this case, the assessee argued that the Profit Level Indicator ("PLI") of 'cash profit to total sales' adopted in the current year should not be disturbed as the department had accepted the same for the subsequent years. Reliance was placed on the decision of the Mumbai Bench of the ITAT in the case of *DCIT v. Reuters India (P.) Ltd. [2013] 33 taxmann.com 481.*

In response, the department argued that it has rejected the Profit Level Indicator ["PLI"] of 'cash profit to sales' not only for the year under consideration (i.e. A.Y. 2003-04) but also for the A.Y.s 2004-05 and 2005-06 which too were being heard by the ITAT. Reliance was also placed by the department on the contrary view taken by the Delhi Bench of the Tribunal in the case of *ACIT v. Mosaic India (P.) Ltd. [ITA No. 4831/D/2010 dated 18-12-2013*].

Before the ITAT, the Departmental Representative also contended and proved with relevant documentary evidence that the acceptance of 'cash profit to sales' for the A.Y. 2007-08 was tax neutral and it was shown that the TPO, in fact, worked out the OP/TC margin of the assessee for that year and since, the OP/TC margin of the assessee was higher than the comparable companies, the TPO did not think it appropriate to categorically discuss the correctness of the PLI of 'Cash profit of sales' in so many words as it did not call for any TP adjustment. It was also argued that similar position prevailed for the A.Y. 2008-09 and it was stated to be the reason for the TPO

not specifically rejecting 'cash profit to sales' as the result under both the situations would have been similar. The correctness of these working(s) filed by the department was not doubted by the assessee.

Deciding on the aforesaid, the ITAT observed that the application of the PLI was rejected by the TPO for all the 3 A.Ys. where the TPO was consistent with his stand that the PLI of 'cash profit to sales' is not correct as it does not properly indicate the ALP of the international transactions and the same should be substituted with the correct PLI of 'OP to Sales'. The ITAT also observed that the Department had placed sufficient material on record which indicates that the TPO did compute OP/TC for the A.Y.s 2007-2008 and 2008-2009 since the same was more than that of the comparables and that in such a situation the fact that no specific mention was made in the Order(s) about the incorrectness of the PLI of 'Cash profit to sales' in the TPOs Order was addition neutral.

Referring to the reliance of the assessee to the case of Reuters India (P.). Ltd. (supra) the ITAT found that the reliance was misplaced since the assessee in that case was engaged in I.T. Enabled Services and in such an industry, the major ingredient of the operating cost is remuneration to employees and the assets play minimal role in the process of rendering of such services and hence the depreciation component in such cases becomes quite insignificant. Further, it also observed that the application of such PLI was accepted because in that case there was an isolated year in which such change in the numerator was objected to and for the subsequent years, the same was accepted, whereas in the instant case before it, the TPO has rejected such PLI consistently for 3 years in a row.

4. Decision of the Delhi Bench of the ITAT in the case of *Techbooks International Pvt. Ltd. v. ACIT (ITA No. 722/Del/2014)* wherein the ITAT observed that if a particular issue has been decided in a particular manner in a preceding year, similar view should be taken on such issue in the subsequent year and that the rule of consistency is not without exception, it comes with a rider that there should be no change in the factual or legal position governing that issue in the preceding year *vis-à-vis* the succeeding year. If the facts and circumstances and the legal position obtaining in the preceding year is similar to that in the later year, then the view taken in the preceding year should ordinarily be followed.

The ITAT has also in the following paragraph of its Order provided guidance on how this principle of consistency has to be applied in TP regulations and what factors should be considered:

> *"We are dealing with the applicability of Chapter-X, being special provision relating to avoidance of tax. The core of this Chapter is that any income arising from an international transaction should be computed having regard to the Arm's Length Price. Certain methods have been prescribed for the determination of ALP. Under the Transactional Net Margin Method (TNMM), which has been applied in the present case, the ratio of net operating profit margin to one of the bases adopted by the assessee is compared with similar base of the comparables for ascertaining whether the assessee's international transactions are at ALP. Certain filters are applied for choosing comparables, which form the bedrock for the setting of the benchmark. The profit margin or even the comparables sometimes undergo change from one year to another. Simply because the Arm's Length Price declared by the assessee was accepted in a preceding year does not put an embargo on the powers of the authority to determine the ALP of the international transactions for the subsequent year. There are several factors which are taken into consideration for determining the ALP of an international transaction. It is also quite possible that a particular case incomparable in one year may*

become comparable in the subsequent year and vice versa. ..... Further a case though functionally comparable may find exclusion from the list of comparables for a year because of certain specific filter in one year, such as the `Related Party Transactions' breaching the reasonable percentage, but it may again find its place in the list of comparables for the subsequent year. The mere fact that no Transfer Pricing Adjustment was made in the preceding year would simply mean that the profit shown by the assessee from its international transactions is equal to or more than the benchmarked profit. If the assessee has shown profit at Arm's Length Price in one year, which has been accepted as such, it does not necessarily mean that the assessee's profit from international transaction in the succeeding year is also better than that of the comparables. It is axiomatic that if profit from the assessee's international transactions in succeeding year is equal to or better than that of comparables after considering the cushion available, then there can be no question of making any transfer pricing adjustment notwithstanding the fact that the international transactions were scrutinised in terms of section 92. The crux of the matter is that there are several factors which affect the determination of the ALP, which may be present in one year but absent in the other year. It is too far to claim that the acceptance of international transaction at ALP in one year should preclude the authorities from the determination of ALP in a subsequent year.

Applying the aforesaid propositions to the facts of the case before it, the ITAT observed that some of the assessee's own chosen comparables for the preceding year are not there in the list of comparables for the instant year and hence it refused to follow the rule of consistency.

Decisions in favour of the tax payers

5. Decision of the Chennai Bench of the ITAT in the case of *VIHI LLC v. ADIT (in ITA No. 17/Mds/2012)* wherein the ITAT has observed that it is very important to keep the principle of consistency alive and active on factual matters. If the consistency rule is not applied in such circumstances, the logic of arguments may lead to opposite findings for different assessment years on the same set of facts and that such a situation may also lead us to unending academic discussion.

Applying the aforesaid principle of consistency the ITAT held as under:

Therefore, when the DCF method has been adopted to work out the ALP of share transfer in assessee's own case for assessment year 2008-09, the same method should be adopted for the impugned assessment year 2007-08 as well. This method is not imposed at the cost of anybody's prejudice. It is to be seen that the Revenue as well as the assessee have ultimately agreed to compute the ALP under DCF method. When that method is mutually agreed and applied for the succeeding assessment year 2008-09, taking a deviant approach and looking out for another method is nothing but pedantic.

6. Decision of the Visakhapatnam Bench of the ITAT in the case of *KTC Ferro Alloys (P.) Ltd. v. ACIT (2014) 43 taxmann.com 152* wherein following the decisions of the Delhi Bench of the ITAT in the case of *Hosley India (P.) Ltd. v. DCIT (ITA. No. 5904/Del/2010 dated 25-10-2012)* and the Pune Bench of the ITAT in the case of *Brintons Carpets Asia P. Ltd. v. DCIT (2011) 46 SOT 289 (Pune)* held as under:

"As seen from the Orders of the TPO in later two years, we are of the opinion that CUP is the most appropriate method and accordingly, we are of the opinion that TPO should have based his analysis on the basis of the CUP method alone, as in later years. Rule of consistency also applies to the facts of this case."

7. Decision of the Mumbai Bench of the ITAT in the case of *Clariant Chemicals (I) Ltd.*

v. JCIT (ITA No. 2393/Mum/2011) wherein after finding that there was a similarity in facts of the case in 2 different years, the ITAT held that:

> When the facts are same the question will be that whether on the same facts Department can take a different stand for the year under consideration which is against the rule of consistency. When there is no difference in the facts of preceding year where the case of assessee has been accepted by the TPO expressly, then in our considered view TPO cannot take a different stand during the year under consideration as the assessee will be entitled to get benefit of the stand taken by the revenue in immediate preceding year. There is insignificant difference in the rates of the commodity and the volume of transactions.

In the said decision the ITAT has also provided guidance as to under what circumstances can a view taken in the earlier/subsequent years not be disturbed and hence the said findings of the ITAT also need to be studied:

> *The rule of consistency will not be applicable in a case where it is found that in preceding year the action of the Revenue Authority is contrary to the statutory provisions having no approval from any judicial forum. In such case where a wrong method has been inadvertently accepted by the TPO in an earlier year then only licence cannot be granted to the assessee to calculate the ALP in a grossly erroneous manner in perpetuity.*

Applying the aforesaid principle to the facts of the case before it, the ITAT observed that:

> *"in the present case no such circumstances have been brought to the notice of the Tribunal by the department. Rather it has been observed that the facts of the preceding assessment year are in* pari materia *of the present year."*

Accordingly, it decided the issue in favour of the assessee following the earlier years.

4. Way forward and approach

Based on the guidance provided by the aforesaid case laws as also the earlier cases, the taxpayer before taking the argument for applying the Rule of Consistency should ensure that:

- the transaction in question remains the same;
- the comparables selected by it remains the same;
- the method of benchmarking is the same;
- the filters applied are same;
- the facts of comparables selected remain the same.

Given the volatility and fast changing environment it is very difficult to prove that the facts of the case for a particular year are consistent with that prevailing in the earlier years and that too after a period of approximately 3 years when the case is selected for an assessment or the appellate proceedings are in progress and much of analysis on the basic data is available in the matter.

5. Conclusion

Thus it can be concluded that though the principle of *res judicata* is inapplicable to income tax (including TP) matters, if the taxpayer is able to demonstrate that the facts are same for various years, then the 'Rule of Consistency' can be applied. However, if a different method or pricing methodology is used in the other years under the same set of facts, then the tax department will be entitled to reject the argument of consistency. The road ahead with this particular line of argument is very challenging and hence it is advisable that the path is adopted very carefully.

Circumstances of earthquake, cyclone, riots, fire, accident, etc., 'Act of God' & Input Tax Credit in VAT Act

J. S. Uppal,
Advocate

As required by the Guidelines issued by the ICAI, VAT paid is not an expense but is a claim of the dealer. Therefore, it has to be segregated from to all amounts paid for purchases and shown as claim receivable under the Group "Current Assets, Loans and Advances." Amount appearing under the said head indicates the extent to which the dealer can reduce his future tax liability or claim refund. Since the dealer is permitted to collect VAT from his buyers, any reduction in liability is a direct benefit.

VAT being indirect tax, its impact on profitability of an undertaking has not been appreciated fully. This may be due to the indirect tax not hitting the taxpayer directly. However, it should be appreciated that any saving in the form of lower tax component will make impact on the bottom-line in the proportion of sales/purchases and net profit. Therefore even a small reduction in tax liability on purchases/sales can help in making the product more competitive. What is true in respect of reduction in tax liability is equally true in respect of disallowance of INPUT TAX CREDIT as well. Considering the fact that indirect taxes forming part of sales consideration/purchases, it relatively carries more value as compared to direct taxes, as any reduction/saving in it can add substantial value as the value addition is multiplier of purchases/sales made.

INPUT means any goods including capital goods purchased by a dealer in the course of his business. INPUT TAX means the tax paid or payable under this Act by a registered dealer to another registered dealer on the purchase of goods including capital goods in the course of his business. OUTPUT TAX is tax collected on sale of goods from the buyer. This tax is calculated by applying the rate of tax on taxable turnover of these goods.

The Input Tax Credit is not allowed in the following transactions. When goods are dispatched outside the State otherwise than by way of sale. When the manufactured goods are exempt from tax or when the goods became exempt from tax and accounted in the business but utilised for providing facility to the proprietor or partner or director or employees and in any residential accommodation Automobiles including commercial vehicles, two wheelers and three wheelers and spare parts for repair and maintenance purchased unless the registered dealer is carrying on business of dealing in such automobiles or spare parts. In respect of goods that are given away by way of free sample or gift or consumed for personal use. If goods are not sold because of theft, loss or destruction including natural calamity. If inputs are destroyed in the fire accident or lost even before use in the manufacture of final products. If inputs are damaged in transit or destroyed at some stage of manufacture. In case goods are purchased from dealers who pay tax at compounded rate. To dealers who are paying tax at compounded rate. To dealers who have opted for payment of tax at compounded rates on works contracts.

In day-to-day business, there are various circumstances under which it may not be possible for the dealer to sell or consume the entire quantity of goods purchased. For example, chemicals might have been evaporated. Certain quantity is lost in transit or in the process of transfer within the factory premises itself. Can it be said that the

dealer has changed his intention in respect of such goods and not being entitled for claiming ITC?

There will be cases wherein there is a loss of a very small quantity of goods in the course of these goods being resold or manufactured or being exported. In other words, ***the loss has occurred while the dealer was carrying out his intention i.e. the condition laid down u/s UPVAT act.*** The loss in these cases is such that it was an inevitable loss arising while dealing with the goods in the normal manner in the course of export or resale, etc. The goods so lost may form less than, say, 1.00% of the goods, which were purchased. If, while carrying out the intention of purchases made i.e. by reselling or exporting the goods, there is some such inevitable loss arising due to leakage or spillage etc. it cannot be said that the assessee has failed to carry out the intention. Looking to the nature of the commodity, and the manner in which it is required to be transported for the purpose of resale or export, such a loss can be inevitable. In such cases, the dealer has in fact carried out the intention of purchases made in a substantial manner and he cannot be held accountable for every single drop/ loss of the commodity which he had purchased.

For example in a factory, there is a fire incident in the factory, what would the factory owners do? Obviously, apart from seeking ways to extinguish the fire/calling the fire brigade, police personnel and ensuring that there is no loss of human life, then start figuring the losses. After the fire is extinguished and became normal, get hold of the police/fire brigade panchanama mentioning the list of the valuable items and property destroyed in fire with an approximate value of the loss and also simultaneously inform the insurance company, obviously if he had insured the factory, machinery & the stocks. Ensure that everything is clearly brought on record so that claim is honoured to its satisfaction. At the same time, never forget the commercial tax authorities for this is the department has to tackle with an ubercool attitude! "Intimate" them.

