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Article

Service tax on grant-in-aid

By **Geetika Srivastava**

'Grant-in-aid or donation is free funding provided at the discretion of the grantor without any expectation in return. Normally, grant-in-aid/donation is voluntary and gratuitous payment independent of the services provided by the person receiving the grant.'

The above definition of grant-in-aid or donation implies that the grant-in-aid or donation is normally given as an aid without expecting anything in return. It means that there is no reciprocal service by the receiver of the grant in return for such grant. Yet in the service tax law there is no clarity about the taxability of grant-in-aid.

It is well understood that service tax is applicable on service provided or to be provided. The entire concept of applicability of service tax is therefore linked to the provision of service. Thus, for levying service tax on any transaction, it is significant that there should be a provision of some service in the said transaction.

Position prior to 1-7-2012

The provisions of the Finance Act, 1994 as they existed prior to the introduction of the concept of negative list, allowed for a levy of service tax on any taxable service provided or to be provided. Prior to the introduction of the negative list concept in service tax law, services were being taxed as per the services individually defined under the Section 65(105) of the Finance Act, 1994. Any activity not falling within the specified taxable services was not subject to the levy of service tax. Though there was no doubt that service tax was leviable only on provision of service, taxability of grant-in-aid always remained a matter of dispute between the department and the assessees.

In the past, it can be seen that the department litigated non-payment of service tax on receipt of grant-in-aid on the premise that such grant was received for the provision of a service. However, CBEC in its Circular No. 127/9/2010- ST, dated 16-8-2010, relating to taxability of donations received for rendering commercial training and coaching services, expressed its view that donation or grant-in-aid is not meant for a specific activity but generally meant for a charitable cause championed by the registered foundation. It was Board's view that since the donation or grant-in-aid is not linked to a specific trainee or training, service tax is not leviable on such payment.

From the above it can be seen that while generally the department litigated the issue of taxability of grant-in-aid, CBEC's Circular referred above provided relief to the assessees. Thus there was no clarity on the legal position of the taxability of grant-in-aid.

In some cases the courts decided in favour of assessees where the link between the provision of service in return for the grant was missing. In one such case, where the grant-in-aid was received by the assessees from the State Government for the implementation of welfare projects for the poor and minorities, it was held that there can be no service tax levy on the ground that the activities undertaken by the assessee did not amount to provision of any taxable service. [*APITCO* v. *Commr. of Service Tax,* 2010 (20) S.T.R. 475 (Tri.-Bang.)]

One can therefore form a view that a grant-in-aid or donation will become taxable only when a service is provided in return for it and if such a link is missing then there is no question of levying service tax.

Position w.e.f. 1-7-2012

It was expected that the new service tax regime based on negative list will bring clarity on this disputed issue. However, the new provisions brought in new challenges for the tax payer. Section 65B (44) of the Finance Act, 1994 defines the term 'service' to mean any activity carried out by a person for another for a consideration and includes a declared service. Some activities have been specified in the negative list of services on which no service tax is leviable, and some specified services have been exempted from the levy of service tax under the mega exemption Notification No. 25/2012-S.T.

A bare reading of the provisions in the new regime indicates that many activities have been included in the service tax net which were not being taxed earlier. But the ambiguity that existed earlier about the taxability of grant-in-aid continues in the new regime. Grant–in-aid is neither covered in the negative list of services nor exempted under the mega exemption notification. It seems that such payments have not been consciously kept out of realm of service tax.

Even today after the introduction of new scheme of taxation, the taxability of grant-in-aid revolves around the nexus/reciprocal theory. This is because of the use of words 'activity carried out by a person for another for a consideration' which makes it imperative to look for the link between the service and the grant. In order to identify such a link between grant and service, the concept of quid pro quo shall be kept in mind which means 'something in return of something'.

It is therefore evident that the new service tax law has also not been able to resolve the controversies relating to taxability of grant-in-aid and the ambiguities relating to the subject still continue.

