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Budget 2013 – Amnesty scheme in service tax

By **Surbhi Premi**

In 1997, the Government introduced the Voluntary Disclosure of Income and Wealth Scheme, 1997 (VDIS), an amnesty scheme under the direct taxes which unearthed approximately ₹ 33,000 Crores worth of black-money yielding tax revenue of approximately ₹ 10,000 Crores. The amnesty scheme was criticized on the ground that it was discriminative as it gave premium to the dishonest taxpayers. However, the Supreme Court in the case of *All India Federation of Tax Practitioners and Another* v. *UOI* [(1998) 2 SCC 161] upheld the constitutional validity of the amnesty scheme rejecting the contention that it was arbitrary and violative of Article 14 of the Constitution of India.

Budget, 2013 has proposed an amnesty scheme under service tax law (Chapter VI of the Finance Act, 1994) by way of waiver of interest, penalty and immunity from prosecution to stop filers and non filers, who declare their tax dues for the period from 1st October, 2007 to 31st December, 2012 by 31st December, 2013 and pay at least 50% of the outstanding amount by 31st December, 2013 and balance by 30th June, 2014 or by 31st December, 2014 with interest.

The Service Tax Voluntary Compliance Encouragement Scheme, 2013 (VCES) provides that any person who has furnished service tax return and disclosed his true liability, but has not paid the disclosed amount of service tax or any part thereof, shall not be eligible to make declaration for the period covered by the said return. In other words, the persons eligible are those who have either failed to furnish the return or not disclosed the true liability in case where return was furnished.

The scheme does not provide any benefit to honest taxpayers, ones who have filed the returns and paid the true liability disclosed therein. Defaulters of payment of tax dues can be categorized into three. First are those who have not filed the return. Second are those who have filed the return but have not disclosed the true liability. Third are those who have filed the return and disclosed the true liability. Out of these, first two are entitled to the benefit under the scheme but the third category of persons is not entitled to the benefit. The scheme not only discriminates between honest and dishonest taxpayers, it also creates separate categories within the dishonest taxpayers which indicates that the scheme targets to incentivize only those persons about whom the department was not having information.

The Finance Minister introduced the scheme in his budget speech by stating:

"While there are nearly 17,00,000 registered assessees under service tax, only about 7,00,000 file returns. Many have simply stopped filing returns. We cannot go after each of them. I have to motivate them to file returns and pay the tax dues."

The obvious question which arises is whether the scheme suggests that the persons who have not paid their service tax dues for any period during 1st July, 2012 to 31st December, 2012 should refrain from filing the return where the last date for submission of the return has not expired before 31st December, 2012 so as to avail the benefits under VCES? Although, the intention of the legislature may not

have been such.

The scheme also provides that a person against whom, an inquiry or investigation in respect of service tax not levied or not paid or short-levied or short-paid has been initiated by way of search of premises under Section 82 of Chapter V of the Finance Act, 1994; or issuance of summons under Section 14 of the Central Excise Act, 1944, as made applicable to Chapter V under Section 83 thereof; or requiring production of accounts, documents or other evidence under the Chapter or the rules made thereunder; or a person against whom an audit has been initiated, and such inquiry, investigation or audit is pending as on the 1st day of March, 2013, will not be eligible to make declaration under the scheme.

The scheme has left certain points open, e.g., it states that if an audit is pending against a person, he shall not be eligible to make a declaration but the scheme is silent as to the kind of audit.

The Supreme Court in the case of *Tanna & Modi* v. *CIT, Mumbai* [(2007) 7 SCC 434] had held that though for the purpose of income tax, a firm and its partners are treated to be separate legal entities but while construing a statute granting immunity (VDIS in the instant case), it should not be construed in such a manner so as to frustrate its objective. Keeping in view the purport and objective of VDIS, the Supreme Court denied the benefit of the scheme to the partnership firm where the partner of the firm was disentitled to make a declaration. It would be an interesting point to see whether such a disentitlement will exist under service tax also.

Unlike VDIS, VCES does not contain any secrecy clause as to the confidentiality of information furnished under VCES. In the absence of a secrecy clause in VCES, a natural question that may arise is: whether the information furnished under VCES will be used by other tax authorities, courts etc?

Just like other amendments, this scheme also opens up a pandora's box of issues but how they will be answered or resolved remains to be seen.