With regard to Act, 2008 for destroy of goods two views are found. One school of thought has expressed views that ITC is eligible, in other words do not require reversal, while as second school of thought has expressed negative views, in other words ITC claimed requires to be reversed. The former is the views expressed by legal experts and latter is the views expressed by learned revenue authorities. However to confirm the net amount of Value Added Tax for tax period is to be determined by considering the provisions of the UPVAT Act, 2008. Refer to the scheme of the Act it provides two methods for discharging the onus to make the payment of VAT. First is composition scheme, it is optional, which is in lieu of VAT. Under the said scheme dealer is neither permissible to collect composition amount or VAT nor entitled to avail credit of tax amount paid to vendor. Second is general scheme, in which dealer can collect VAT amount or can keep the VAT amount inclusive and is entitled to avail credit of tax which they have paid to vendor and discharge the onus by net off. For ITC the accounting standard guideline states those dealers who desire to avail it are obliged to open separate ledger account. Hence for cases pertaining to second category needs specific answer.

In pursuance of above facts and circumstances, the affected registered dealers did not find above approach satisfactorily, feeling aggrieved, for just and fair decision they approached the commercial tax authority concerned and also made representation to the State Government that the principles on which Act is formulated is beneficial legislation of the State that needs to be interpreted precisely in liberal manner and with an intention to see that purpose for Act is fulfilled and the beneficiary is helped. The prayer has also been made that the interpretation should not lead to see that it would frustrate the object of Law and welfare State should not become harsh and deny the benefits available to them when they have acted in good faith. It has been specifically urged that any contrary decision would lead them into unfair act, and that would not befit a welfare State, which is expected to act in fair and equitable manner. Despite the fact, after considerably long period it appears that the representation made to State Government on the aforesaid subject matter and decision in that behalf is still pending on even date. Empathetically the enactment states that registered dealers are statutorily required to file annual return, which is self assessment, has also to

get books of account audited and that has created doubt that:

Whether dealer can legitimately claim the full amount of ITC when such goods have been destroyed on account of riots, fire, accident, etc., 'Act of God'?

When dealer has acted in good faith and situation becomes beyond the control, for the destroyed goods amount of ITC be reversed?

What is the legal position of law, remedy and defence? Is there any case law which supports the claim of ITC?

Circumstances of earthquake, cyclone, riots, fire, accident, etc. are similar or they are different?

Whether the denial of ITC by Commercial Tax authority would be legitimate within four corners of Act, 2008?

Section 2 (p) of UPVAT act 2008 Definitions **"input tax"**, in relation to a registered dealer who has purchased any goods from within the State, means the aggregate of the amounts of tax,–

(i) paid or payable by such registered dealer to the registered selling dealer of such goods in respect of purchase of such goods; and

(ii) paid directly to the State Government by the purchasing dealer himself in respect of purchase of such goods where such purchasing dealer is liable to pay tax under this Act on the turnover of purchase of such goods;

The tax credit to be so claimed under this sub-section shall be subject to the provisions of sub-sections (1) to (13); and the tax credit shall be calculated in such manner as may be prescribed

Sub- section (11) of section 21. A dealer who claims input tax credit under section 13 shall maintain a register in respect of tax period wise computations of amount of input tax credit.

This view is fortified by the apex court decision in *Controller of Estate Duty v. Kantilal Trikamlal (1974) 4 SCC 643 at 649-650*. It is further well settled that in order to ascertain the true meaning of the terms and phrases employed, it will be legitimate to call in aid other well-recognised rules of construction. Such as legislative history, the basic scheme and framework of the statute as a whole, each portion throwing light on the rest, the purpose of the legislation, the object sought to be achieved, and the consequences that may flow from the adoption of one in preference to the other possible interpretation.. It is settled principle of law that wherever the inference arises for the purpose of interpretation of a statute the entire statute is to be read in its entirety. The purport and object of the Act must be given its full effect and in case of this nature, principles of purposive construction must come into play. The fundamental principle in the construction of statutes is that the whole and every part of the statute must be considered in the determination of the meaning of any of its parts. In construing a statute as a whole two principle results to clear up obscurities and ambiguities in the law and to make the whole of the law and every part of it harmonious and effective. It is presumed that the Legislature intended that the whole of the statute should be significant and effective. Different sections, amendments and provisions relating to the same subject must be construed together and read in the light of each other. Every statute must be construed ex *vigoenibus actus*, that is, within the four corners of the Act. When the taxing authority is called upon to construe the term of any provision found as a statute, they should not confine its attention only to the particular provision, which falls for consideration. But the authority should also consider other parts of the statute, which throw light on the intention of the Legislature and serve to show that the particular provision ought not to be construed as if it stood alone and apart from the rest of the statute. Every clause of a statute should be construed with reference to the context and other clauses of the statute so as, as far as possible, to make a consistent enactment of the whole statute. This is the settled position of law in *CIT v. Amin (1972) ITJ 300, 307 SC (Bhagwati, C.J.); also in Vaddeboyina Tulasamma v. Vaddeboyina Sesha Reddi, AIR 1977 SC 1977 at p. 1948: (1977) 3 SCC 99. Warren, C.J. observed in Richards v United States, 7L Ed 2d 492, 499: 359 US 1.*

The reason being, his finished goods that were destroyed in fire need to be remitted of its ITC. Simply because, Excise duty is on manufacture and payment of duty, as a facilitation measure, is allowed to be paid on removal from the goods from the premises. Make an application to the assessing officer & if he is satisfied that the goods have been destroyed or lost by natural cause or due to an unavoidable accident, he will grant remission of duty due on the said finished goods destroyed in fire. Obviously, this exercise may take some days or months or some years for that matter! It depends.

And, if dealer have availed credit on inputs which went into the manufacture of those "unfortunate finished goods which were reduced to ashes", just forget it (remission) because apart from the Damocles sword of being held liable to pay Excise duty on the destroyed goods, you may also be served with another notice demanding the MODVAT/CENVAT credit contained in the said finished goods.

In the case of *Mafatlal Industries v. CCE, Ahmedabad, (2003-TIOL-290-CESTAT-MUM)*, the West Zonal Bench agreed with the Inalsa decision that remission of duty on the finished goods cannot be equated with exemption to goods and that the inputs can be considered to have been put to the intended use of manufacturing of final products, but held as under - "The intention of the MODVAT scheme is that the duty paid on inputs can be taken credit for paying duty on the finished goods to give relief against the cascading effect of excise duty. When the duty on the finished goods is being remitted, allowing credit of duty paid on inputs would confer a totally unintended benefit on the appellants. Allowing such credit when the finished goods suffer no duty would amount to allowing a cash refund as it can be utilised for paying duty on other goods. There is no provision in the Central Excise Rules to either allow refund of duty paid on inputs or to grant remission of such input duty when the finished goods made from such inputs get burnt/destroyed in fire. The MODVAT scheme cannot be interpreted in a way to allow such a refund/remission of duty on the inputs which is not provided for in the Rules.

Conclusion: The riots, fire, accident etc, affected dealers had every *bona fide* intention to sell the goods but situation beyond the control had put them behind hence such dealers are not required to reverse the ITC. The language used in the UPVAT Act, 2003 cannot be interpreted to read that even if due to factors beyond control of the trade and industry, if the purchased goods could not be sold, resold, manufactured, there would be breach of the said condition. The condition incorporated in the said clause deals with a voluntary action on the part of the trade and industry. Dealers engaged in trade and industry cannot be constrained to do something which is impossible. By following the well known legal maxim *"Lex non cogit ad impossibilia"*, means that law cannot compel them to do what they cannot possibly do. There was absolutely impossibility on the part of them to perform an obligation during Circumstances of earthquake, cyclone, riots, fire, accident, etc., which affected large number of common men, such law cannot expect from them to do that impossible thing. The dealers became disabled to perform their faithful duty which the law has cast upon them. Under the circumstances of natural calamity, compliance with one of the provisions of statutes which prescribe how something is to be done should be governed as good excused. For the default, the law should treat them in general good excuse, the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which though they were interested but had no control, like the act of God, the said circumstances is valid excuse.

All incidents like cyclone, earthquake, riots and fire are akin. Hence they would fall into the same path. Any contrary decision would not be proper for a welfare State to become further harsh and withdraw the benefits available to them to the dealers who had acted in good faith for availing benefits under a particular Law of the State.

From the detailed discussions herein above the readers will certainly agree with the views expressed by me, that in the situation of flood no ITC is to be revered. However, finding it contrary, the subject is open for comments and/or debate. It will be welcomed.

"Consumption, Use or Sale therein" for levy of Local Body Tax

Kishor T. Lulla,
Advocate

(I) Every Local Body Tax (LBT) Practitioner is facing daily disputes with Corporation Authorities for levy of LBT *qua* goods or *qua* dealer due to misunderstanding of relevant sections under, "The Maharashtra Municipal Corporation Act". The relevant sections for dispute in relation to 'goods' are section 127(2), 152B and 152P of the Act. The concerned sections for disputes *qua* dealer/ individual, are S. 2(5A) and S. 2(16A) of the said Act. In this article I will brief the dispute relating to first part.

Sec. 127(2) – Taxes to be imposed under this Act

In addition to the taxes specified in sub-section (1) the Corporation may for the purposes of this Act and subject to the provisions thereof impose any of the following taxes, namely :–

(a) Octroi;

[(aa) a cess on entry of goods into the limits of the City for consumption, use or sale therein to be levied in lieu of Octroi with the previous sanction of the State Government] w.e.f. 31-8-1995.

[**Provided that**, the State Government may, by notification in the *Official Gazette*, direct the Corporation to levy the cess on the entry of the goods into the City for consumption, use or sale therein, in lieu of octroi] w.e.f. 3-10-2008.

[(aaa) Local Body Tax on the entry of the goods into the limits of the City for consumption, use or sale therein, in lieu of octroi or cess, if so directed by the State Government by Notification in the *Official Gazette;*] w.e.f. 31-8-2009.

(II) Section 152B – Incidence of Cess (now L.B.T.)

1. Every dealer whose turnover either of all sales or of all purchases or of all imports made :

   a. During the year immediately preceding to year; or

   b. During the year

   in which the Corporation has decided to levy the cess specified in sub-section (2) of section 127, has exceeded or exceeds the relevant limit prescribed in this behalf, shall be liable to pay the cess under this Act.

   Provided that, a dealer to whom sub-clause (a) does not apply but sub-clause (b) applies and whose turnover either of all sales or of all purchases or of all imports first exceeds the relevant limit prescribed in this behalf after the first day of April if the year in which the Corporation has decided to levy the cess, shall not be liable to pay the cess in respect of the goods imported by him into the limits of the city for **consumption, use or sale therein** up to the time when his turnover of sales or of purchases or of

imports as computed from the first day of April of the said year, does not exceed the relevant limit prescribed in this behalf.

2. Every dealer whose turnover, either of all sales or of all purchases or of all imports made during any year commencing on the first day of April, being a year subsequent to the years mentioned in sub-section (1) first exceeds the relevant limit prescribed in this behalf, shall be liable to pay cess under this Act;

Provided that, a dealer shall not be liable to pay the cess in respect of the goods imported by him into the limits of the City for **consumption, use or sale therein** during the period commencing on the first day of April of the said year, up to the time when his turnover of sales or of purchases or of imports, as computed from the first day of April of the said years does not exceed the relevant limit prescribed in this behalf.

(III) Section 152P – Levy of Local Body Tax

Subject to the provisions of this Chapter and the rules, the Corporation, to which the provisions of clause (aaa) of sub-section (2) of section 127 apply, may, for the purposes of this Act, levy and collect Local Body Tax on the entry of goods specified by the State Government by notification in the *Official Gazette*, into the limits of the City, for **Consumption, use or sale therein**, at the rates specified in such notification.

(IV) In all the above-mentioned sections, you will find the words " Consumption, Use or Sale therein" which are of prime importance while deciding the liability as well as taxability of L.B.T. The decisions delivered for octroi or cess can be equally applicable for Local Body Tax.

(V) It is held in several cases before High Courts and Apex Court that "where a dealer imports goods within the octroi limits, not for ultimate consumption or sale for consumption within the limits but for the purpose of export, he is not liable to pay octroi on such goods notwithstanding that in the larger sense for purposes of export, he sells the goods within the octroi limits, that is to say, even where the situs of the sale could be fixed within the octroi limit.

In other words "A company was liable to pay octroi on goods brought into local area (a) to be consumed by itself or sold by it to consumers directly and (b) for sale to dealers who resold the goods to consumers within the municipal area, irrespective of whether such consumers brought them for use in the area or outside it. The company was, however, not liable to octroi in respect of goods which it brought into the local area and which was re-exported".

It is also held that "It is not the immediate person who brings into a local area must consume them himself. The act of consumption may be postponed or may be performed by someone else. But so long as the goods have been brought into the local area for consumption, in that sense, no matter by whom they satisfy the requirements of the Act."

In short, tax is on the goods bought into the city for the purpose of consumption, use or sale in the city. If the consumption or use is not in the city, then even if the sale is in the city, the goods brought in, cannot be taxed in the city as constitutionally not valid. There may be a situation where the large size packing is brought into the city and then is converted to smaller packings and sent out of the city; the goods do not get consumed, used or sold in the city. Further in case of goods brought into the city for storage and exported out of the city either immediately or after some time, cannot be taxed for the same constitutional reasons.

To sum up: Having regard to the nature and incidence of octroi, unless the octroiable goods are consumed or used or are meant to reach an ultimate user or consumer in the octroi area, no octroi is leviable. The words 'sale therein' in the words "consumption, use or sale therein" in the definition octroi, means sale of octroiable goods

to a person for the purpose of consumption or use by such person in the octroi area. If sale was intended for consumption or use in the octroi area whether the purchaser actually consumed inside or outside octroi area is irrelevant.

(VI) Recently Hon'ble Apex Court, in the case of Jet Airways (India) Ltd, in W.P. No. 208 of 2001 on 29th March, 2012 held that, "the aircrafts have not entered the municipal limits of Brihan Mumbai for the purpose of use therein i.e. for the purpose of flying within the municipal limits. Assuming that there is some kind of use involved in disembarkation, embarkation of passengers, luggages and fuelling, such use is not within the meaning of that term in section 192 in relation to an aircraft. In any case, even if the word "use" as employed colloquially is applied for such incidental activities referred to above, it cannot be said that the entry is for the purpose of use within the municipal limits since the import into the municipal limits is with the intention of exporting and it is settled law that the use contemplated must be for an indefinite period, in such a way that comes to rest finally and permanently within the municipal limits".

Questions & Answers

CA. H.N. Motiwalla

Query No. 1

Mr. X moved to UK in 2001 to work as a doctor in a reputed hospital over there. However, he again moved back to India in 2010. He bought a property in the UK which he had purchased from own funds which he saved while being in India and now he wants to sell it off. The money will be transferred to his Indian bank account. What taxes do Mr. X need to pay?