Position under the laws of other countries

The provisions for levy of VAT on services in different countries are generally similar to the provisions existing in India. Generally, VAT is leviable on taxable supplies, that is, the levy is attracted when there is a supply. While researching on judgments involving the applicability of tax on grant-in-aid it is observed that the issue has not been free from doubt in different countries. The courts have taken divergent views under different facts and circumstances. In one case, the grant paid by a local authority to a trust engaged in providing training to physically and mentally disabled was not linked with the supplies made by the trust and hence, was kept out of the scope of VAT *[Ref. Trustees of the Bowthorpe Community Trust reported in LON/94/1276A].* In another case, it was held that the activities carried out by the appellant were outsourced to it by the funder organizations and were connected with the grant. Hence the services provided by the appellant in return for payments described as grants were supplies attracting the levy of tax *[Ref. Hope in the Community (HITC), Anglia Energy Conservation Ltd., Interglow Ltd.]*

In the light of above, it can be construed that the taxability of grant-in-aid will directly depend on the existence of its nexus with service provided in return. It is important to note that there is no thumb rule here for identifying such nexus between the grant received and the services provided. Hence, the taxability of grant-in-aid will always depend upon the facts and circumstances of the case.

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CUSTOMS

Notifications & Circulars

Setting up of public/private bonded warehouses for gems and jewellery sector: Private/Public warehouses for gems/jewellery sector have been allowed to be set up in SEZ/DTA for the purpose of import and re-export of specified goods. DGFT Notification No. 30(RE:2012)/2009-2014, dated 31-1-2013 issued in this regard, inserts Para 4A.16A in Foreign Trade Policy 2009-14.

Deemed export benefits for supplies to mega power projects clarified: Deemed export benefits will be available for supply to only 111 specified mega power projects as per DGFT Policy Circular No. 14 (RE-2012)/2009-14, dated 4-2-2013. Para 8.2(f) of Foreign Trade Policy provides for grant of deemed export benefits to supplies made for setting up a mega power project, as specified in Sl.No.507 of Notification No. 12/2012-Cus. dated 17-3-2012 and Notification No. 49/2012-Cus., dated 10-9-2012 has amended Sl. No. 507 whereby benefit of zero duty import is made available only to 111 mega power projects, specified in List 32A, appended to Notification No. 49/2012-Cus.

'Declaration of Intent' on shipping bills for claiming Chapter 3 benefits relaxed for period 1-1-2011 to 2-6-2011: Benefits under Chapter 3 of Foreign Trade Policy have been allowed even if 'declaration of intent' is not mentioned in the shipping bills filed under Chapters 4, 5 or 6 of FTP, during period 1-1-2011 to 2-6-2011. Earlier, vide Public Notice No. 82, dated 16-8-2010, condition of mentioning 'declaration of intent' on the shipping bills was made mandatory for claiming benefits under Chapter 3 of Foreign Trade Policy (FTP) w.e.f. 1-1-2011. On the other hand, Public Notice No. 53, dated 3-6-2011, dispensed with the said condition from 3-6-2011. As per DGFT Policy Circular No. 13 (RE-2012) / 2009-14, dated 31-1-2013 issued in this regard, last date for filing fresh requests for grant of Chapter 3 benefits is 30-4-2013 and the same will not be subject to any late fee.

Ratio decidendi

Mere non-payment of duty is not collusion, willful misstatement or suppression of facts: The Supreme Court has held that non-payment of the duty is not equivalent to collusion or willful misstatement or suppression of facts by the assessee so as to invoke extended period of demand under proviso to Section 28 of the Customs Act, 1962. It noted that the said section covers two distinct situations viz. inadvertent non-payment of duty, and deliberate default on the part of the assessee and that while former is in the main body of Section 28 and is met with the limitation of specified months, the latter can be found in the proviso to the section with the limitation period of 5 years. The Court also held that the burden to prove that the conduct of the assessee is malafide is upon the Department. [*Uniworth Textiles Ltd.* v. *Commissioner* - 2013 TIOL 13 SC-Cus].