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CUSTOMS

Budget 2013 – Major changes proposed by Finance Bill, 2013

Time limit for payment of Customs duty to be reduced from 5 days to 2 days: Section 47 of the Customs Act is proposed to be amended to allow only two days of interest free period, excluding holidays, for the purpose of Customs duty payment. Amendment in this regard by clause 62 of the Finance Bill 2013 will be effective from date of its assent.

Warehoused goods to be cleared within thirty days: Time period for storage of goods in a warehouse, under Section 49 of the Customs Act, is being proposed to be introduced. Clause 63 of the Finance Bill 2013 specifies period of thirty days for such purpose, extendable by Commissioner for a further period of thirty days at a time.

Provisional attachment of property when SCN invokes extended period of limitation: Section 28BA of the Customs Act, providing for provisional attachment of property of the persons to whom demand notice has been issued, is proposed to be amended by clause 57 of the Finance Bill to also cover persons to whom show cause notice has

been issued invoking extended period of limitation for demand.

Advance Rulings – 'Activity' re-defined: Section 28E of the Customs Act, 1962 is proposed to be amended to cover new business of import or export proposed to be undertaken by the existing importers and exporters. Clause 58 of the Finance Bill, 2013 seeks to substitute a new definition for 'activity'.

Specified offences to be made non-bailable: Specified offences under Section 135 of the Customs Act are proposed to be made non-bailable. These offences are:

- Evasion or attempt to evade duty exceeding ₹ 50 lakhs;
- Goods notified under Section 11 and Section 135 (Fake Indian currency notes);
- Goods not declared as per Customs Act having market price exceeding ₹ 1 Crore;
- Fraudulent availment or attempt to avail drawback or exemption exceeding ₹ 50 lakhs.

Clause 65 of the Finance Bill covering said changes will come into effect from date of assent of the Bill.

CESTAT - Stay Order extendable to 365 days and be vacated thereafter: Section 129B of the Customs Act is proposed to be amended to allow for extension of stay orders passed by Tribunal by another 185 days after the expiry of 180 initial days of stay, in case the delay in disposal is not because of any fault of assessee. The proviso proposed to be inserted by clause 66 of the Finance Bill also says that such stay shall stand vacated if the appeal is not disposed within 365 days.

CESTAT – Single Member can handle cases involving amount upto ₹ 50 lakh: Section 129C of the Customs Act is proposed to be amended to allow Single Member Bench of the CESTAT to handle cases involving amount up to ₹ 50 lakh. At present, this limit is ₹ 10 lakh and clause 67 of the Finance Bill, 2013 seeks to amend the same.

Recovery of dues from any person: Section 142 of the Customs Act is proposed to be amended to allow for recovery of dues from any person (post office, banking company, insurer, etc.) other than the defaulter. Recovery is sought to be made from such person from whom money is due to the actual defaulter or when such person holds money of the defaulter. This new provision also states that in case such person fails to make the payment, he shall be deemed as defaulter for the purposes of the Customs Act.

Paper – Classification of printed paper for further use in printing or writing: Paper and paper products classifiable under Heading 4811, 4816 or 4820 of the Customs Tariff Act, 1975 and printed with any character, name, logo, motif or format will continue to be classifiable under the respective headings if the said product is intended to be used for further printing or writing. Clause 76 read with the Third Schedule to the Finance Bill makes such changes with effect from 1-3-2013. Last year similar amendment was carried out in the Central Excise Tariff.

Notifications & Circulars

Post export EPCG scheme brought into force: Post-export EPCG duty credit scrip scheme announced last year in the annual supplement of the Foreign Trade Policy, has been brought into force. Notification Nos. 5/2013-Cus., 6/2013-Cus., 2/2013-C.E. and 3/2013-C.E., all dated 18-2-2013 issued in this regard, allow imports as

well as domestic procurement through debit of the Customs and Central Excise duties in the duty credit scrip. As per Circular No. 10/2013-Cus., dated 6-3-2013, duty remission is envisaged in proportion to export obligation fulfilled within a fixed export obligation period. This circular further states that issuance of this scrip is akin to discharge of export obligation and the same is in the nature of remission of duty. Further, DGFT, by Notification No. 33 (RE-2012)/2009-2014 dated 8-2-2013, has restricted the benefit under these duty credit scrips to the basic customs duty portion only. As per amendments by DGFT Public Notice No. 48/2013, dated 8-2-2013, benefit of Post Export EPCG Scheme will not be available on re-export of capital goods, found to be defective and unfit for use, when the exporter has claimed drawback on such re-export.