Answer

Mr. X was in UK from 2001 to 2010. Thereafter he moved to India. So far the financial year 2013/14 he was in India for more than 182 days. So as per S. 6 of the Income-tax Act, 1961 he is resident in India. Even u/s. 2(1)(v) of the Foreign Exchange Management Act (FEMA), he is a "Person residence in India".

As per Regulation 3 of the Foreign Exchange Management (Acquisition And Transfer of Immovable Property Outside India) Regulations, 2000, no person resident in India shall acquire or transfer any immovable property situated outside India without general or special permission of the Reserve Bank of India (RBI)

Now, X being a resident in India is liable to tax on his world income. So, capital gains arising in UK on transfer of immovable property will be chargeable in India, despite capital gains taxable in UK. Article 14 of India-U.K. Treaty provides that "Except as provided in Article 8 (Air Transport) and a (shipping) of this convention, each contracting state may tax capital gain in accordance with the provisions of its domestic law".

However, Mr. X is entitled for credit in respect of tax paid in UK from Indian tax payable as per Article 24(2) of Indian-UK Treaty, which reads as under:

"Subject to the provisions of the law of India regarding the allowance as a credit against Indian tax of tax paid in a territory outside India (which shall not affect the general principle hereof), the amount of the United Kingdom tax paid, under the laws of the United Kingdom and in accordance with the provisions of this Convention, whether directly or by deduction, by a residence of India, in respect of income from sources within the United Kingdom which has been subjected to tax both in India and the United Kingdom shall be allowed as a credit against the Indian tax payable in respect of such income but in an amount not exceeding that proportion of Indian tax which such income bears to the entire income chargeable to Indian tax"

Query No. 2

My two brothers and I have inherited two properties and an agricultural land from our father which was gifted to him in 1930 by a close relative. However, none of us live in the city where these properties are, neither do we plan to shift to that city. We want to sell the properties and acquire new properties outside India as in future we have got plans to settle in US. However, we are not sure about the tax treatment on sale of these land and property? And how the same can be mitigated. Kindly suggest.

Answer

From the facts it is clear that all the three brothers have inherited the properties. Thus, they are co-owners of the properties.

Now, they want to dispose of the said properties and would like to acquire another properties

outside India. From the facts, it is not clear what kind of properties they would like to acquire.

On the sale of inherited properties, they are liable for long term capital gains tax. To mitigate the brunt of capital gains tax, if each brother makes investment into residential house outside India, then, each brother is entitled to get exemption under section 54F of the Income-tax Act, 1961 on the basis of following Tribunal decisions:

i) *Vinay Mishra v. ACIT [141 ITR 301 (Bang)]*

ii) *Mrs. Prema P. Shah v. ITO [100 ITD 60 (Mum)]* and

iii) Dr. Girish M. Shah [ITA No. 3582/M/2009 dated 17-2-2010].

Query No. 3

Ajay was seconded to US for 11 months by his company to work in its parent company while being on Indian company payroll. As per US domestic tax laws, Ajay was advised to offer his US sourced income which is nothing but his 11 months salary received in India while being in US. However since the salary was being paid in India, the TDS u/s. 192 was accordingly deducted while remitting the salary to Ajay in his Indian bank account. Now Ajay (since qualifying as a Non-resident) wants to know instead of claiming the exclusion as per Article 16(1) as prescribed in Indo-US DTAA in his return of income, can the same be claimed in his Form 16 itself?

Answer

As Ajay was seconded to USA for 11 months by his company to work in its parent company, while being on India company's payroll, he does not become a non-resident as per section 6(1)(c) of the Income-tax Act, 1961.

So he remains "resident" in the previous year, and therefore salary earned in USA will be taxable in his hand.

Since he is a resident of India, he can claim benefit of India-USA Treaty and eligible to claim benefit of Article 25 of the said treaty for relief from double taxation.

Query No. 4

I sold my residential house property for ₹ 1.2 crores in December, 2013 which I wanted to re-invest in NHAI bonds. I understand that the investment in NHAI bonds needs to be made within 6 months from the date of sale and the restriction for such investment is ₹ 50/- lakhs per financial year. Accordingly, I made a plan of invest ₹ 50/- lakhs in January, 2014 once and again in May, 2014 ₹ 50 lakhs whether I would get a exemption of ₹ 1/- crore from long term capital gain tax. However, my advisor informed me that there are some litigations involved in this point. Can you please clarify what exactly is the litigation involved and how it can be mitigated? If that is so why is this restriction of ₹ 50/- lakhs per financial year has been prescribed in the Act?

Answer

Yes, In *ITO v. Ms. Rania Faleiro [142 ITD 769]* the Panji Tribunal has held as under:

"The plain reading of section 54EC(1) as well as the proviso thereto clearly suggests that the limit of ₹ 50 lakhs as given under the proviso is as per person per financial year. There is no ambiguity in the interpretation, Had there been an intention of the legislature to restrict the exemption of ₹ 50 lakhs, the legislature would have provided the embargo in this regard. Restriction relates only to the investment made in any financial year by the assessee. Making of the investment is a condition for availing of the exemption condition for availing of the exemption requires that the investment can be made within a period of 6 months. If 6 months fall within two different financial years, as has happened in the instant case, the Tribunal cannot add the embargo that the assessee cannot make the investment to avail of the exemption under section 54EC in the different financial years if he had already made the investment in the financial year in which the capital asset is transferred. The language of section 54EC is clear and unambiguous and it leads to the interpretation that the assessee can make the investment in two

different financial years provided in a financial year the investment made did not exceed ₹ 50 lakhs.

From the Circular No. 3/2008, dated 12-3-2008 issued by the CBDT being an explanatory note on the provisions relating to direct taxes in the Finance Act, 2007, it is apparent that the Government only intended to restrict the investment in a particular financial year and accordingly has fixed the limit of ₹ 50 lakhs as permissible limit in a particular financial year. The Government did not intend to restrict the maximum amount of exemption permissible under section 54EC. Legislature has consciously used the words 'in a financial year' in the proviso to section 54EC. If the legislature wanted to restrict the exemption itself to ₹ 50 lakhs, it could have simply dispensed with using the words 'in the financial year'.

Similar view has also been expressed by the Chennai Tribunal in:

a) *Smt. Sriram Indubal v. ITO [32 Taxmann.com 118]*

b) *Coromandel Industries (P) Ltd. vs. ACIT [145 IDS 171]*

However, the Jaipur Bench of Tribunal in *CIT v. Raj Kumar Jain & Sons (HUF) [50 SOT 213]* has taken a contrary view.

The Supreme Court in *CIT v. Vegetable Products Ltd. [88 ITR 192]* has taken a view that if there are two views possible, the view favourable to the assessee be taken.

Query No. 5

An Indian Company X which is situated in the Special Economic Zone, has entered into transactions during the financial year 2013-14 with a foreign Company Y in relation to the purchase and sale of goods or services. Co. X wishes to set off (or netting off) the export receipts against the amounts payable for imports. Whether the setting off (or netting off) of export receipts against amounts payable for imports by Co. X is permissible as per the Indian Exchange Control Regulations?

Answer

As per section 7 of FEMA 1999, exporters have to receive full value of export of goods or services:

Any arrangement involving adjustment of value of goods imported into India against value of goods exported from India, shall require prior approval of the Reserve Bank of India

Counter-trade is very common business practice in domestic trade. But, in international trade, both payments and receipts are governed by separate regulations. Where the regulations do not give liberty to set off dues between the supplier and the importer, the importer is required to pay for imports separately, just as the exporter is obliged to realise the export proceeds in terms of these regulations.

Note: Please send your queries relating Direct, Indirect and International taxation, Company Law, FEMA etc. to AIFTP, having interest to the Members.

Questions & Answers

C. B. Thakar, *Advocate*

Inter-State Works Contract

Q.1. In case of works contract, the material is taken on site by the contractor and used in the contract. Under such circumstances, whether inter-State works contract is possible and if yes, what should be the supporting factual position?

Reply

The works contract transactions are made taxable as 'deemed' sale transactions by inserting clause (29-A) in Article 366 by 46th Amendment in Constitution.

Hon'ble Supreme Court has analysed the scope of such 'deemed sale' in number of judgments. Reference will be made to landmark judgment of *Builder Association of India (73 STC 370)(SC).* Hon'ble Supreme Court has held as under.

"The tax leviable by virtue of sub-clause (b) of Clause (29-A) of Article 366 of the Constitution thus becomes subject to the same discipline to which any levy under Entry 54 of the State List is made subject to under the Constitution. The position is the same when we look at Article 286 of the Constitution. Clause (1) of Article 286 says that no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place (a) outside the state; or (b) in the course of the import of the goods into, or export of the goods out of the territory of India. Here again we have to read the expression "a tax on the sale or purchase of goods" found in Article 286 as including the transfer of goods referred to in sub-clause (b) of Clause (29-A) of Article 366 which is deemed to be a sale of goods and the tax leviable thereon would be subject to the terms of Clause (1) of Article 286. Similarly, the restrictions mentioned in Clause (2) of Article 286 of the Constitution which says that Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in Clause (1) of Article 286 would also be attracted to a transfer of goods contemplated under Article 366 (29-A)(b). Similarly, clause (3) of Article 286 is also applicable to a tax on a transfer of property referred to in sub-clause (b) of clause (29-A) of Article 366. Clause (3) of Article 286 consists of two parts. Sub-clause (a) of clause (3) of Article 286 deals with a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce, which is generally applicable to all sales including the transfer, supply or delivery of goods which are deemed to be sales under clause (29-A) of Article 366 of the Constitution. If any declared goods which are referred to in section 14 of the Central Sales Tax Act, 1956 are involved in such transfer, supply or delivery, which is referred to in clause (29-A) of Article 366, the sales tax law of a State which provides for levy of sales tax thereon will have to comply with the restrictions mentioned in section 15 of the Central Sales Tax Act, 1956, Clause (b) is an additional provision which empowers Parliament to impose any additional restrictions or conditions in regard to the levy of sales tax on transactions which will be deemed to be sales under sub-clause (b) or sub-clause (c) or sub-clauses (d) of Clause (29-A) of Article 366 of the Constitution.

It may be that by virtue of sub-clause (b) of clause (3) of Article 286 it is open to Parliament to impose some other restrictions or conditions which are not generally applicable to all kinds of sales. That however cannot make the other parts of Article 286 inapplicable to the transactions are deemed to be sales under Article 366(29-A) of the Constitution. All transfers, deliveries and supplies of goods referred to in clauses (a) to (f) of clause (29-A) of Article 366 of the Constitution are subject to the restrictions and conditions mentioned in clause (1), clause (2) and sub-section (a) of clause (3) of Article 286 of the Constitution and the transfers and deliveries that take place under sub-clauses (b), (c) and (d) of clause (29-A) of Article 366 of the Constitution are subject to an additional restriction mentioned in sub-clause (b) of Article 286(3) of the Constitution."

Thus, the criteria applicable to decide inter-state sale in case of normal sale is equally applicable to works contract sale also.

Relying upon above judgment, there are number of judgments where nature of inter-state works contract has been decided by various judicial forums.

Brief reference can be made to following judgments.

State of Karnataka and others v. ECE Industries Limited (144 STC 605)(Kar.), wherein the transaction of installation of lift/elevators is held as inter-state works contract. In that case the materials for lift were sent from U. P. and contract was completed in Karnataka. Karnataka authorities tried to levy local tax. High Court held that it is inter-State works contract transaction and cannot be liable under Local Act.

Projects and Services Centre & Others (82 STC 89)
Assessee entered into contract for erection and commissioning of sub-station in Tripura. Materials brought from Calcutta for said project. Turnover is shown as CST turnover in Calcutta. Authorities in Tripura tried to levy tax considering this as intra-State sale in Tripura. High Court set aside the same holding the transaction as inter-State sale from Calcutta.

Therefore the law is now well settled that in case of works contract also there is inter-State sale and same criteria, as applicable to normal sale is attracted to such transaction.

Nature of Inter-State Sale
When the sale is said to have taken place in course of inter-state sale is also fairly clear by number of judgments. Transfer of property in any State is not material for deciding inter-State nature of transaction. The above cited judgments clarify the said legal position also. Further reference can be made to following judgments.

Nivea Time (108 STC 6)(Bom)
The observations of the Bombay High Court on nature of inter-State sale are as under:

"8. Section 3 of the Central Sales Tax Act, 1956 lays down when a sale or purchase of goods is said to take place in the course of interstate trade or commerce. It says:

'A sale or purchase of goods shall be deemed to take place in the course of interstate trade or commerce if the sale or purchase :

(a) occasions the movement of goods from one State to another; or

(b) is effected by a transfer of documents of title to the goods during their movement from one State to another.'

In this case, we are concerned with sale or purchase falling under clause (a).

9. It is well-settled by now by a catena of decisions of the Supreme Court that a sale can be said to have taken place in the course of inter-State trade under clause (a) of the section 3, if it can be shown that

the sale has occasioned the movement of goods from one State to another. A sale in the course of inter-State trade has three essentials: (i) there must be a sale; (ii) the goods must actually be moved from one State to another; and (iii) the sale and movement of the goods must be part the same transaction. The word 'occasion' is used as a verb and means to cause to be the immediate cause of. There must exist a direct nexus between the sale and the movement of the goods from one State to another. In other words, the movement should be an incident of and necessitated by the contract of sale and be inter-linked with the sale of goods. [*See Kelvinator of India Ltd. v. State of Haryana [1973] 32 STC 629(SC)*]. It is not necessary for a sale to be an interstate sale that the covenant regarding inter-state movement must be specified in the contract itself. It would be enough if the movement was 'in pursuance of' or 'incidental to' the contract of sale. Similarly, if the movement of goods is the result of contract and is an incident to the agreement between the parties, the transaction will remain an inter-state one no matter in which State the delivery of goods is taken by the purchaser. In other words, the question whether it is an inter-state sale or intra state sale, does not depend upon the circumstances as to in which state the property in the goods passes. It may pass in either State and yet the sale can be an inter-state sale. What is decisive is whether the sale is one which occasions the movement of goods from one State to another."