Storage of duty free goods by duty free shops: CESTAT, Mumbai has held that when goods are transferred from the private bonded warehouse to the duty free shops, the bond is required to be valid only till the removal of the goods from the bonded warehouse. The Tribunal upheld the Order of Commissioner (Appeals) which had held

that there is no requirement of execution of fresh bond for sale of goods from the duty free shops. The Department's argument that the bond should be kept valid till the time goods are sold from such shops, was rejected. [*Commissioner* v. *India Tourism Development Corporation Ltd.* - 2013 TIOL 117 CESTAT(Mum)].

Valuation – Prices of skimmings/ash when not comparable: CESTAT, Delhi has held that price for zinc skimming imported from USA cannot be applied for prices of such goods or zinc ash imported from other countries. It was noted that the Department had not adduced any evidence to prove that zinc content in goods received from different countries was same. The Tribunal in this case also held that CVD and SAD wrongly paid cannot be adjusted against short fall in other types of Customs duty paid at the time of import. [*Deekay Exports* v. *Commissioner* - 2013-TIOL-51-CESTAT-DEL].

Confiscation and penalty when goods exported without 'Let Export Order': CESTAT, Mumbai has held that in cases where goods are exported without the LEO, there is clear violation of the provisions of the Customs Act and hence the goods are liable for confiscation and penalty can be imposed on the exporter and the CHA. It was noted that Sections 50 and 51 of the Customs Act cast a responsibility on the exporter as well as his agent to ensure the goods are exported after completion of all customs formalities such as assessment, examination and issue of 'Let Export Order' (LEO). The Tribunal further held that no mens rea is required for imposition of penalty under Section 114. [*Patkar & Sons Shipping Agency Pvt Ltd.* v. *Commissioner* - 2013-TIOL-91-CESTAT-MUM].

Printed material with textile materials pasted therein is classifiable as books: CESTAT, Mumbai has held that printed material having textile material pasted in it would be classifiable as books. The Tribunal observed that merely because the textile material occupies more space it cannot be stated that they are not books. To hold so the Tribunal considered the example of a book containing large photographs and noted that merely because such printed material contains photographs, it cannot be considered as a photo album. [*Honesty Subscription Agency* v. *Commissioner* – 2013 TIOL 18 CESTAT MUM].

CENTRAL EXCISE

Ratio decidendi

Recovery during pendency of stay application – CBEC's latest circular stayed: Various High Courts have granted stay of department's proceedings for recovery during pendency of stay applications in cases where the department is seeking to recover confirmed demands based on CBEC's latest Circular No. 967/1/2013-CX, dated 1-1-2013. This circular has so far been stayed by Rajasthan, Madras and Andhra Pradesh High Courts. Recently, the Bombay High Court [*Larsen & Toubro Limited* v. *Union of India,* Writ Petition No. 813 of 2013, decided on 1-2-2013] has dealt with the applicability of this circular and has held that the provisions contained in this circular, mandating the initiation of recovery proceedings 30 days after the filing of an appeal, if no stay is granted, cannot be

applied to an assessee who has filed an application for stay, which has remained pending for reasons beyond the control of the assessee. However where an application for stay has remained pending for more than a reasonable period, for reasons having a bearing on the default or the improper conduct of an assessee, recovery proceedings can be initiated. [*Refer:* 2013 TIOL 67 RAJ, 2013 TIOL 55 MAD., and 2013 TIOL 23 AP.].