Bank Guarantee under export promotion schemes – Conditions for exemption modified: In respect of export promotion schemes, as per departmental instructions, exemption from furnishing of bank guarantee is deniable if cases involving specified offences under the customs or central excise or service tax provisions have been booked against the licence holder during the previous three financial years. As per C.B.E. & C.'s Circular No. 6/2011-Cus., dated 18-1-2011, to avail such exemption, license holders were asked to file affidavit that cases involving technical offences have not been booked against them. To allay fears that the benefit will be denied even before SCN is adjudicated, Circular No. 8/2013-Cus., dated 4-3-2013 has been issued according to which, for exemption from furnishing BG, the license holder should not have been penalized for specified offences.

Deemed export benefits for supply against ARO or invalidation letter: DGFT has clarified that for supply against Advance Release Order, benefit of refund of duty drawback and of terminal excise duty (TED) would be available. Policy Circular No. 15/2013, dated 21-2-2013 issued in this regard also clarifies that for supply against invalidation letter in respect of Advance Authorization, benefit of exemption from TED and Advance Authorization/ DFIA for intermediate supply would be available.

Ratio decidendi

Recovery of duty when LOP for EOU extended by Development Commissioner: The Bombay High Court has held that where the 100% EOU status of an assessee set up in a private bonded warehouse valid for a period of five years is extended by the Development Commissioner for a further period of five years, it would be obligatory on the part of the customs authorities to extend the private bonded warehouse licence for such period, unless the assessee has violated the provisions of the Customs Act in the first block of five years. The court noted that the circulars issued by the CBEC clearly showed that where extension of LOP was granted by the Development Commissioner, the customs authorities were required to grant extension of the private bonded warehouse licence, unless the assessee had violated any other provisions of law. It was also held that once the LOP was extended, no penal action could be taken before expiry of extended period of LOP on the ground of failure to fulfill export obligation in the first block of five years. [*Mavi Industrial Ltd.* v. *Commissioner* - Customs Appeal (LOD) No. 63 of 2012, decided on 14-2-2013].

Car import – Exemption when car remaining with trading company for some time before import: CESTAT Mumbai has held that exemption under Notification No. 21/2002-Cus. is available to

the importer of car even if the car remained with the foreign trading company for some time before its import into India. The department had denied the exemption alleging that the car was old and used. The Tribunal noted that the time gap was the time taken for conversion of left-hand drive to right-hand drive and that there was no evidence that the car was registered before its importation. [*Inderpal Singh Gujral* v. *Commissioner* – 2013 (288) ELT 588 (Tri. – Mumbai)].

Assistant Commissioner having granted remission cannot review his own order: CESTAT, Mumbai has held that the Assistant Commissioner, after having granted remission under Section 23 of the Customs Act, 1962, cannot review his own order and direct recovery of the amount remitted. Such order was held to be bad in law by the Tribunal. Further, it was held that since the insurance amount settled in favour of the appellant did not include customs duty in respect of bonded goods, the question of recovering the duty remitted did not arise. [*DSM Anti-Infectives India Ltd.* v. *Commissioner* - 2013-TIOL-375-CESTAT-MUM.].

Flash Memory and Flash Memory Cards are classifiable under same heading: CESTAT, Mumbai has held that flash memory card is a solid state memory card and is meant for external use with a computer or laptop as a plug in device and benefit of concessional rate of CVD under Notification No. 6/2006-C.E., for flash memory is also available to flash memory card. [*Ingram Micro India Ltd.* v. *Commissioner* - 2013-TIOL-341-CESTAT- Mum.].

Nickel Silver Turning "Niece" - Classification and benefit under Notification No. 21/2002-Cus.: CESTAT, New Delhi relying upon larger bench decision in the case of *Saurashtra Chemicals* - 1986 (23) ELT 283 has held that section notes and chapter notes would prevail over the headings of the tariff. It was further held that the sub-heading 7503 00 would cover only that scrap of nickel or its alloy in which nickel predominates by weight over other constituents. Thus, nickel silver, in which copper predominates by weight over the other constituents, even though specifically mentioned in the tariff under sub-heading 7503 00, cannot be classified as nickel alloy scrap and cannot be treated as "Nickel". It was accordingly held that, nickel silver is not covered by Sl. No. 438 of Notification No. 21/2002-Cus, which covers nickel and articles of nickel. [*Commissioner* v. *Industrial Importers* - 2013-TIOL-290-CESTAT-DEL.].