Commissioner of Sales Tax, U.P., Lucknow v. Suresh Chand Jain (70 STC 45)

Hon'ble Supreme Court judgment observed as under:

"The respondent, a dealer carrying on business in tendu leaves in U.P., had claimed from the very beginning that he had effected only local sales of the tendu leaves, that he had not effected any sales of tendu leaves in the course of inter-State trade, that he had never applied to the Forest Department for issue of form T.P. IV and no such forms were issued to him, and that the tendu leaves were never booked by him through railway or trucks for places outside U.P. The Appellate Tribunal found nothing to discredit the version of the dealer. The Tribunal had also taken notice of T.P. form IV which did not relate to sale but was a permit or certificate regarding the validity of *nikasi* of tendu leaves from the forest. The Tribunal accepted the claim of the dealer and held that the sales in question were not inter-State sales. On a revision the High Court found no material to interfere. On a petition for special leave filed by the department:

Held, dismissing the petition, that the Tribunal applied the correct principle of law, viz., that the condition precedent for imposing sales tax under the Central Sales Tax Act, 1956, was that the goods must move out of the State in pursuance of some contract entered into between the seller and the purchaser.

A sale can be said to be in the course of inter-State trade only if two conditions concur, viz., (i) a sale of goods and (ii) a transport of those goods from one State to another. Unless both these conditions were satisfied, there could be no sale in the course of inter-State trade. There must be evidence that the transportation was occasioned by the contract and as a result goods moved, out of the bargain between the parties, from one State to another."

English Electric Company of India Ltd. v. Deputy Commercial Tax Officer [1976] (38 STC 475) (SC)

In this case, it was observed by Supreme Court as under:

'When the movement of goods from one State to another is an incident of the contract it is a sale in the course of inter-state sale. It does not matter in which State the property in the goods passes. What is decisive is whether the

sale is one which occasions the movement of goods from one State to another. The inter-State movement must be the result of a covenant, express or implied, in the contract of sale or an incident of the contract. It is not necessary that the sale must precede the inter-State movement in order that the sale may be deemed to have occasioned such movement. It is also not necessary for a sale to be deemed to have taken place in the course of inter-state trade or commerce, that the covenant regarding inter-State movement must be specified in the contract itself. It will be enough if the movement is in pursuance of and incidental to the contract of sale.'

It was further observed:

'....-If there is a conceivable link between the movement of the goods and the buyer's contract, and if in the course of inter-state movement the goods move only to reach the buyer in satisfaction of his contract of purchase and such a nexus is otherwise inexplicable, then the sale or purchase of the specific or ascertained goods ought to be deemed to have taken place in the course of inter-state trade or commerce as such a sale or purchase occasioned the movement of the goods from one State to another...."

(underlining ours)

State of Karnataka and others v. ECE Industries Limited (144 STC 605)(Kar)

The small gist of judgment is as under:

"The respondent-company engaged in the business of manufacture, supply and installation of lifts and elevators had its branch office at Bengaluru which procured orders from customers in Karnataka. Lifts and elevators were manufactured in its factory at Uttar Pradesh according to the design and specifications of the customers and the manufactured items after being tested were dismantled and dispatched to the customers' place in the State of Karnataka by way of stock transfers. The works contract was executed by the branch office by installation and commissioning of the lifts and elevators at the customers' place. After receipt of the report from Intelligence Wing the assessing authority reopened the assessment for the assessment years 1990-91 and 1991-92 and passed reassessment orders under section 12-A of the Karnataka Sales Tax Act, 1957 and levied penalty under section 12-A(1-A) of the Act. The returns filed by the respondent for the years 1994-95, 1995-96 and 1996-97, were rejected and best judgment assessment was made under section 12(3) of the Act read with rule 18(1) of the Karnataka Sales Tax Rules, 1957. The respondent aggrieved by those orders filed appeals before the Appellate Authority but they were rejected by a common order dated December 26, 2000. Thereafter, the respondent filed appeal before the Tribunal against the appellate order passed by the appellate authority for the assessment year 1992-93, wherein the Appellate Authority had confirmed the order of assessment passed by the assessing authority under section 12(3) of the Act and the levy of penalty under section 12(4) of the Act. The respondent, also filed appeals before the Tribunal against the common order passed by the Appellate authority. The Revenue being aggrieved by the common order passed by the Appellate Authority filed cross-appeal before the Tribunal. The Tribunal by its common order allowed all the appeals filed by the respondent and rejected the cross-appeal filed by the Revenue. The Revenue aggrieved by the orders, filed revision petitions contending, *inter alia,* that the property in the goods would become the property of the purchaser only after the lifts and elevators were installed and commissioned at the premises of the customers, that the contract did not provide either expressly or by implication the movement of the goods from one State to another and that therefore the Tribunal was not justified in coming to the conclusion that the transaction was not exigible to levy under section 5-B of the Act providing for levy of tax on transfer of property in goods in execution of works contract. On the other hand the respondent contended that the entire transaction being done at Uttar Pradesh and goods being moved inter-State as a result of deemed sale in the course of execution of works contract the

State had no power to levy tax on such inter-State works contract:

'Held,' dismissing the petitions, (i) that in exercise of legislative power to impose tax on the sale or purchase of goods under Entry 54 of the State List read with Article 366(29-A)(b) of the Constitution, the State Legislature while imposing a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract is not competent to impose a tax on such a transfer (deemed sale) which constitutes a sale in the course of inter-State trade or commerce or a sale outside the State or a sale in the course of import or export. Similarly, if clause (c) of explanation (3) to section 2(1)(t) of the Karnataka Sales Tax Act, 1957, which fixes *situs* of sale in case of works contract, is read with other provisions of the Act including clauses (a) and (b) of explanation (3) it cannot be said that in fixing the *situs* in respect of deemed sales resulting from the transfer of property in goods involved in the execution of a works contract the State Legislature has included a sale in the course of inter-State trade or commerce or a sale outside the State or a sale in the course of import or export;

(ii) that the principles for determining when a sale takes place in the course of inter-State trade or commerce laid down in section 3 of the Central Sales Tax Act, 1956, would apply equally to transfer of property in goods involved in the execution of works contract;

(iii) that for the purpose of section 3(a) of the Central Sales Tax Act, 1956, it is not necessary that the contract of sale must itself provide for and cause the movement of goods or that the movement of goods must be occasioned specifically in accordance with the terms of the contract of sale. A sale can be an inter-State sale even if the contract of sale does not itself provide for the movement of the goods from one State to another but such movement is the result of a covenant in the contract of sale or is an incident of that contract; and

(iv) that where the description of the goods is clear and goods of that description are despatched then the goods so despatched can be taken as appropriated to the contract unconditionally and despatches from one State to another to an identified customer result in inter-State sale. Merely, because the lifts and the elevators are installed and commissioned in the State, it cannot be said that it is a local sale exigible to levy under section 5-B of the Act on the ground that the actual transfer of property used in the works contract took place in the State of Karnataka and, therefore, the Tribunal was justified in coming to the conclusion that the transaction in question was not exigible to levy of tax under section 5-B of the Karnataka Sales Tax Act, 1957."

Commissioner of Trade Tax, U.P. v. Advance Spectra Trade Pvt. Ltd. (38 VST 336)(All.)

In this case goods were transferred from other State to U.P. State for pre existing works contract. Allahabad High Court has held that such transfer is inter-state sale from other State and not liable in U.P. State.

Interna (S.A. No.193 of 2006 dt. 7-9-2007(MSTT)

Works Contract – Inter-State

Appellant received orders in Mumbai. The furniture as per order was manufactured in Silvassa factory, stock transferred to Maharashtra and the same was installed. Assessing authority noting the activity done in Maharashtra like polishing, cutting, painting, glass fitting etc. and relying on the explanation to definition of 'sale' in section 2(2) held the transaction as liable to tax under Works Contracts Act. Before Tribunal appellant cited judgment in case of *Gannon Dunkerley & Co. (88 STC 204), and ECE Ind. Ltd. (134 STC 605).*

Tribunal noting above judgments held that the transaction is in course of interstate trade not liable in Maharashtra. Tribunal observed that the explanation to definition is to be read along with section 10 of W.C. Act and if so read the inter-state transaction from Silvassa cannot be taxed in Maharashtra.

Thus, the nature of inter-state works contract can be ascertained in light of above legal position. The movement of goods is required to be established as a consequence to works contract. Once, that is established then taking the goods by contractor himself to the site and using in the contract will not make any difference. Accordingly, on such contracts liability will be required to be discharged under CST Act, 1956.

Works Contract

Q.2 Whether Judgment of Hon'ble Supreme Court in case of Kone Elevator India Pvt. Ltd. v. State of Tamil Nadu (71 VST 1) has made any difference in interpretation about nature of 'works contract' transaction?

Reply:
The background of above judgment is that the division bench of Hon'ble Supreme Court in original judgment in case of M/s. Kone Elevators (I) Ltd. (140 STC 22), held that the transaction of supply and installment of lift in a building is sale transaction.

In the original judgment, the Hon'ble bench came to the conclusion that installation part of the lift is incidental and sale of the materials i.e. lift is the real substance of the transaction.

In the present case, the Larger Bench of five judges, has re-examined the issue and by majority of four versus one, it is decided that transaction of supply and installation of lift is a works contract.

From the overall judgment, it appears that the judgment is based on facts. The real issue which is examined is the degree of installation services i.e. whether incidental or substantive. By examining the factual position of installation, Hon'ble Supreme Court has held that installation services are substantially important as the lift comes into existence by installation. This position is clear from paras 63 & 64 of the judgment, which is reproduced below.

"63. Considered on the touchstone of the aforesaid two Constitution Bench decisions, we are of the convinced opinion that the principles stated in *Larsen and Toubro (supra)* as reproduced by us hereinabove, do correctly enunciate the legal position. Therefore, "the dominant nature test" or "overwhelming component test" or "the degree of labour and service test" are really not applicable. If the contract is a composite one which falls under the definition of works contracts as engrafted under clause (29A)(b) of Article 366 of the Constitution, the incidental part as regards labour and service pales into total insignificance for the purpose of determining the nature of the contract.

64. Coming back to *Kone Elevators (supra),* it is perceivable that the three-Judge Bench has referred to the statutory provisions of the 1957 Act and thereafter referred to the decision in *Hindustan Shipyard Ltd. (supra),* and has further taken note of the customers' obligation to do the civil construction and the time schedule for delivery and thereafter proceeded to state about the major component facet and how the skill and labour employed for converting the main components into the end product was only incidental and arrived at the conclusion that it was a contract for sale. The principal logic applied, i.e., the incidental facet of labour and service, according to us, is not correct. It may be noted here that in all the cases that have been brought before us, there is a composite contract for the purchase and installation of the lift. The price quoted is a composite one for both. As has been held by the High Court of Bombay in *Otis Elevator* (supra), various technical aspects go into the installation of the lift. There has to be a safety device. In certain States, it is controlled by the legislative enactment and the rules. In certain States, it is not, but the fact remains that a lift is

installed on certain norms and parameters keeping in view numerous factors. The installation requires considerable skill and experience. The labour and service element is obvious. What has been taken note of in *Kone Elevators* (supra) is that the company had brochures for various types of lifts and one is required to place order, regard being had to the building, and also make certain preparatory work. But it is not in dispute that the preparatory work has to be done taking into consideration as to how the lift is going to be attached to the building. The nature of the contracts clearly exposit that they are contracts for supply and installation of the lift where labour and service element is involved. Individually manufactured goods such as lift car, motors, ropes, rails, etc. are the components of the lift which are eventually installed at the site for the lift to operate in the building. In constitutional terms, it is transfer either in goods or some other form. In fact, after the goods are assembled and installed with skill and labour at the site, it becomes a permanent fixture of the building. Involvement of the skill has been elaborately dealt with by the High Court of Bombay in *Otis Elevator* (supra) and the factual position is undisputable and irrespective of whether installation is regulated by statutory law or not, the result would be the same. We may hasten to add that this position is stated in respect of a composite contract which requires the contractor to install a lift in a building. It is necessary to state here that if there are two contracts, namely, purchase of the components of the lift from a dealer, it would be a contract for sale and similarly, if separate contract is entered into for installation, that would be a contract for labour and service. But, a pregnant one, once there is a composite contract for supply and installation, it has to be treated as a works contract, for it is not a sale of goods/chattel simpliciter. It is not chattel sold as chattel or, for that matter, a chattel being attached to another chattel. Therefore, it would not be appropriate to term it as a contract for sale on the bedrock that the components are brought to the site, i.e., building, and prepared for delivery. The conclusion, as has been reached in *Kone Elevators* (supra), is based on the bedrock of incidental service for delivery. It would not be legally correct to make such a distinction in respect of lift, for the contract itself profoundly speaks of obligation to supply goods and materials as well as installation of the lift which obviously conveys performance of labour and service. Hence, the fundamental characteristics of works contract are satisfied. Thus analysed, we conclude and hold that the decision rendered in *Kone Elevators* (supra) does not correctly lay down the law and it is, accordingly, overruled."

Therefore, the real issue as to what are the guidelines for deciding the nature of works contract transaction is still not readily available. As per above judgment it appears that the basic nature of the transaction is required to be seen and if it is works contract then the dominant nature test or overwhelming component test etc., are not relevant. What the dealer expect is, as to how to appreciate basic nature of transaction i.e. whether works contract or not? There is no ready answer to above issue in the judgment. Again the same logic as to whether basic transaction is works contract or not will be required to be ascertained based on above tests like dominant nature test etc., though Hon'ble Supreme Court has held it irrelevant. It will become irrelevant, once basic nature of transaction is considered as works contract. Therefore, on the overall analysis, it appears that every transaction will be required to be examined on its own facts and then to decide the nature of transaction.

We hope that in future the above guidelines will become more clear.

Quest – Opinion
MVAT

P. C. Joshi
Advocate

Facts relevant for the query placed before me, are as under:

The Querists are _____ incorporated under the provisions of Indian Companies Act, 1913 and have their registered office at_____. They are also registered under the provisions of Maharashtra Value Added Tax Act, 2002.

2. As a manufacturer of Alcohol and Country liquor they are in possession of a manufacturing license in Form I issued by the State Excise Authorities. Under such a license the querists are permitted to manufacture both the above mentioned items but subject to the provisions of Bombay Prohibition Act, 1949.

3. On 14th March, 2014 they executed an agreement styled as lease agreement with _____ a Partnership Firm; for allowing or permitting them to use, the licence, to manufacture various grades of alcohol and by products at the premises of the querists under the terms and conditions specified in the said agreement for a duration from 31st March, 2014 to 30th June, 2025.