Limitation for demand – Extended period not invocable against persons not involved in fraud: The Gujarat High Court has held that Central Excise Act, 1944 does not envisage invocation of extended period of limitation for demand against persons who had nothing to do with fraud, collusion, mis-statement, etc. The court, noting the words 'such person or his agent' in Section 11A of the said Act as extremely significant, held that since the petitioner-exporter was not party to fraud committed by the manufacturer, extended period of limitation was not available to the department for recovery of rebate sanctioned to the exporter. [*Kapadia Enterprise* v. *Union of India* – 2013 (287) ELT 255 (Guj.)].

Refund in case of downward revision of price after clearance of goods: CESTAT, Delhi has held that refund of duty paid in excess will be available if the price of the goods is revised downwards after clearance, when assessee is having a price variation clause in the sale agreement. The Tribunal while holding so relied upon an earlier order in the case of *Universal Cylinders* which was affirmed by the Apex Court [2005 (179) ELT A41 (SC)]. Earlier decision in the case of *Hindustan Wires* was distinguished by the Tribunal holding that the said decision did not consider the price variation clause in the agreement. [*Commissioner* v. *Mahavir Cylinders* – 2013 TIOL 48 CESTAT DEL].

SSI exemption not available when goods sold from branded sale outlets: The Supreme Court has held that the assessee selling goods from the branded sale outlets would not be eligible to exemption under SSI exemption Notification No. 1/93-CE, even when the goods do not physically bear the brand name. The court held that the specified goods sold even without inscription of the brand name would be considered as branded ones when clear connection with brand name is established. The court held that environment or surrounding circumstances need to be taken into account and 'environment' was clarified by the court as being packaging and wrapping of the goods, accessories it is served with, uniform of vendors, invoices, menu cards, hoardings and display boards of outlet, furniture and props used, specific outlet itself in its entirety and other such factors. It was also held that there can be no single formula to determine if a good is branded or not; such determination would vary from case to case. [*Commissioner* v. *Australian Foods India (P) Ltd.* – Supreme Court Judgment dated 14-1-2013 in Civil Appeal No. 2826 of 2006].

Exemption on condition of non-availment of Cenvat credit: CESTAT, Ahmedabad has held that condition of non-availment of Cenvat credit in order to avail exemption is not violated when Cenvat credit availed prior to exercise of option of exemption and lying idle in the books, is not reversed prior to or on exercise of exemption option. The Tribunal noted that there were no inputs or semi-finished goods lying with the assessee when exemption was opted and that the said condition

was only to dissuade the assessee to avail double benefit of exemption as well as Cenvat credit. [*Polycoat Knitters* v. *Commissioner* – 2013 (287) ELT 470 (Tri.-Ahmd.)].

Valuation – Spares cleared for packing, assessable under Section 4 and not Section 4A: CESTAT, Delhi has held that the goods cleared in loose condition to spare parts division for being packed for retail sale cannot be considered as packaged commodity and hence there would not be any requirement to declare MRP on such goods. The Tribunal held that provisions of Section 4A of Central Excise Act, 1944 would not be applicable in the present case. [*Hero Motorcorp Ltd.* v. *Commissioner* – 2013 (288) ELT 82 (Tri. – Del.)].

SERVICE TAX

Ratio decidendi

Sport stadium is not commercial or industrial construction: The Tribunal held that public facilities mean the facilities owned by a state or local government such as public building, structure or system and sports stadium constructed for conducting Commonwealth Youth Games was used for public purpose. The Tribunal, while granting stay, considered the issue as to whether sports stadium could be considered as commercial or industrial construction. It held that merely because some amount was charged for using the facility, it would not become a commercial construction. [*B G Shirke Construction Technology Private Limited* v. *CCE,* 2012-TIOL-210-CESTAT-MUM].