CENTRAL EXCISE

Budget 2013 – Major changes proposed by Finance Bill, 2013

Statement sufficient in place of detailed SCN if grounds same for subsequent period: Section 11A of the Central Excise Act is proposed to be amended to the effect that the Central Excise officer may serve a statement containing details of duty not levied, etc. for the period subsequent to the period covered in the show cause notice. As per the amendment by clause 81 of the Finance Bill, such statement would be deemed as show cause notice if the grounds relied upon for the subsequent period are same as mentioned in the SCN for the earlier period.

Arrest and prosecution – Specified offences made cognizable and non-bailable: Offences of evasion of duty or contravention of provisions relating to credit of duty allowed to be utilized towards payment of excise duty, are proposed to be made cognizable and non-bailable. As per amendment proposed in Section 9A of the Central Excise Act, 1944 by clause 79 of the Finance Bill, 2013, such offences would be cognizable if the duty amount exceeds ₹ 50 lakh.

Recovery from any person who owes amount to the manufacturer: Section 11 of the Central Excise Act, 1944 is proposed to be amended to allow recovery of amounts from any other person from whom money is due to the person who owes to the Central government under any of the provisions of the Central Excise Act. This amendment sought to be made by clause 80 of the Finance Bill 2013, also states that if the other person fails to make such payment, he shall be deemed to be the person from whom amount is due and all the consequences will follow.

Provisional attachment in all cases of demand under Section 11A: Section 11DDA of the Central Excise Act pertaining to provisional attachment of property of the person is proposed to be amended to include persons to whom SCNs have been issued after extending the limitation for demand i.e. cases involving fraud, collusion, willful mis-statement, suppression of facts or intention of evasion. Clause 82 of the Finance Bill, 2013 seeks to omit reference to sub-section (1) of the Section 11A, in this regard.

Advance Rulings – 'Activity' redefined: Definition of 'activity' under the Advance Rulings provisions under Central Excise Act, 1944 is proposed to be expanded to include any new business of production or manufacture proposed to be undertaken by the existing producer or manufacturer. Further, as per amendment in Section 23C, admissibility of Cenvat credit of Service tax paid on input services is also proposed to be covered under the application for advance rulings. These changes sought to be made by clauses 85 and 86 of the Finance Bill will come into force on enactment of the bill. Further, with effect from 1-3-2013, resident public limited companies have also been made eligible for availing advance rulings. Notification No. 4/2013-C.E. (N.T.), dated 1-3-2013, issued in this regard, also defines 'public limited company' and 'resident'.

Service of decisions, orders, summons, etc. by speed post or by courier is sufficient: Section 37C of the Central Excise Act, 1944 is proposed to be amended to allow service of notice, orders, etc. by way of speed post with proof of delivery or by courier also. It may be recalled that the Bombay High Court in its recent case of *Amidev Agro Care Pvt. Ltd.* v. *Union of India* - 2012 (279) E.L.T. 353 (Bom.) had held that service by speed post would not constitute sufficient compliance of the provisions.

Ayurvedic, Unani, Siddha, Homoeopathic and Bio-chemic medicaments brought under MRP based valuation: Medicaments exclusively used in Ayurvedic, Unani, Siddha, Homoeopathic and Bio-chemic systems and sold under the name specified in the specified books or pharmacopoeia or under a brand name, have been specified for MRP based valuation. Notification No. 1/2013-C.E. (N.T.), dated 1-3-2013 issued in this regard also explains meaning of brand name while amending Notification No. 49/2008-C.E. (N.T.). Further, as per amendment by clause 91 of the Finance Bill, the said products have also been included in the Third Schedule to the Central Excise Act which specifies goods in

relation to which specified processes are held to be amounting to manufacture. This amendment has come into force with effect from 1-3-2013 by way of declaration under the Provisional Collection of Taxes Act, 1931.