4. One of the terms provided that the original license in Form I would always be in the custody of the querists. In nutshell the querists have permitted the said _____ to use their premises and other installed infrastructure including the machinery required for the manufacture of the alcohol etc. It is clearly understood that all the outgoing expenses relating to the business, conducted by the lessee i.e. _____ will be at their risk and cost without any liability of the querists of any nature. The said lessee have agreed to employ their own employees for the purpose of manufacturing and selling the said alcohol and other byproducts. In other words the querists will have no relation of employer-employee between themselves and the persons employed by the said lessee. In case the lessee desired to expand the manufacturing / distillery, that also would be allowed by the querists to install such new plant and machinery in the premises of the querists with the rider that on expiry of the duration of the agreement, such additional machineries, furniture and fixture will be removed before giving back peaceful possession of the said premises leased to the lessee.

5. The querists would be free to continue or set up its own manufacturing business in rest of the premises other than the area given to lessee for its use.

6. For all the aforesaid permission, license or facilities, the querists would receive every month, an amount to be calculated @ 3% of the sale value of the manufactured products

by the lessee at distillery of the querists and sold by the lessee under the term summarized hereinabove.

Query

7. On the above facts, the querists desire to have my opinion about the applicability of the provisions of MVAT Act with special reference to the notification under entry 39 of the C Schedule appended to the said Act.

8. Entry 39 refers to the levy of tax @ 5% on the sale of goods of intangible or incorporeal nature that may be notified by the State Government.

9. Accordingly the State Government issued a notification under No. VAT – 1505/ CR – 114 / Taxation – 1 on 01.06.2005 specifying certain goods to be of that nature. The notification in question contained as many as fourteen types of intangible or incorporeal goods. Entry 3 refer to import licences etc., while Entry 4 relate to export permit or licence or quota. Entry 12 which is relevant for the query placed before me read as under:

> *(12) "Franchise, that is to say, an agreement by which the franchisee is granted representational right to sell or manufacture goods or to provide service or undertake any process identified or associated with the franchisor whether or not a trade mark, service mark, trade name or logo or any symbol as the case may be, is involved."*

10. The applicability of entry 3 or 4, to the agreement entered into by the querists is ruled out for the simple reason that both the entries referred to import /export licences which are normally traded in the market and title transferred across the counter on payment of consideration by the buyer to the seller.

11. The other entry as referred to above is entry 12, which relate to 'franchise'. That word have various significances, both in popular as well as in legal sense. In popular sense it can be stated that the term 'franchise' means privileges of a personal character while in legal sense it may mean a privilege conferred on one individual by another. The word 'franchising' when used as a verb would cover a form of licence by which the franchisor of the trademark or copyright grant a licence to the franchisee for selling goods or services, as for example Kodak, Sony, 'McDonald', Holiday Inn, La Meriden etc.

12. Under the aforesaid entry however, the notifying authority have expressly narrowed down the meaning of the word 'franchise' using the phrase 'that is to say' to mean an agreement under which right to represent, to sell or manufacture goods or services associated with the franchisor; is granted to franchise without having any regard as to whether any use of trademark, trade name etc., is used or not. For considering the application of that entry to the agreement before me, certain important terms of the agreement will have to be analysed.

13. Clause 2 provide that the lessee will operate the distillery of the querists, in their own name and not in the name of the querists. It is also specifically provided that the querists will continue to possess the licence in Form I; in other words, the custody and possession is not intended to be transferred to the lessee.

14. Clause 3 refers to the monthly consideration payable by the lessee to the querists, which is not a fixed consideration but @ 3% of monthly sale by the lessee.

15. The licence / permission to use the premises or property of the querists, is for

the earmarked part of the area, from the total estate of the querists (clause 5).

16. Clause 6 expressly make it clear that the entire responsibility of running the distillery of the querists, will be that of lessee; in other words, the lessee is not supposed to represent the querists before any third party.

Clause 10 also support the above view.

17. At the time of the conference, _____ confirmed that the plant and machinery referred in the agreement, were embedded to the earth in such a fashion that it became part of the immovable property. Such duly installed plant and machinery were also allowed to be used by the said _____ for their manufacturing alcohol etc., in their own name and risk (refer clause 13).

18. For the purpose of carrying on the business of manufacturing at the premises of the querists, the lessee would be effecting the purchases of raw material and selling the manufactured goods from the distillery in their own name (refer clause 20).

19. Clause 25 make it clear that even during the subsistence of the agreement, the querists would be free to use their property for their own manufacturing activities. This clause reveal that what was intended by the parties to the agreement was the grant of licence to use immovable properties and nothing movable was intended to be leased for the exclusive use of the lessee nor such inference can be drawn.

20. An overview of the entire agreement led me to the conclusion that the goods of intangible or incorporeal nature as specified and defined at serial No.12, in regard to the franchise, will not be applicable to the facts of the querists. It is worthwhile to note that the licensee of the immovable property, is not supposed to represent the querists nor sale any goods manufactured by them, to be those of the querists; therefore the word 'franchise' as contemplated under serial No.12 is restricted in its scope to only those transactions wherein the franchisee is granted a right to represent, sale, manufacture or undertake any process which can be identified or associated with the franchisor. Such is not the case before me.

21. Considering the query from another angle, it may be added that the State legislature acquire its right to levy tax limited only to the areas expressly covered by entry 54 of list II appended to the Seventh Schedule of the Constitution read with Article 246 (3).

22. Entry 54 in the State list (list II) refer to the 'taxes on the sale or purchase of goods' other than newspaper, subject to the provision of entry 92-A of list I.

23. Article 366 which is the definition article, define the term 'goods' under clause 12 to include all materials, commodities and articles, while clause 29A expanded the expression 'tax on the sale or purchase of goods' to include a tax on the transfer of right to use any goods for a consideration.

24. Applying the above Constitutional provisions, to the aforesaid terms of the 'agreement' it is crystal clear that the use of a portion of the premises by the lessee was permitted by its owner i.e. querists. It is not related to any transaction involving any movable; tangible or intangible goods and therefore the agreement placed before me for my opinion is outside the limited scope of the provisions of Maharashtra Value Added Tax Act, 2002.

25. Turning to the Second Agreement dated 17th January, 2014 executed by the querists with the same _____though the same is titled as Lease Agreement, in substance it's a permit or a licence granted to _____ by the querists, to use its licence to manufacture country liquor under the provisions of Bombay Prohibition Act.

26. The term of the agreement provide for a monthly payment of Rs.9,00,000/- to the querists without having any regard to the quantum of business conducted or manufactured by the lessee under the licence of the querists.

27. The entire activity of manufacturing country liquor is to be undertaken by the lessee, at their own premises, with the help of plant, equipment and machinery owned by the lessee. In other words, unlike the later agreement dated 14th March, 2014, the lessee is not to undertake its manufacturing activity in the premises of the querists.

28. Detailed examination of the agreement dated 17th January, 2014 in entirety, reveal the intention of the parties to the agreement, to be the permission or licence to use CL-1 licence granted by the querists to the lessee, with a rider that the original CL-1 licence shall always be in the custody and possession of the querists.

29. On the above facts the querists desire to have my opinion about the applicability of the MVAT Act, 2002.

30. As narrated in the earlier paras, what is intended to be dealt with between the parties is only the CL-1 licence and nothing more.

31. Word 'licence' appearing in entry 3 & 4 of the notification refer to those licences under import / export policy which are traded in the market.

32. As discussed hereinabove, while dealing with the later agreement dated 14th March, 2014, the scope of the VAT Act is limited to the movable goods; whether in the nature of tangible or intangible. Entry 39 of Schedule C authorise the issuance of a notification by the State Government specifying the goods of intangible or incorporeal nature, which are taxable @ 5%.

33. The word 'licence' is not defined in the notification dated 1st June, 2005 as clarified initially in this opinion, however Serial No. 3 and 4 referred to the import licences, export permit or licence or quota.

34. The word 'licence' in common parlance or as understood by common man, would mean a transaction involving one person granting to another person, a right to do something which in the absence of the licence would be unlawful, however such right cannot amount to an easement or an interest in the property (section 52 of Indian Easement Act). Applying the said meaning CL-1 licence issued under the State Excise Act, to the querists; cannot be said to be covered by the specifications in the notification issued by the State Government enumerating, the goods of intangible or incorporeal nature.

35. In view of the above discussion the agreement dated 17th Jan, 2014 also does not attract any liability of payment of VAT under entry 39 of Schedule C appended to the MVAT Act, 2002.

I opine accordingly.

Quest – Opinion
Sales in course of import / export – Local sales or CST

Vinayak Patkar
Advocate

Opinion No. 1

QUERY

The XYX Company is doing the business as ship chandler. It imported the fuel from foreign countries and after receipt of the goods, kept them in a bonded warehouse under the relevant provisions of the Customs Act, 1962.

My client is the Dubai based company and is dealing with bunker business. On receipt of order from the Captain of the foreign going vessels requiring ship stores, the Dubai based company purchased fuel from the XYZ Company from bonded warehouse and supplied to foreign going vessel.

Whether this kind of transaction can be considered as,

1) Sales in course of import

2) Sales in course of export

3) Local sales or CST

OPINION

1. For the purpose of replying your query we will have to first state the historical background of such sales taking place outside the customs frontiers of India. The Supreme Court of India in their Lordships' judgment in the case of *Burmah Shell Oil Storage and Distribution Co. of India Ltd. v. Commercial Tax Officer, judgment dated 27th September, 1960 and reported in 11 STC 764* had held that the custom barrier is the barrier for custom purposes and meaning thereof can not be used for sale tax purposes.

2. The appellant-companies in that case dealt in petroleum and petroleum products, and carried on business at Kolkata. They maintained supply depots at Dum Dum Airport from which aviation spirit was sold and delivered to aircraft proceeding abroad and belonging to several companies. The Sales Tax Authorities in West Bengal held that the sales were within that State and levied tax on the same. During that period an Explanation existed to sub-clause (a) of the first clause of Article 286.

   It read:

   "*Explanation*.– For the purposes of sub-clause (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

3. The State of West Bengal had after the coming into force of the Constitution, enacted section 22, in terms of Article 286.

It read:

"22(1)Nothing in this Act shall be construed to impose or authorise the imposition of a tax on the sale or purchase of motor spirit:

(a) where the sale or purchase takes place outside the State of West Bengal;

(b) ----------

(c) (omitted)

(2) The Explanation to clause (1) of Article 286 of the Constitution shall apply for the interpretation of clause (a) of sub-section (1)".

4. On the basis of this Explanation the State of West Bengal contended that the sales of aviation spirits were in that State and therefore it was competent to levy tax on the same.

The apex court agreed with the contention and held that,

"These sales must, therefore, be treated as made within the State of West Bengal. The customs barrier is a barrier for customs purposes, and duty drawback may be admissible if the goods once imported are taken out of the country. The customs duty drawbacks have nothing to do with the sale of aviation spirit, which takes place in West Bengal.

The customs barrier does not set a terminal limit to the territory of West Bengal for sales tax purposes. The sale beyond the customs barrier is still a sale, in fact, in the State of West Bengal. Both the buyer and the seller are in that State. The goods are also there. All the elements of sale including delivery, payment of price, take place within the State. The sale is thus completely within the territory of the taxing State."

5. It should be noted that during this period there was no definition of 'crossing the customs frontiers of India' under the Central Sales Tax Act, 1956.

6. Then came the judgment of *Madras Marin Company v. The State of Tamil Nadu reported in 63 STC 169 (SC), judgment dated July 16, 1986.* The facts of this case are somewhat similar to the case of the querist. The appellant/petitioner-company, a dealer in stores and doing business as ship chandlers, imported goods from foreign countries on the undertaking to supply them only to foreign going vessels and/or to diplomatic personnel and to receive the goods in customs bonded warehouses. After import of the goods the company kept them in bonded warehouses in the State of Tamil Nadu. On receipt of an order from the captain of a foreign bound ship requiring ship stores, the company supplied the goods on board the ship. The company contended that no sales tax was payable on such sales under the Tamil Nadu General Sales Tax Act, 1959, because (i) the goods were all intended for re-export only and were at all times in a bonded warehouse, the delivery was on board a foreign going ship and the goods were to be consumed on the high seas; the property in the goods passed only after the goods had crossed the customs frontiers and did not pass in Tamil Nadu, and the sales were, therefore, in the course of export; and (ii) the sales took place in territorial waters of India within the jurisdiction of the Union of India and outside Tamil Nadu. The sales tax authorities held that the sales took place in Tamil Nadu where appropriation of the goods took place and imposed sales tax.

7. The apex court confirmed the levy. The Court held thus,

"In our opinion as the goods were within the State of Tamil Nadu in case of ascertained goods at the time when the contract of sale was made and in case of unascertained goods at the time of their appropriation to the contract by the seller, sale must be deemed to be within the State of Tamil Nadu. In our opinion, therefore, Shri M.M. Abdul Khader, learned counsel for the respondents, was right that under section 2(n) of the Act read with explanation (3), these sales were within the State. It may be mentioned that there was an amendment in 1976 of the Central Sales Tax Act, 1956, by Act No. 103 of 1976. By that provision, the following was inserted in section 2 of the Central Sales Tax Act, 1956:

"(ab) 'crossing the customs frontiers of India' means crossing the limits of the area of a customs station in which imported goods or export goods are ordinarily kept before clearance by customs authorities.

Explanation.– For the purposes of this clause, 'customs station' and customs authorities' shall have the same meanings as in the Customs Act, 1962."

The short question, therefore, that arises in all these matters is whether sale of the goods in question took place within the territory of Tamil Nadu. In these cases sale took place by appropriation of goods. Such appropriation took place in the bonded warehouse. Such bonded warehouses were within the territory of the State of Tamil Nadu. Therefore, under sub-section (2), sub-clauses (a) and (b) of section 4 of the Central Sales Tax Act, 1956, the sale of goods in question shall be deemed to have taken place inside the State because the contract of sale of ascertained goods was made within the territory of Tamil Nadu and furthermore in case of unascertained goods appropriation had taken place in that State in terms of clause (b) of sub-section (2) of section 4 of the Central Sales Tax Act, 1956. There is no question of sale taking place in the course of export or import under section 5 in this case. From that point of view the amendment introduced by Act 103 of 1976 by incorporating in clause (ab) of section 2 of the Central Sales Tax Act, 1956, does not affect the position. In this connection reference may be made from the observations of this Court in Burmah Shell Oil Storage Ltd. [1960] 11 STC 764 (SC) where it has been held that customs barrier does not set a terminal limit to the territory of the State for sales tax purposes. Sale, therefore, beyond the customs barrier is still a sale within the State. The amendment introduced in section 2 by the Act 103 of 1976 does not affect the position because the customs station is within the State of Tamil Nadu.' (Underlining supplied).