Point of taxation when Service tax hiked: Delhi High Court has held that CBEC Circulars No.158 /9/2012-ST dated 8-5-2012 and No.154 /5/2012-ST dated 28-3-2012, clarifying that the provisions of Rule 7(c) of the Point of Taxation Rules as they existed on 31-3-2012 would apply and therefore service tax rate should be applied as 12%, are erroneous as these were based on old rule which was not in existence from 1-4-2012. The point of taxation in respect of chartered accountancy services, rendered before 31-3-2012 and invoice also issued before 31-3-2012, shall be governed by Rule 4(a)(ii) of the Rules and accordingly, the rate of tax shall be 10% as applicable before 1-4-2012. In this case, the services were rendered before 1-4-2012 and the invoices were raised before that date but payment was received after the said date. [*Delhi Chartered Accountant Society* v. *Union of India*, 2013-TIOL-81-HC-DEL-ST].

C&AG not empowered to audit non-government companies: The Court held that there is no provision in Finance Act, 1994 or in the CAG Act to empower the CAG to audit the accounts of an assessee which is a non-government company, not receiving aid or assistance from any government or government entity. It further held that the government was not empowered under Section 94(2) also to frame rules for audit of the accounts of an assessee by audit team under the Comptroller and Auditor General of India. The court noted that statutory rules [Rule 5A(2)], framed in exercise of power conferred by statute cannot introduce something not contemplated in the statute, from which it

derives its rule making power. [*SKP Securities Ltd* v. *Deputy Director (RA-IDT),* 2013-TIOL-38-HC-KOL-ST].

Refund of credit on inputs/input services used in export goods – Limitation begins from date of settlement of dispute: The Tribunal held that for filing a refund claim in respect of accumulated Cenvat credit on inputs and inputs services used in export goods under Notification No. 5/2006-C.E. within one year from the relevant date, the relevant date shall be the date on which the *lis* ends. It held that the relevant date for the purpose of limitation shall be the date on which the dispute on admissibility of Cenvat credit was settled in favour of the assessee. In this case, reckoning the settlement of dispute as date of commencement of time-limit, the claims filed were held as not time-barred. [*India Trimmings Limited* v. *Commissioner,* 2013-TIOL-144-CESTAT-MAD].

Service tax liability in respect of money transfer service: In the business of money transfer from abroad to India, the company, agent and sub-agents entered into a tripartite arrangement which showed that though the sub-agent's received commission through the agent, it was the company who received the services of sub-agent which the company used in providing money transfer services to its customers located abroad. The service provided by the agent/ sub-agent was held as covered under business auxiliary service and, in the case before the Tribunal, to be treated as export of service. [*Paul Merchants Ltd.* v. *Commissioner,* 2013 (29) S.T.R.257 (Tri.-Del.)].

Valuation – Inclusion of statutory charges and levies: The statutory charges and fees collected by the air transport operator from the passenger shall form part of the gross amount of the air ticket under Section 67 of the Finance Act, 1994. As per CESTAT's order, expenditure incurred on account of statutory levies and charges in providing taxable service shall be treated as consideration for the taxable service and shall be included in the value for payment of service tax. The Tribunal held that for claiming exclusion, the service provider is required to prove that all conditions in the relevant provisions are satisfied and that in the case before it, the appellant had not done so and hence, benefit of exclusion was not available. [*British Airways PLC* v. *Commissioner* - 2013(29) S.T.R.177 (Tri.-Del.)].

VALUE ADDED TAX (VAT)

Notifications & Circulars

Information Technology goods exempted from Entry Tax in Madhya Pradesh: Information Technology goods, as specified in serial number 51 of Part II of Schedule II of the Madhya Pradesh Value Added Tax Act, 2002, have been exempted from payment of whole of Entry tax. This exemption will be available for the period from 14th September, 2012 to 13th September, 2017. Notification No. F-A-3-47-2012-1-V (02), dated 5-1-2013 has been issued under Section 10 of the Madhya Pradesh Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1967 in this regard.