Ratio decidendi

Duty hike proposed in Finance Bill – Date of effect when declaration under PCTA silent: Imposition or increase in duty through amendments by Finance Bill in the absence of declaration under Provisional Collection of Taxes Act, 1931 (PCTA) will not be effective immediately. The department demanded duty on Portland Pozzolana cement for the intervening period between the date of introduction of bill and its enactment. The declaration under PCTA including the clauses in the Finance Bill which take immediate effect did not mention the relevant clause on tariff change in respect of the said item. It was therefore held that the effective date of enhancement of duty would be date of enactment and that no duty was payable for the intervening period. [*Ultratech Cement* v. *Commissioner,* 2013 (288) E.L.T. 438 (Tri. – Kolkata)]

Cenvat credit on transfer of goods to DTA in same premises after de-bonding of EOU: Finding force in the assessee's argument that the EOU ceased to be one on the date of de-bonding and the goods stood transferred to the DTA unit in the same registered premises, the Tribunal held that credit was availed correctly and hence, the Department could not demand interest on the credit taken immediately after payment of dues for the purpose of de-bonding up to the date of actual de-bonding certificate was issued by Development Commissioner. The Tribunal also held that in the absence of separate registration of the units concerned, question of procedural requirement of issuing invoices for transferring the goods did not arise. [*Commissioner* v. *FAG Bearing India Ltd.,* 2013-TIOL-396-CESTAT-AHM]

Every amount received from buyer is not additional consideration: The assessee charged transportation charges to customer's premises at different rates, in addition to price at factory gate. The Tribunal set aside the demand for duty on differential between the freight charges and actual expenses, holding that the factory gate price to independent buyer would be the assessable value and Department could not take recourse to Central Excise Valuation Rules to make additions to the factory gate price. It observed that the "additional consideration" which is includible in the assessable value of the goods is the consideration for the goods being sold, which is in addition to the declared sale price and not every amount being received by a manufacturer from the buyer of the goods can be termed as "additional consideration". It must be shown to be for sale of goods. [*Mohan Bottling Co (P) Ltd* v. *Commissioner,* 2013-TIOL-251-CESTAT-DEL]

Refund admissible when credit note genuine, neutralising duty burden: Deciding on the admissibility of refund when the assessee had issued credit notes to neutralize the higher incidence of duty passed to the customer, the Tribunal held that if the credit notes are genuine and have been acted upon, the refund claim is not hit by principle of unjust enrichment. It concurred with the judgment of various high courts that once the assessee produces evidence in the form of credit notes to the customer or any other evidence, it is for the department to prove that they are bogus or not acted upon. The

department had contended that once incidence has been passed on at the time of clearance, subsequent issue of credit notes cannot neutralise the same. [*Commissioner* v. *IBP Ltd,* 2013 (288) E.L.T 385 (Tri. – Del).]

Legal heirs not liable for fresh demand raised after cancellation of registration: Examining an appeal by the department to recover dues from legal heirs based on SCN raised after the death of the proprietor, the Tribunal held that the demand was not sustainable. It reiterated the position that a sole proprietorship has no independent legal entity and the SCN had been issued against a non-existent firm. Also, the undertaking given by legal heirs at the time of cancellation of registration to settle pending dues under dispute would not extend to demand raised after three years of cancellation of registration. [*Commissioner* v. *Shree Ambica Steel Industries,* 2013 (288) E.L.T. 420 (Tri.- Del.)].

Sale of assets by itself is not transfer of business: Examining entitlement to registration, the Tribunal held registration cannot be revoked on the ground that the previous owner had not paid excise dues. It held that only a successor in business would be liable to clear the dues. In the case before the Tribunal, the respondent had taken land on lease from successful bidder of auction which was conducted owing to default of various dues by the unit located on such land. [*Commissioner* v. *Keshardeep Pressing,* 2013-TIOL-362-CESTAT-MUM]

SERVICE TAX

Budget 2013 – Major changes proposed by Finance Bill, 2013

Normal period of limitation applicable when invocation of extended period held as not sustainable: A new sub-section (2A) is proposed to be inserted in Section 73 of Finance Act, 1994 so as to provide for determination of service tax payable for normal period (18 months) when invocation of extended period is held as not sustainable by Commissioner (Appeals) or CESTAT or Court.

Penalty for offences by director or other officers: Section 78A is proposed to be inserted in Finance Act, 1994 to impose penalty on director, manager, secretary or any other officer of the company which has been held liable for commission of offences like evasion of service tax, issuance of invoice or bill without provision of service, credit utlitisation of without receipt of taxable service, etc. A maximum penalty of ₹ 1 lakh can be imposed as per the proposals.

Power to arrest: Finance Bill, 2013 seeks to empower officers to arrest persons who have committed specified offences. Arrest shall be carried out as per the procedures laid out in Code of Criminal Procedure, 1973.