8. Now in the case of *Hotel Ashoka v. The Asstt. Commissioner of Commercial Taxes reported in 48 VST 443*, judgment dated 3rd February, 2012 the Supreme Court expressed exactly opposite view as regards bonded warehouses. See the following observations of the Court in that case,

"It is an admitted fact that the goods which had been brought from foreign countries by the appellant had been kept in bonded warehouses and they were transferred to duty-free shops situated at International Airport of Bengaluru as and when the stock of goods lying at the duty-free shops was exhausted. It is also an admitted fact that the appellant had executed bonds and the goods, which had been brought from foreign countries, had been kept in bonded warehouses by the appellant. <u>When the goods are kept in the bonded warehouses, it cannot be said that the said goods had crossed the customs frontiers. The goods are not cleared from the customs till they are brought in India by crossing the customs</u>

frontiers. When the goods are lying in the bonded warehouses, they are deemed to have been kept outside the customs frontiers of the country and as stated by the learned senior counsel appearing for the appellant, the appellant was selling the goods from the duty-free shops owned by it at Bengaluru International Airport before the said goods had crossed the customs frontiers. (Underlining supplied).

Looking to the aforestated legal position, it cannot be disputed that the goods sold at the duty-free shops, owned by the appellant, would be said to have been sold before the goods crossed the customs frontiers of India, as it is not in dispute that the duty-free shops of the appellant situated at the International Airport of Bengaluru are beyond the customs frontiers of India'

9. The apex court has not referred to the earlier judgments in Burmah Shell or Madras Marine cited supra while deciding the location of the bonded warehouse *qua* sales tax laws. Since this is the later judgment of the Supreme Court on the subject, you may follow the same. However, you are advised to take the indemnity from the buyers if any tax is payable in future.

10. At this juncture, we wish to bring to your notice the observations of the Bombay High Court in the case of *DEEPMANI v. The State of Maharashtra reported in 45 MTJ 380, judgment dated January 21, 2010*. The period involved is 1983-84 :

"If one turns to the facts of the present case, it is a sale on the shop counter. The moment goods were segregated for sale and the amount of sale consideration was paid in the shop, the sale was complete. The delivery of the goods was to be given just before the Customs Area. Therefore, the sale was complete with the factum of delivery of goods. There was no compulsion on the purchaser to export it. It was at the sweet will of the purchaser whether or not to take it to its country. Absence of export was not to nullify the transaction of sale. The sale was complete the moment goods were identified on the counter and sale price was paid in the shop though delivery of goods was postponed till the date of journey, which the foreign going passenger (purchaser) was to undertake. It was open to the foreign going passenger (purchaser) to gift it before customs clearance. Such an act was not to invalidate sale. In other words, validity of sale was not to depend upon necessity of export. It may be a sale for export or purchaser may have purchased it to take the goods abroad but, surely, sale did not occasion export.

In the above backdrop, the sale was for export and not in the course export."

11. The State of Maharashtra has exempted the VAT on the goods supplied from bond to foreign going ships and aircrafts under entry No. A-50 (b) of the MVAT Act, 2002. You may take benefit of the same. However, you are advised to obtain clarification from the Commissioner of Sales Tax, Maharashtra State the meaning of bond and whether the legislature has intended to exempt VAT on the sales effected from bonded warehouse.

12. The Union Government has by way of deeming fiction treated the sales of Aviation Turbine Fuel supplied to the Indian carriers, as notified by the Central Government, for their international flights, as in the course of export and thus immune from tax. See Section 5 (5) of the CST Act, 1956.

SALES TAX

D. H. Joshi, *Advocate*

1. Additional Sales Tax vis-a-vis Opting for Composition Option

In this case, the appellant-dealer in gold and silver ornaments opted to pay tax at the compounded rate u/s 7 of the KGST Act. The appellant continued to pay tax at auction rate for A.Y. 2001-02. On 23rd July, 2001, the legislature had brought in an amendment to the KGST Act by inserting Sec. 5D, levying additional tax on those dealers who were taxable u/ss. 5 and 5A of the KGST Act. The appellant in accordance with this provision deposited additional tax for the months of July and August 2001. Being aggrieved by the demand of additional tax u/s 5D for the aforesaid months and also for subsequent months, the appellant had approached the Writ court. Learned Single Judge of the court held that when a dealer exercises his option to pay tax at the compounded rate u/s. 7, it pays the tax payable u/s 5(1) and, therefore, the appellant is liable to pay additional tax. The Division Bench of the High Court confirmed the Order of the Learned Single Judge. The appellant therefore approached the Apex Court.

In the facts of the case, the Apex Court held that the Order of the High Court was not proper and hence it reversed. The purpose of non-obstante clause in section 7 of the Act is to give the provisions contained in non-obstante clause, an overriding effect over the provisions of section 5(1). Hence, additional tax can be levied and collected only from a dealer who is liable to pay tax u/s 5(1) or 5A of the Act. Additional sales tax, therefore, cannot be levied on a dealer who pays tax under compounding scheme u/s 7. Accordingly, the order of the High Court was set aside and tax so paid by the dealer directed to be refunded.

Bhima Jewellery v. AC (Assmt.) Kerala and Anr. (2014) 22 KTR 175 (SC) / (2014) 71 VST 110 (SC)

2. Appellate Authority vis-a-vis Assessing Authority

In this case, an Association of Tax Practitioners challenged Notification No. 38 dated 19-10-2012 on the ground that the said Notification *'ultra vires'* to the provisions of section 3A of the M.P. VAT Act, 2002, as it has appointed the Dy. Commissioners as Appellate Authority while they were also acting as Assessing Authority. It was therefore an apprehension of the petitioner that while performing work of Assessing Authority, once the Dy. Commissioners follows instructions given by the Commissioner, it would not be possible for him to take different view while performing the job of Appellate Authority. The High Court held that though the apprehension of the petitioner was theoretically true but under the scheme of

the VAT Act, there was no provision that the officer, who performs the job of the appellate authority, cannot perform the work of tax officer. There was no separate tier of officers. When a particular statute does not provide separate cadre for a particular purpose, it was not proper for the court to prescribe the same. It was also a fact that Dy. Commr. notified as appellate authority does not hear appeals of same area where he is posted. Moreover, it was stated in the reply by the State that instructions issued by the Commissioner are not binding on appellate authority. Therefore, the impugned notification cannot be declared as *'ultra vires'*.

Kar Salahakar Sangh, Gwalior v. State of M.P. & Ors. (2014) 24 STJ 699 (M.P.)

3. Attempt to evade tax

Section 51(7)(c) – Attempt to evade tax. Penalty imposed on the ground that the document produced i.e. the retail invoice was not genuine observing that the invoice book from which the invoices produced had been issued was tampered with and fresh invoice carbon copies inserted in it after rebound and that the dealer was maintaining duplicate set of bill books which ran parallel. The appellant-dealer during the course of proceedings before the penalising officer was not confronted with the invoice book which was alleged to have been tampered. The AETC was obliged to confront the appellant-dealer with the alleged tampering, which was in the custody of the Dept. Hence, the matter was remanded back to the AETC for passing a fresh order.

Chopra Mfg. Co. v. State of Punjab (2014) 48 PHT 162 (PVT)

4. Cancellation of Registration Certificate

In this case, writ petition was filed before the Madras High Court contending that RC was cancelled with retrospective effect, without affording an opportunity of hearing. The dealer applied for Registration and the same was granted w.e.f. 11-7-2012. Thereafter, the registration was cancelled dt. 11-2-2013 with retrospective effect from 11-7-2012 without granting an opportunity of hearing. Based on these facts and following a judgment in *Indo Germa Products Ltd. v. AC (CT), (2011) 45 VST 236 (Mad.)*; High Court set aside the Order saying that opportunity of hearing is not granted. However, it further said that it would be open to the respondent to cancel the RC of the petitioner, as per law, after issuing an appropriate notice and by affording an opportunity of personal hearing.

Jana Steels v. AC (CT), Poneri (2014) 48 PHT 84 (Mad.)

5. Determination of disputed Question

U/s 70 of the Chhattisgarh VAT Act, the power has been conferred upon the Commissioner to determine the rate of tax as applicable to the goods. He is exercising judicial functions. There is a lis between the parties. U/s 70(2), the decision of the Commissioner is final as no appeal or revision lies thereagainst. It is binding upon all authorities mentioned in section 3 except the Appellate Authorities. Therefore, the Commissioner is a Tribunal under supervisory jurisdiction of Article 227 of the Constitution.

Sony India Pvt. Ltd. and Anr. v. State of Chhattisgarh and Ors. (2014) 24 STJ 706 (CG)

6. Entries in Schedule

A In this case, the question was about the rate of tax applicable to Soft drink "Appy Fizz". It was an aerated soft drink containing carbon-di-oxide required to be classified u/s 6(1)(a) of the KVAT Act taxable at 20% as an "aerated soft drink". Commodities not having H.S.N. No. should be interpreted in "common parlance" or "commercial parlance", as the case may be. Section 6(1)(a) of the Act, r/w Rules of interpretations of schedules given in Appendix to the Kerala VAT Act; Entry 71(2) of list of goods notified by Govt. by SRO No. 82 / 2006.

Tradelines v. State of Kerala (2014) 22 KTR 231 (Tri.)

B Flex banner (printed) they are not covered in Entry relating to HDPE i.e woven fabrics and tarpaulin. There being no any other specific entry for the same in the schedules of CG VAT Act, they are covered under residuary entry and are liable to tax at 14%.

Balaji Plastics, Bhilai v. Commissioner of Commercial Tax, CG (2014) 24 STJ 730

C Instruments/Apparatus for use by Laboratories/research and educational institutions – they are not covered in Entry 24 of Notification No. 45 dated 28-4-2006 issued in terms of entry 27 of Schedule II Part II of CG VAT Act, as in that entry there is a condition that instruments, apparatus and parts thereof should be used for the manufacture of goods in an industry. Thus, the said entry does not cover instruments/apparatus for use by laboratories research and educational institutions. They are covered under residuary entry and are liable to tax at 14%.

Dewra Associates, Raipur v. Commissioner of C.T., C.G. (2014) 24 STJ 731

7. Interpretation of Notification

In this case, the Apex Court was concerned with CST Act, 1956 – Section 8(5)(b) r/w Notification S.O. No. 25 dated 25-6-2001 relating to reduction in rate of tax on 'types of glass'. The expression used in the Notification issued by State of Jharkhand is whether identical to the expression 'Form of Glass' in their connotation and import. Held, 'No', by reasoning that the Notification must be interpreted in terms of its language. In order to claim benefit of a Notification, a party must strictly comply with the terms of the Notification. If on wording of the Notification the benefit is not available then by stretching the words of the Notification or by adding words to the Notification benefit cannot be conferred.

State of Jharkhand and Ors. v. M/s LA Opala R.G. Ltd. (2014) 48 PHT 22 (SC)

EXCISE & CUSTOMS

Mr. Vipin Kumar Jain

Summary of Case laws – January to March, 2014

1. Amount of Sales Tax collected and retained by the assessee as an incentive is includible in Transaction Value after 1-7-2000.

1) Facts

As per the provisions of the sales tax New Incentive Scheme for Industries, 1989, the assessee was entitled to retain 75% of the sales tax collected and pay only 25% of the tax collected to the Government as a measure of grants incentive by the State Government. Department sought to include the said amount of Sales Tax to the transaction value for the purpose of payment of duty as on additional.

2) Issue

Whether the amount of Sales Tax collected and retained by the assessee is to be excluded for the purpose of arriving at the transaction value for payment of excise duty?

3) Held

The Supreme Court has held that unless the sales tax is 'actually paid' to the Sales Tax department of the State Government, no benefit towards excise duty can be given under the concept of "transaction value" under Section 4(4)(d), for it is not excludible. 25% of the sales tax collected has been paid to the State exchequer by way of deposit. The rest of the amount has been retained by the assessee that has to be treated as the price of the goods under the basic fundamental conception of "transaction value" as substituted with effect from 1-7-2000. Therefore, the assessee is bound to pay the excise duty on the said sum after the amended provision was brought into effect on the statute book.

{2014-TIOL-19-SC-CX, COMMISSIONER OF CENTRAL EXCISE, JAIPUR-II, v. M/s SUPER SYNOTEX (INDIA) LTD AND OTHERS}

2. Differential amount paid in pursuance of Show Cause Notice cannot be said to be recovered from the consumers-Unjust enrichment

1) Facts

Assessee was paying duty on Tyre Cord Fabric under Heading 59.02 of Central Excise Tariff from 1986 as per approved classification list where only basic excise duty was payable, and no special excise duty was payable while the Department subsequently demanded differential duty under a separate Heading 59.09 by issue of a Show Cause Notice in 1993. Thus, the assessee paid duty under Heading 59.09 from 1988. However, the assessee was declared eligible to refund under Section 11B of the Central Excise Act, 1944 on such differential duty amount and for such refund, petitioner department filed a Special Leave Petition (SLP) before the Supreme Court for considering unjust enrichment before making the assessee eligible for such refund amount.

2) Issue

Whether unjust enrichment arises in case of refund of excess differential amount paid in the pursuance of the show cause notice?

3) Held

It was held that the assessee all through has been paying duty under Heading 59.02 and so it is obvious that the assessee did not recover any duty from the consumer under Heading 59.09 at least till the date of issue of show cause notice which was issued in February 1993. Hence, amount recovered from the assessee by the department cannot be required to be refunded to the consumer. The Court also relied on the decision of *Commissioner of Central Excise, Hyderabad v. I.T.C. Ltd. in dismissing the SLP.*

{2014 (301) E.L.T. 161 (S.C.) COMMISSIONER OF CENTRAL EXCISE-IV, KOLKATA v. MADURA COATS LTD.}

3. An abnormal delay cannot be condoned on the ground that the file was moving from one Department/Officer to another

1) Facts

There petitioner (Government Authorities) filed the Special Leave Petition (SLP) but there was an abnormal delay of 481 days in filing in such SLP and therefore the petitioner filed an application for condonation of delay thereof. In the said condonation application, the petitioner attributed the delay to moving of file from one Department/Officer to other.

2) Issue

Whether an abnormal delay be condoned on the ground that the file was moving from one Department/Officer to another?