TDS rate enhanced to 4% in Delhi: Rate at which TDS is to be deducted, by any person making payment to a contractor or by a contractor making payment to a sub-contractor, has been enhanced

to 4% in Delhi. Delhi Value Added Tax (Fourth Amendment) Act, 2012, amends Section 36A of the Delhi Value Added Tax Act, 2005 with effect from 16th January, 2013 in this regard. [*Notification No. F.14(13)/LA-2012/law/180-190, dated 28-12-2012 read with Notification No. F.3(9)/Fin.(Rev-1)/2012-13/dsv1/34-39, dated 15-1-2013*].

Andhra Pradesh Value Added Tax Rules, 2005 amended: By Notification G.O.Ms. No. 33, dated 21-1-2013, the Government of Andhra Pradesh has amended Andhra Pradesh Value Added Tax Rules, 2005. The major amendments are:

1. Rule 18 has been retrospectively amended with effect from 14-9-2011. According to the amendment, the rate of tax deduction at source (TDS) has been:-

(i) Increased from 2% to 2.5% on 70% of the amount payable as consideration in respect of contracts for laying or repairing or roads and contracts for canal digging, lining and repairing.

(ii) Increased from 4% to 5% on 70% of the amount payable as consideration in respect of all the other contracts not mentioned in (i) above.

2. Sub-sections (8B) and (11) were added to Section 4 of the APVAT Act, introducing composition schemes in respect of lease transactions (transfer of right to use) and certain transactions of printers. Now by the amendments made to the AP VAT Rules vide the present notification, Rule 17A has been inserted with respect to Section 4(8B) [*relates to leasing*] with effect from 1-4-2005 and Rule 17B has been inserted with respect to Section 4(11) [*relates to printing*] with effect from 1-4-2009.

Submission of information in Form T-2: By Notification No. F.7(433)/Policy-II/VAT/2012/1170-81, dated 31-1-2013, the Delhi Government has extended the effective date for submission of information in Form T-2 with respect to the following dealers as follows:

Class of Dealers	Effective date from which submission of information required in Form T-2
Dealers having GTO ≥ Rs.10 Crores and total liability of tax (VAT plus TDS deduction plus CST) ≥ Rs. 50 Lakhs in the year 2011-12.	1-3-2013
Dealers whose GTO and tax liability (VAT plus TDS deduction plus CST) equals to Rs.10 Crores and Rs.50 Lakhs respectively, during the current year.	1-3-2013 or any future date on which the dealer attains the lower limit of GTO Rs.10 Crores and tax (VAT plus TDS deduction plus CST) Rs.50 Lakhs, whichever is earlier.
All other dealers	1-4-2013

Ratio decidendi

Tax credit reduction for dealers: The Gujarat High Court has held that the reduction in the amount of input tax credit as per Section 11(3)(b) of Gujarat Value Added Tax Act, 2003 shall be made only once

irrespective of the fact that a particular purchased commodity falls in more than one sub-clauses of said Section. In this case polymers and chemicals manufactured in Gujarat were stock transferred to various branches across the country for sale. For the purpose of manufacturing activity the assessee purchased furnace oil chargeable to VAT at the rate of 4% and natural gas and light diesel oil taxable at the rate of 12.5%. Section 11(3)(b) of Gujarat Value Added Tax Act, 2003 provides that the amount of tax credit in respect of a dealer shall be reduced by the amount of tax calculated at the rate of 4% on the turnover of purchases (i) of taxable goods consigned or dispatched for branch transfer or to his agent outside the State, or (ii) of goods taxable which are used as raw materials in the manufacture, or in the packing of goods which are dispatched outside the State in the course of branch transfer or consignment or to his agent outside the State (iii) of fuels used for the manufacture of goods. The taxable goods purchased by assessee being covered in sub-clauses (ii) and (iii) of Section 11(b), the issue before the Gujarat High Court was whether tax credit can be reduced more than once, if a particular item falls in more than one of the sub-clauses of Section 11(3)(b). The court observed that the intention of the legislature can be gathered from the proviso to Section 11(3)(b) which provides that where the rate of tax of the taxable good is less than 4%, then the reduction of tax credit shall only be to the extent tax credit is available to a dealer in respect of those goods and no more. The legislature, thus intended, that the reduction of the tax credit would in no case exceed 4%. However, if the tax credit is reduced more than once because the taxable goods purchased by a dealer fall in more than one sub-clause of Section 11(3)(b), then the dealer would have to surrender more than 4% of the tax credit. The legislature could not have intended for the reduction to exceed the tax credit itself. Therefore, the reduction shall be made only once. [*State of Gujarat* v. *Reliance Industries Ltd.* - 2013-VIL-11-Guj)].