Notifications

Last date for filing of ST-3 return for interim period, extended: The date for submission of service tax return (ST-3) for the period from 1-7-2012 to 30-9-2012 has been extended from 25-3-2013 to 15-4-2013 by CBEC Order No. 1/2013-ST, dated 6-3-2013. The Form ST-3 is expected to be available on ACES around 20-3-2013.

Residential complex construction – abatement reduced: Notification No. 26/2012-ST, dated 20-6-2012 granted abatement of 75% of the amount charged by service provider for providing service of construction of a complex, building, civil structure or a part thereof, intended for a sale to a buyer, wholly or partly except where entire consideration is received after issuance of completion certificate by the competent authority. By Notification No. 2/2013-ST, dated 1-3-2013, effective from 1-3-2013 the aforesaid benefit of 75% abatement has been restricted for residential unit having carpet area upto 2000 square feet or where the amount charged in less than ₹ 1 Crores. In other cases, the abatement benefit has been reduced to 70% of the amount charged.

Mega exemption notification amended: By Notification No. 3/2013-ST, dated 1-3-2013 the following changes have been made in Notification No. 25/2012-ST, dated 20-6-2012 (Mega Exemption Notification), effective from 1-4-2013:

(i) The exemption available to services by way of auxiliary education services and renting of immovable property services "by or to" educational institutions in respect of education is now restricted only to such services provided "to" educational institutions. (Refer Entry No.9)

(ii) Exemption to services by way of temporary transfer or permitting the use or enjoyment of a copyright relating to cinematograph films has been restricted to exhibition in a cinema hall or cinema theatre. Therefore, such services for purposes such as television broadcast, DVDs etc. will be taxable. (Refer Entry No. 15)

(iii) All restaurants having air conditioning or central air-heating facility in any part of the establishment, will fall under the purview of service tax whether or not they have a license to serve alcoholic beverages. (Refer Entry No. 19)

(iv) The exemptions available to transportation of goods by railway and vessel under Entry No. 20 and services provided by a goods transportation agency (GTA) under Entry No. 21 are being harmonized. Exemption to transportation of petroleum and petroleum products, postal mails or mail bags and household effects by railways and vessels will not be available while the benefit of transportation of agricultural produce, foodstuffs, relief materials for specified purposes, chemical fertilizers and oilcakes, registered newspapers or magazines and defence equipments will be available to GTA. (Refer Entry No. 20 and 21)

(v) Exemption to services by way of vehicle parking to general public is no more available. (Refer Erstwhile Entry No. 24)

(vi) Exemption to services provided to Government, a local authority or a governmental authority is not available in respect of repair or maintenance of an aircraft. (Refer Entry No. 25)

(vii) Exemption to services by way of charitable activities will not be available for activities relating to advancement of any non-specified object of general public utility. [Refer Entry No. 4 read with definition under Para 2(k)]

Ratio decidendi

Cenvat credit admissibility on welfare activities: The appellant claimed credit of service

tax paid on rent-a-cab services used to transport employees to and from place of work, transport sick employees to hospital and children of employees to school and tuition centres and back. The Tribunal held that credit could not be availed in respect of transport of children to school/ tuition centres and back as it was a welfare activity and not covered by the definition of input service. However, it held that credit was admissible in respect of transport of employees to workplace and back as well as ambulance services, since welfare of employee has nexus with the manufacture of final product. [*Hindustan Zinc Ltd* v. *Commissioner,* 2013-TIOL-287-CESTAT-DEL]

Service necessary for compliance with statutory provisions is input service: Holding that the manpower supply services used by the assessee for plantation and maintenance of lawn to comply with the statutory requirement of having plantation in 33% of total area of factory premises, was an input service, the Tribunal set aside the order disallowing such credit. The assessee successfully argued that the activity had nexus with manufacturing activity since in event the statutory requirement was not met, the permission granted to operate the smelter would be withdrawn. [*Hindustan Zinc Ltd* v. *Commissioner,* 2013 (288) E.L.T. 406 (Tri. – Del)]

Company not liable for services rendered by director as MD to another company: Agreeing with the appellant's plea that activity of settlement of management staff does not constitute Management Consultancy Service, the Tribunal held that compensation for services by a managing director routed through the company is not exigible to service tax. In the instant case, the managing director was employed as MD in another concern which compensated him. The department contended that the appellant company had rendered Management Consultancy Service. However, the Tribunal opined that no advisory services had been rendered and even in the event they were rendered, only the individual and not the company would be liable to service tax. [*Bosch Chassis Systems India Ltd* v. *Commissioner,* 2013-TIOL-350-CESTAT-MUM]