3) Held

Relying upon the case of *Postmaster General and Ors. v. Living Media India Ltd. [2012 3 SCC 563 =2012 (277) ELT 289 (SC)*] where the Court had deprecated such practices on the part of the Government Authorities/Department, it was held that unless they have reasonable and acceptable explanation for the delay and there was *bona fide* effort, there is no need to accept the usual explanation that file was kept pending for process. The law shelters everyone under the same light and should not be swirled for the benefit of a few. Accordingly, considering such ground of delay as an unacceptable reason, the SLP was dismissed.

{2014 (302) E.L.T. 26 (S.C.) STATE OF U.P. v AMAR NATH YADAV}

4. Whether Interest and Penalty can be levied on Credit taken but not utilised till reversal?

1) Facts

The respondent is a manufacturer of fibre glass and some other products and is entitled to utilise CENVAT credit facilities. During the relevant period, the respondent has taken CENVAT credit facilities erroneously and the same has been reversed. Show cause notice was issued holding that the respondent is bound to pay interest and penalty and for the purpose of taking the credit. The demand in the show cause notice was upheld in Order-in-Original. The Order-in-Original has been challenged before the Commissioner (Appeals). The Commissioner of Appeals has partly set aside the penalty and an appeal was preferred before the CESTAT. The CESTAT, set aside the entire claim of the Department. Against this order passed by the CESTAT, the Department has filed this Civil Miscellaneous Appeal on the following substantial questions of law:

"1. Whether interest is recoverable or not from the manufacturer in terms of Rule 12 of erstwhile CCR, 2002, and Rule 14 of CCR, 2004 when the CENVAT Credit has been taken wrongly by the manufacturer but kept unutilised, when the said Rules specifically state that where the CENVAT credit has been taken or utilized wrongly or has been

erroneously refunded, the same along with interest shall be recovered from the manufacturer?

1. Whether penalty is imposable or not on the manufacturer in terms of Rule 13 of erstwhile CCE, 2002 and Rule 15 of CCR, 2004 when the CENVAT credit has been taken wrongly, when the said rules specifically state that if any person, takes CENVAT credit in respect of input or capital goods, wrongly or contravenes any of the provisions of these rules in respect of any input or capital goods, then, all such goods shall be liable to confiscation and such person, shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention has been committed, or ten thousand rupees (as it stood at the material time), whichever is greater?"

2) Issue

The short point involved in the present case is as to whether a mere taking of CENVAT credit without actually using it, would carry interest as well as penalty?

3) Held

The entire argument put forth by the Appellant/Department is based upon the decision reported in 2012 (25) S.T.R. 184 (SC) *(Union of India vs. Ind-Swift Laboratories Limited)*

The Court perused the entire decision reported in 2012 (26) S.T.R. 204 (Karnataka) *(Commissioner of Central Excise & S.T Bangalore vs. Bill Forge Private Limited)* and ultimately found that mere taking of CENVAT credit facilities is not at all sufficient for claiming of interest as well as penalty. Rule 14 of the CENVAT Credit Rules has been subsequently amended, wherein it has been clearly stated as "taken and utilised". Therefore it was quite clear the mere taking itself would not compel the assessee to pay interest as well as penalty. The subsequent amendment has given befitting answer to all doubts existed earlier. Therefore it was quite clear the mere taking credit itself would not compel the assessee to pay interest as well as penalty.

{2014-TIOL-466-HC-MAD-CX, THE COMMISSIONER OF CENTRAL EXCISE, MADURAI v. M/s STRATEGIC ENGINEERING (P) LTD}

5. Whether recovery proceedings can be initiated before expiry of time to file the appeal?

1) Facts

The Petitioner filed petition under Article 226 of the Constitution of India assailing the communications dated 22nd January, 2014 and 23rd January, 2014 issued by Respondent no By the impugned communications the Assistant Commissioner of Service Tax has called upon the Petitioner to reverse CENVAT credit of Rs.22.28 crores and also pay the applicable interest and penalty, as confirmed by the Order. The Assistant Commissioner of Service Tax called upon the Petitioner to comply with the order within two days, failing which he threatened to take coercive action to recover the dues. The Petitioner informed the Assistant Commissioner of Service Tax that they are in receipt of the Order in Original and they are in process of preferring an appeal and a stay application to the Tribunal. The Petitioner also brought to the notice of the Assistant Commissioner to circular dated 1 January 2013 [Circular No.967/01/2013] issued by the Central Board of Excise and Customs, Ministry of Finance (Department of Revenue), Government of India (`CBEC') wherein Entry No.4 of paragraph 2, stipulates that in a situation where no appeal is filed against an order-in-original issued by the Commissioner, the recovery shall be initiated only after expiry of statutory period of 90 days. In spite of the above, the Petitioner was served with communication dated 27th January, 2014 of the Assistant Commissioner of Service Tax calling upon the Petitioner to reverse the excess CENVAT credit along with applicable interest and penalty within two days, failing which coercive proceedings for recovery would be initiated.

2) Issue

If the Revenue is allowed to adopt coercive measures and/or if the assessee is required to pay tax determined immediately i.e. before the statutory period of 3 months expires, would it lead to injustice to an assessee, as his opportunity to obtain a stay from the appellate authority would stand foreclosed?

3) Held

The officers of Revenue would do well to realize that their job is much more than merely collecting the tax. They are officers of the State, administering the Finance Act, 1994 and fairness in approach to the taxpayers and acting in accordance with the Rule of Law is a *sine qua non* in discharge of all its functions.

It was held that the impugned communications are issued without waiting for the statutory period of three months provided to enable the filing of an appeal and stay application to the Tribunal is over. This is contrary to the circular dated 1 January, 2013 issued by CBEC. The impugned communications, to say the least, is high handed. The statute has advisedly provided a period of three months to an assessee to file an appeal before the Appellate Authority and also to obtain a stay. This is with a view to enable the assessee to seek proper advice and consider opinion on the adjudication order before taking a decision and then challenging the adjudication order in appeal proceedings.

In case, the Revenue is allowed to adopt coercive measures and/or if the assessee is required to pay tax determined immediately, it would lead to injustice to an assessee, as his opportunity to obtain a stay from the Appellate Authority would stand foreclosed. Moreover, the inherent right of an Appellate Authority to stay the order being appealed against would be rendered futile.

The following order was passed:

(i) The impugned communications issued by the Assistant Commissioner of Service Tax were quashed and set aside;

(ii) The Revenue authorities were restrained from adopting any coercive proceedings to implement the order-in-original of the Commissioner of Service Tax till the statutory period of three months from the date of communication of the adjudication order had expired;

(iii) In the event the Petitioner files an appeal and a stay application within the statutory period before the Tribunal, then the Revenue authorities shall not adopt any coercive procedure for recovery of tax dues in terms of the order-in-original, till the disposal of stay application by the Tribunal.

{2014-TIOL-147-HC-MUM-ST, TATA TELESERVICES (MAHARASHTRA) LIMITED Vs THE MINISTRY OF FINANCE, DEPARTMENT OF REVENUE AND OTHERS}

6. Whether assessee is eligible for drawback if duty is paid on inputs after issue of show cause notice?

1) Facts

The petitioner is a Public Limited Company incorporated under the Companies Act, engaged in manufacture and export of skimmed milk powder, full cream milk powder, butter, oil etc. The petitioner was sanctioned drawback and the amount was also paid to the petitioner. Later on notices were issued to the petitioner for recovery of the amount on the ground that the petitioner was not eligible to receive drawback under Rule 16 of Customs & Central Excise Duties Drawback Rules, 1995 (hereinafter referred to as the 'Rules of 1995'). The petitioner submitted reply and thereafter Assistant

Commissioner of Custom ICD, Malanpur has held that the petitioner was not eligible to receive drawback. Consequently, the petitioner was ordered to deposit the amount with interest. It is an admitted fact that the petitioner imported MS drums and multi wall papers the material used in the manufacture of skimmed milk powder, full cream milk powder, butter oil etc. The petitioner initially did not pay excise duty on the aforesaid material. Subsequently, a show cause notice was issued to the petitioner and the petitioner paid the excise duty on MS drums and multi wall papers on 28.4.2009.

2) Issue

Whether the petitioner was eligible for drawback where the petitioner had procured inputs viz. MS drums and multi wall papers under the Rule 19(2) of Central Excise Rules 2002 without payment of excise duty and used the same product in the manufacture of goods exported by the petitioner and the duty on such inputs was paid after receipt of show cause notice.

3) Held

The argument of the revenue that since the petitioner paid the excise duty or CENVAT credit subsequently after issuance of show cause notice, hence, the petitioner was not eligible for the aforesaid benefit is not acceptable because there is no such condition mentioned in the proviso to Rule 3(1) of the Rules of 1995.

On the basis of above, the Hon'ble High Court held that since the petitioner had paid the excise duty subsequently to issuance of show cause notice and deposited the CENVAT credit, he was eligible to the benefit of drawback in accordance with the proviso to Rule 3(1) of the Rules of 1995.

{2013-TIOL-329-HC-MP-CX M/s. STERLING AGRO INDUSTRIES LTD MALANPUR v. UNION OF INDIA AND OTHERS}

7. Retrospective application of validating status.

1) Facts

Assessee filed a writ challenging the retrospective operation of the amendment and validation which relates back to 1st April, 2005 when the principal legislation came into force. It was urged by the assessee that though the legislature had the power to enact legislation both prospectively as well as retrospectively, the reasonableness of retrospective legislation can be scrutinised in the facts of each case. In the present case, what was in issue was not a tax imposed but an incentive scheme. An unambiguous benefit was available under the Package Scheme of Incentives of 1993 in accordance with the intent of the scheme. In such a situation, it was not open to the State Legislature to withdraw a benefit which had been provided only because a power was available. The legislature can enact validating legislation when there was a manifest intent to levy a tax, but when a legislative enactment had been struck down by the Court. In such a situation, what a validating enactment does was to remove the deficiency or the cause of invalidity. However, a fresh levy of tax or the withdrawal of an exemption, unambiguously granted was never permissible even by way of validating legislation. A validating enactment only legalises a levy already imposed, but does not impose a fresh tax. The State legislature has by enacting section 93 in its amended form, sought to collect a tax after the Petitioners have taken the benefit of the exemption and passed on the benefit, which is unreasonable. The retrospective amendment to Section 93 does not seek to remove an ambiguity or to correct a cause of invalidity but in essence seeks to impose a fresh levy for the first time which is unreasonable and arbitrary; Under Sub-section (2) of Section 93, the assessee would be liable to pay not only the tax, but also interest and penalty which is manifestly unreasonable. On these grounds it had been urged that the

amending and validating provisions offend Articles 14 and 19(1)g of the Constitution.

2) Issues

Whether in the present factual matrix, the validating legislation has cured the vice that was noted in the judgment of this Court?

Whether the penal provisions can operate retrospectively in the guise of validating statues?

3) Held

In the judgment of the Division Bench of this Court in Pee Vee Textiles, notice was taken of the fact that in the statement of objects and reasons explaining the basis for inserting section 41BB in 2001, "it is clearly stated that the said section is introduced with a view to restrict grant of incentives in proportion to the goods manufactured in the expansion unit located in the backward areas of the State". This legislative intent, as held in the judgment of the Division Bench, was not effectuated by the framing of rules by the State Government. Finding that there were no rules prescribing the ratio which would determine the proportion of the total turnover of sales and purchases of the unit that would be allowable for incentives, the Division Bench in its judgment dated 13 October 2008 came to the conclusion that the Deputy Commissioner was not justified by means of an administrative circular in imposing a ceiling on the utilisation of incentives under the 1993 Scheme in proportion to the production attributable to the newly acquired fixed assets. This anomaly also led to the quashing of the administrative circular issued by the State Government on 17th January, 1998 by a judgment of a Division Bench dated 19 June 2009 in *Mirc Electronics Limited v. State of Maharashtra.*

This anomaly has been corrected by the state legislature by the enactment of Maharashtra Act 22 of 2009. The fact that a draft rule which had been formulated at an anterior point in time had not been converted into an operative piece of subordinate legislation cannot possibly override the power of the state legislature to enact legislation which falls within its legislative competence. There can be no estoppel against the legislature. It is legitimately open to the legislature to enact validating legislation with retrospective effect to cure a deficiency which was noted in the judgment of the Court as a result of which the legislative intent of granting incentives *pro rata* could not be effectuated. The legislature has stepped in to cure the deficiency. The validating legislation and the amendment lay down the manner in which proportionate incentives would be computed. Such a course of action is legitimately open and cannot be regarded as being arbitrary or as violative of Article 14 or 19(1)(g) of the Constitution. The principle of allowing *pro rata* incentives subserves the object of the legislation. If the legislature has, as in the present case, determined that the purpose of the Package Schemes of Incentives should or would be achieved by allowing incentives to be computed on a proportional basis, that legislative assessment cannot be regarded as unconstitutional.

The retrospective operation of the penalty with effect from 1st April, 2005 would be harsh. A penalty is in the nature of a penal or quasi-penal exaction. A penalty cannot be imposed merely because it is lawful to do so. The imposition of a penalty for the period prior to the amendment of Section 93 with retrospective effect would be arbitrary.

{2013-TIOL-473-HC-MUM-VAT M/s JINDAL POLY FILMS LTD & ANR v. THE STATE OF MAHARASHTRA & ORS}

8. Classification of the oil in bunkers in the engine room of the ship ?

1) Facts

The assessee is engaged in importing ships for breaking. A show cause notice was issued seeking to show cause as to why duty in respect of movable gears, stores and bunkers leviable under section 12 of the Customs Act, 1962 should not be recovered under section 28 of the Act. The Adjudicating Authority as well as the Commissioner held that duty in respect of movable gears and stores was to be assessed with the vessel under Heading 89.08 of the Customs Tariff Act, 1975, however, fuel and oil kept in the engine room cannot be considered as oil in engine or machinery and hence cannot be classified under the same heading as a part of the vessel. The assesse succeded before the Tribunal which held that fuel contained in the engine room tanks should be classifiable with the ship.

2) Issue

Whether the bunkers containing oil were to be treated as part of the vessel's machinery so as to attract Entry No. 89.08 of the Schedule to the Customs Tariff Act, 1975?

3) Held

The Hon'ble High Court upheld the order of the Tribunal following the decision in *Priya Holding Pvt. Ltd. v. Commissioner 2013 (288) E.L.T 347 (Guj.)* and held that fuel and oil contained in the bunkers i.e. in the engine room tanks are included in the LDT of the vessel and form an integral part of the vessel.