Rental charges for bottles and crates are not compensation for transfer of right to use goods: The issue raised before the Andhra Pradesh High Court was, whether the rental charges collected by the manufacturer from the distributors/ wholesalers for bottles and crates is to be treated as part of sale price of the soft drinks or is to be treated as a compensation for transfer of right to use goods thereof assessable under Section 5E of the Andhra Pradesh General Sales Tax Act, 1957. The High Court held that the bottle is used only for storing the soft drinks and they are only a medium of transport to transfer the soft drinks from the manufacturers to the customer in fixed quantities. Further, when the bottle is returned, the cost of bottle cannot be said to get included in the cost of soft drink. Also, entry 21 of Schedule-VI to the AP General Sales Tax Act imposes sales tax only on the soft drinks which are bottled and sold under a brand name and merely because the words "bottled soft drinks under a brand name" are used in the entry, it does not follow that the bottle has to be taken as sold along with the soft drink. However, the court held that there is a transfer of right to use goods of such bottles and crates attracting tax under Section 5E of the Andhra Pradesh General Sales Tax Act, 1957. [*Hindustan Coco Cola Beverages Private Limited* v. *State of Andhra Pradesh* - 2013 – VIL – 08 – AP].

INCOME TAX

Ratio decidendi

Computing actual cost of assets - Explanation 3 to Section 43(1) when not invocable: The tax payer acquired a trademark for Rs. 500 Crores from related parties and claimed depreciation at the rate of 25% on the sum paid. The revenue authority, invoking Explanation 3 to Section 43 (1), reduced the actual cost of asset acquired in the hands of the taxpayer and accordingly disallowed excess depreciation. The Tribunal observed that the said Explanation can be invoked only if it is established that the main purpose of transfer of such asset, directly or indirectly to the tax payer, was the reduction of liability to income tax by claiming extra depreciation with reference to an enhanced cost. The Tribunal also observed that it is not sufficient that one of the main purposes was reducing tax liability i.e. it has to be established that apart from claiming additional deprecation on enhanced cost, there was no other main purpose for acquiring the asset in question. It noted that for the purpose of valuing the asset, the guiding factor has to be the income expected in the future and not the past income. *[Nirma Industries Private Limited* v. *DCIT* - ITA No 386/ Ahd/2010, Order dated 24-1-2013 (ITAT Ahmedabad)]

'Retail clientele business' is an intangible asset eligible for depreciation: The tax payer had acquired the entire 'Retail Clientele Business' of a company for a consideration of Rs. 2.50 crores. The taxpayer treated the said business as an intangible asset and claimed depreciation thereon. The revenue authorities held that the said acquisition did not fit into the definition of intangible asset defined in the statute. The revenue authority also held that depreciation was allowable only on assets which depreciate over a period of time due to damage, wear and tear or obsolescence and thus disallowed the claim for depreciation. The Tribunal interpreted the expression 'any other business or commercial rights of similar nature' used in Section 32 (1) (ii) and held that the same would include rights which can be used as a tool to carry on the business. The Tribunal also observed that commercial rights gain significance in the commercial world as they represent a particular benefit or advantage or reputation built over a certain span of time and the customer associate with such assets. The Tribunal also held that purchase of the clientele business by the tax payer is a right which can be used as a tool to carry on the business and accordingly allowed the claim of the tax payer [*India Capital Markets Private Limited* v. *DCIT* - ITA No 2948/Mum/2010, Order dated 12-12-2012 (ITAT Mumbai)].

Amalgamation of an undertaking will not disentitle Chapter VI-A deduction: An industrial undertaking of a company was amalgamated with the taxpayer under a scheme of amalgamation. Thereafter, the tax payer claimed deduction under Section 80-I in respect of the profits earned from the said industrial undertaking in its return of income. The revenue authority held that, through amalgamation, the plant and machinery were transferred to new business and accordingly the claim for deduction is restricted by 80-I(2)(ii). The Karnataka High Court observed that it is a settled law that amalgamation does not amount to 'transfer' and hence the disallowance was not justified. [*CIT* v. *Bhuwalka Steel Industries Limited* - ITA 922 of 2006, Order dated 3-12-2012 (Karnataka HC)]

Depreciation cannot be disallowed for non-deduction of tax on purchasing the asset: The taxpayer had purchased a world renowned brand from an Australian entity and claimed depreciation on the cost of acquisition. The Authority of Advance Ruling (AAR), on an application made before it by the Australian entity, ruled that the consideration received by it was taxable in India. The Delhi High

Court however stayed the ruling of the AAR on a petition filed by the Australian entity. Meanwhile, the Revenue Authority disallowed the depreciation claim of the taxpayer on the ground that the taxpayer has failed to deduct tax on the sum paid by it for purchase of the asset. On appeal, the Tribunal observed:

a. Disallowance under Section 40(a) relates only to expenditure where certain sum is payable and not to deductions like loss incidental to carrying on the business, bad debts etc., which are deductible items themselves, not because an expenditure was laid out

b. Depreciation is a deduction for an asset owned by the tax payer and used for the purpose of its business and not for incurring of any expenditure. Explanation 5 to Section 32 makes this clear.

As depreciation is not in respect of any amount paid or payable, the Hon'ble Tribunal held that the provisions of Section 40(a)(i) are not attracted to it. [*SKOL Breweries Limited* v. *ACIT* - ITA 6175/Mum/2011, decision dated 18-1-2013 (ITAT Mumbai)]

Arms' Length Price in brand promotion expenses incurred by Indian affiliates of MNCs:-The tax payer was an Indian subsidiary of a multinational group engaged inter alia in manufacturing of consumer electronics. The tax payer had incurred marketing expenses during the year in India for promoting its products and the international brand. The revenue authorities compared the proportion of marketing expenses incurred by the tax payer with the proportion of expenses incurred by other comparable companies and held that the tax payer had incurred excessive expense which resulted in promotion of the international brand, for which the tax payer has not been adequately compensated by its group entities.

A Special Bench of Income Tax Appellate Tribunal, by a majority, held that the arrangement between the tax payer and its associates abroad would constitute an international transaction for within the meaning of the statute, though the transacting parties have not considered it so or though there was no written agreement between the tax payer and its affiliates.

The Revenue authorities had adopted the 'bright line' test prescribed in the US legislature in the facts of the case to determine the cost/ value of the international transaction, to which the tax payer did not agree as the same is not prescribed in the Indian statute. The Hon'ble Tribunal gave its assent for using the 'bright line test' prescribed in a foreign legislature as it was a more appropriate method, though it has a different nomenclature abroad.

The argument of the tax payer that once the marketing expense is found allowable under Section 37(1), no part of it can be attributable to the a foreign enterprise was not accepted by the Hon'ble Tribunal as such an interpretation would render the entire transfer provision redundant. The Hon'ble Tribunal has also given broad guidelines on determining the Arms' Length Price in such transactions. [*LG Electronics India Private Limited* v. *ACIT* - ITA 5140/Del/2011, decision dated 15-1-2013 (ITAT Special Bench – Delhi)]