{2014 (302) E.L.T. 382 (GUJ.) COMMISSIONER OF CUSTOMS v. J.M. INDUSTRIES}

9. Excisability and dutiability of Bagasse obtained during the manufacturing activity of sugar from sugarcane

1) Facts

The company was engaged in the manufacture of sugar from sugarcane. It was also obtained bagasse & press mud during the course of Manufacture of sugar. A recovery of 8% was sought to be made by the department on the amount of waste bagasse and press mud cleared by it.

2) Issue

Whether bagasse and press mud which are obtained in the course of manufacture of sugar from sugarcane and mentioned in the Central Excise Tariff Act, are final products of the manufacturer?

Whether merely on account of being marketable duty can be imposed on bagasse considering it is an agricultural waste?

3) Held

The appeal of the revenue was dismissed being devoid of any merits and the controversy being settled by earlier decisions. The Hon'ble High Court placed reliance on the following decisions:

a. Balrampur Chini Mills Ltd. v. UOI

b. CCE v. Mahalaxmi Sugar Mills

c. CCE v. U.P. State Sugar Corporation.

It was held that bagasse is a waste product and no duty can be imposed over it. Further, bagasse and press mud are not final products of the manufacturer.

{2014 (302) E.L.T. 346 (ALL.) COMMISSIONER OF CENTRAL EXCISE, LUCKNOW v. KISAN SAHAKARI CHINI MILLS LTD.}

INCOME TAX APPELLATE TRIBUNAL

STATEMENT SHOWING THE LIST OF SPECIAL BENCH CASES PENDING AS ON 30-5-2014.

Sr. No.	Appeal No.	Name of the Assessee	Points involved	Remark
	MUMBAI BENCHES			
1	ITA No. 5568 & 5569/M/1995 & 6448/M/1994 A.Y. 1991-92 to 1993-94	DHL Operations B.V. Netherlands	"Whether, or not, on the facts and in the circumstances of the case and on a proper interpretation of Art. 5.5 and Art. 5.6 of the DTA (with Netherlands) and having regard to its activities, it can be said that Airfreight Ltd. was the agent of the assessee so that it can be held that the assessee had a PE in India? And if the answer is in the affirmative, whether or not the income from inbound shipments can be treated as attributable to the PE?"	Fixed on 16-6-2014
2	ITA 5996/M/93 ITA 1055/M/94 ITA 1056/M/94	GTC Industries Ltd.		Fixed on 14-7-2014
	DELHI BENCHES			
1	ITA No. 1976/ Del/2006	M/s C.L.C. & Sons Pvt. Ltd.	"Whether, on the facts and circumstances of the case, assessee is entitled to claim depreciation on the value of all intangible assets falling in the category of "any other business or commercial rights", without coherence of such rights with the distinct genusis/ category if intangible assets like know how, patents, copyrights, trade marks, licences and franchises as defined u/s 32(1) (II) of the I.T. Act."	Fixed after the disposal of Hon'ble High Court in the case of CLC Global Ltd. which is pending before Hon'ble High Court.

Sr. No.	Appeal No.	Name of the Assessee	Points involved	Remark
2	ITA Nos. 1999 & 2000/Del/2008	M/s National Agricultural Co-op. Mkt. Federation of India, New Delhi.	"Whether on the facts and circumstances of the case, where claim of damages and interest thereon is deputed by the assessee in the court of law, deduction can be allowed for the interest claimed on such damages while computing business income."	Fixed on 11-8-2014
3	ITA No. 163/ ASR/2003 A.Y. 1998-99	Shri Tejinder Singh (HUF)	"Whether on the facts and circumstances of the case, consideration claimed to have been received on account of sale of jewellery etc. relating to the disclosures made under VDI Scheme, 1997, can be considered to be the income of the assessee from undisclosed sources under any of the provisions of Income-tax Act, 1961?"	Block for 6th Months
	KOLKATA BENCHES			
1	ITA Nos.1548 & 1549/Kol/2009 A.Ys.2003-04 & 2004-05	M/s. Instrumentarium Corporation Ltd.	1. "Whether, on the facts and in the circumstances of the case, no arm's length rate of interest was required to be charged on the loan granted by the non-resident assessee-company to its wholly owned subsidiary Indian company M/s Datex Ohmeda (Indian) Pvt. Ltd. (Datex)?"	Adjourned *sine die*
			2. "Whether, in the given facts and circumstances of the case, CBDT Circular No. 14 of 2001 [252 ITR (St.) 104] and Taxation Ruling TR 2007/1 issued by Australian Taxation Office are relevant in the context of Transfer Pricing Regulations of India, in particular to the case of the assessee?	
			3. "Whether, setting off of loss with future profits and not assessing the interest income in the hands of the assessee on arm's length price will cause real loss to the Govt. exchequer?"	

Sr. No.	Appeal No.	Name of the Assessee	Points involved	Remark
	CHENNAI BENCHES			
1	Int. T.A. 101 & 161/Mds/2003 A.Y. 1999-2000 A.Y. 2000-01	M/s Bharat Overseas Bank Ltd., Chennai	"Whether, the amount collected from the borrowers to meet the interest tax liability could be taxed as interest under the Interest Tax Act, 1974?"	Adjourned *sine die*
	AHMEDABAD BENCHES			
1	ITA 1952/AHD/ 2012	Shri Himanshu V. Shah, Ahmedabad.	"Whether deduction u/s 80-IA (4) (ii), which is available to BASIC Telecom Services Providers is also available to Franchisee of such Basic Service Providers also, which is only putting EPEX system without creating infrastructure in the field of Telecom?"	Adjourned *sine die*
2	ITA Nos. 2668, 2669 & 2670/ Ahd/ 2012 & C.O. Nos. 10, 11, 12/ Ahd/2012	The People's Co-op. Credit Society Ltd., Deesa.	1."Whether the assessee being a Co-operative Credit Society, in view of its function in providing credit facilities to its members, is into the business of banking and is it not being impeded or hit by the provisions of section 80P(4) of I.T. Act, 1961? Further, in view of section 5 of Banking Regulation Act, 1949 and section 2 of NABARD Act, 1981, whether this Co-operative Credit Society is carrying on the Banking Bank?" Business, and for all practical purposes acting like a Co-operative	Adjourned *sine die*
			2. "Whether a Co-operative Credit Society being providing credit facility to its members can be held as banking function, so as to deny the benefit of section 80P(2)(a)(i) by invoking the provisions of section 80P(4)?"	
	HYDERABAD BENCHES			
1	ITA No. 18/H/ 2012	M/s Jagathi Publication Pvt. Ltd., Hyderabad	To hear & decide entire appeal	Adjourned *sine die*

INCOME TAX APPELLATE TRIBUNAL MUMBAI

SUB:- Figures of institution, Disposal and Pendency of Appeals as on 1-6-2014.

Bench	No. of Benches	No. Members	Institution	Disposal	Pendency	SMC Pendency
Mumbai	12	21	1030	374	23814	38
Pune	2	04	299	135	4537	31
Nagpur	1	-	43	0	1104	21
Panaji	1	02	37	28	362	0
Delhi	9	13	788	347	17132	107
Agra	1	02	36	12	361	1
Bilaspur	1	-	51	0	919	12
Lucknow	2	01	196	132	1551	13
Allahabad	1	-	82	36	1286	54
Jabalpur	1	-	137	7	757	30
Kolkatta	5	06	491	74	7289	127
Patna	1	-	40	0	827	30
Ranchi (Jharkhand) Circuit Bench	1	-	47	0	384	18
Cuttack	1	02	91	65	964	19
Guwahati	1	-	62	0	820	79
Chennai	4	06	366	197	3208	32
Bengaluru	3	05	215	101	4211	30
Kochi	1	02	76	37	741	15
Ahmedabad	4	08	487	209	11508	186
Indore	1	02	192	6	1715	26
Rajkot	1	02	53	12	1399	54
Hyderabad	2	03	351	215	2451	26
Vishakhapatnam	1	-	111	0	1502	0
Chandigarh	2	03	90	93	2317	17
Amritsar	1	02	104	54	804	11
Jaipur	2	01	94	62	2249	26
Jodhpur	1	02	91	83	436	0
Total	**63**		**5660**	**2279**	**94648**	**1003**

TWO DAY NATIONAL TAX CONFERENCE AT NAGPUR

ON 23RD AND 24TH AUGUST 2014

ORGANISED BY

ALL INDIA FEDERATION OF TAX PRACTITIONERS – WESTERN ZONE

JOINTLY WITH

THE SALES TAX PRACTITIONERS ASSOCIATION OF MAHARASHTRA, MUMBAI;
SALES TAX BAR ASSOCIATION, NAGPUR &
VIDHARBHA TAX PRACTITIONERS ASSOCIATION, NAGPUR

Theme : Learn, Relax & Rejuvenate

All India Federation of Tax Practitioners (Western Zone) jointly with above organisations are pleased to announce Two Day National Tax Conference at Nagpur on 23rd and 24th August, 2014. The venue is "Suraburdi Meadows", which is a new and unique resort, spread over 35 acres, and is a lush green leisure destination with scenically located hillocks, winding roads and pristine lake water. This retreat destination having serene and tranquil atmosphere, is one of its kind in entire Central India. We strongly recommend all members not to miss this opportunity of learning with complete relaxation. In fact, we suggest all members to come with family one day in advance for total rejuvenation and have quality time with family (as no Idiot Box in rooms, so free from daily soaps)! We have negotiated attractive package for the delegates and their families. Conference details are:

Days & Dates : Saturday, 23rd August, 2014 (Full Day)
Sunday, 24th August, 2014 (Half Day)
AIFTP - NEC Members - NEC Meeting on Friday 22nd Aug., 2014 - EVENING

Venue : SURABURDI MEADOWS, Nagpur-Amravati Road, Near Suraburdi Lake, Waddhamna, Nagpur - 440023 Maharashtra
Approx. 20 kms. from Nagpur Airport and also from Nagpur Railway Station (Nagpur is well connected with major cities by Air / Rail / Road. Details will be mailed to the requesting delegates)

Delegate Fees :

Members of AIFTP, STPAM, STBA & VTPA	**Non-Members**
For Non-Residential Delegate – ₹ 3,000/- per person	For Non-Residential Delegate – ₹ 4,000/- per person
For Residential Delegate – ₹ 4,500/- per person	For Residential Delegate – ₹ 5,500/- per person

For Accompanying Spouse / Family Member - ₹ 3,500/- per person.
(Package deal inclusive of one night stay at the resort on twin sharing basis.)

[The above rates are inclusive of two breakfast (23rd & 24th), two lunch (23rd & 24th) and gala dinner on 23rd night, along with Entertainment Evening. It also includes (for delegates) course material, tea & coffee during the conference and delegate kit. For the spouses / family members, it includes sightseeing]

Delegates wishing to stay extra will get the same accommodation @ ₹ 1500/- per person on twin sharing, excluding food charges

The tentative schedule of the conference is as under:-

DAY 1 – SATURDAY, 23RD AUGUST, 2014

9.30 a.m. to 10.00 a.m. – Registration & Fellowship
10.00 a.m. to 10.45 a.m. – Inaugural Session
10.45 a.m. to 12.00 noon – **1st Technical Session**
Topic – Service Tax Issues in Reverse Charge Mechanism & issues of CENVAT Credit under Service Tax
Paper Writer – Mr. Jitendra Motwani, Advocate, Mumbai
Chairman – Shri Bharat Ji Agrawal, Sr. Advocate, Allahabad

12.00 noon to 1.30 p.m. – **2nd Technical Session**
- Topic – Update on liability of Developers & Works Contractor
- Paper Writer – Shri Nitin S. Shah, Advocate, Pune
- Chairman – Shri Vinayak Patkar, Advocate, Mumbai

1.30 p.m. to 2.30 p.m. – Lunch Break

2.30 p.m. to 3.45 p.m. – **3rd Technical Session**
- Topic – Issues of Inter-State Sales *vis-à-vis* Branch Transfer & practical difficulties & solutions
- Paper Writer – Shri H. C. Bhatia, Advocate, New Delhi
- Chairman – Shri P. C. Joshi, Advocate, Mumbai

3.45 p.m. to 4.00 p.m. – Tea Break

4.00 p.m. to 5.15 p.m. – **4th Technical Session**
- Topic – Capital Gain *vis-à-vis* transactions in Immovable Property
- Paper Writer – CA. (Dr.) Girish Ahuja, New Delhi
- Chairman – Shri N. M. Ranka, Sr. Advocate, Jaipur

ENTERTAINMENT PROGRAMME

7.00 p.m. to 7.30 p.m. – Fellowship
7.30 p.m. onwards – Musical Programme
8.30 p.m. onwards – Gala Dinner

DAY 2 – SUNDAY, 24TH AUGUST, 2014

9.30 a.m. to 10.45 a.m. – **5th Technical Session**
- Topic – Deemed Income under sections 56(2), 68 & 69 of Income-tax Act, 1961
- Paper Writer – CA. Pradip Kapasi, Mumbai
- Chairman – CA. Jaydeep Shah, Nagpur, Past President, ICAI.

10.45 a.m. to 12.00 noon – **6th Technical Session**
- Topic – Input Tax Credit with special reference to Rules 53(6), 54(g) & 54(h)
- Paper Writer – CA. Kiran Garkar, Mumbai
- Chairman – CA. Ashok Chandak, Nagpur, Past President, ICAI.

12.00 noon to 12.15 p.m. – Tea Break

12.15 p.m. to 1.30 p.m. – **Brains' Trust Session**
- Trustees – Shri Chandrakant J. Thakar, Advocate, Nagpur (Income Tax)
- Shri S. K. Poddar, Advocate, Ranchi (Income Tax)
- Shri Mukul Gupta, Advocate, Ghaziabad (Service Tax)
- Smt. Nikita R. Badheka, Advocate, Mumbai (Sales Tax/CST)
- Shri Vikram Nankani, Advocate, Mumbai (Service Tax, Excise)
- Shri S. S. Gandhi, Advocate, Nagpur (Sales Tax/CST)

1.30 p.m. – Lunch

For further information, please contact the below Office Bearers:

1. Vipul B. Joshi, Chairman, AIFTP – WZ (Mob.) 09820045569
2. Chirag S. Parekh, Vice Chairman, AIFTP – WZ (Mob.) 09821634128
3. Deepak R. Shah, Chairman, Education Committee, AIFTP – WZ (Mob.) 09820148536
4. Pravin R. Shah, Secretary, AIFTP – WZ (Mob.) 09821476817
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6. Mahesh Mundada, President, STBA, Nagpur (Mob.) 09423685325
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