Service providers exporting 100% of services can claim refund irrespective of when credit is taken: There is no bar in Notification No.5/2006-C.E. (N.T.) in granting refund of credit accumulated in the past period, in subsequent quarter. The appellant was exporting 100% of its services and did not have any domestic clearances. Citing C.B.E. & C.'s circular dated 19-1-2010, the Tribunal held that refund of Cenvat credit can be allowed irrespective of the time when credit was taken in case of service providers exporting 100% of their services. [*Amdocs Business Services* v. *Commissioner,* 2013-TIOL-324-CESTAT-MUM]

Rebate of service tax admissible when declaration not filed due to peculiar nature of business: According weightage to the peculiar nature of business, whereby it was impossible for the assessee to file declaration prior to the date of export, the Delhi High Court held that, by furnishing the same in reasonable time the assessee could be eligible for rebate of service tax. The department had rejected the rebate claim stating that the assessee providing IT-enabled services had not filed the declaration on description, value and the amount of service tax and cess payable on input-services, prior to date of export. [*Wipro Ltd* v. *Union of India,* 2013-TIOL-119-HC-DEL-ST]

VALUE ADDED TAX (VAT)

Notifications

Works Contract - Revised Composition Scheme under Delhi VAT: By a notification dated 28-2-2013, a new composition scheme has been notified under Section 16 of the Delhi Value Added Tax Act, 2004 which shall take effect from 1st April, 2013. Under the Current Notification No. 3(13)/ Fin. (Rev-I)/2012-13/dsvi/180, dated 28-2-2013, composition scheme is available for every registered dealer engaged *exclusively in carrying out works contract* for cash or for deferred payment or for valuable consideration in Delhi. Further, as opposed to the earlier notification which provided the option of availing composition scheme only to registered dealers engaged exclusively in works contracts of the nature of civil construction of the specified type, the current notification covers a wide variety of 'works contract' for which the composition scheme will be available and different rates have been prescribed with respect to various categories of works contract covered under the current notification. Under the present notification the registered dealer has an option of choosing to pay under Scheme A (lower rate) or Scheme B (higher rate).

Form T-2 - Effective dates for submission revised: Delhi Government has revised the effective date for submission of information in Form T-2. As per Notification No. F.7(433)/Policy-II/VAT/2012/1297-1307, dated 28-2-2013, issued in this regard, dealers having GTO ≥ ₹ 10 Crores, except those exclusively dealing in tax-free goods or who are 100% exporters, are required to file such return from 1-4-2013. In case of other dealers the effective date will be notified later.

Ratio decidendi

Entry Tax on chassis brought in Maharashtra: The Bombay High Court has held that entry tax is leviable on entry of chassis into Maharashtra when bus body was purchased in Maharashtra for mounting the same on the said chassis. The bus was registered with the registration authorities in Maharashtra. Section 3(1) of the Maharashtra Tax on Entry of Motor Vehicles into Local Areas Act, 1987, prior to 25th April, 2012, provided for levy of tax on the purchase value of a *motor vehicle*, an entry of which is effected into a local area *for use or sale therein* which is liable for registration in the State under the Motor Vehicles Act, 1988. Section 3(1) was amended on 25th April, 2012 and levy of entry tax was made on the purchase value of a motor vehicle, an entry of which has been effected into a local area for *use, consumption or sale therein.* The contention of the respondent was that, by mounting the bus body the chassis was "consumed" as the process ultimately resulted into an altogether different product i.e. motor vehicle and the same was not "used", therefore, no entry tax is leviable on the entry of chassis as during the relevant period entry tax was payable on 'use' and not on 'consumption'. The High Court held that under Section 3 of the Act, tax is levied on entry of 'motor vehicle' which as per the definition under the Act as well as the Motor Vehicles Act, 1988 includes chassis of motor vehicles. The court placed reliance on the judgment of the Apex Court in the case of *Automotive Manufacturers (P) Ltd.* v. *Government of Andhra Pradesh* - AIR 1972 SC 229, wherein the

Apex Court clarified that…*it is not necessary for a chassis to have a body attached to it before it can be used within the meaning of the [Andhra Pradesh Motor Vehicles Taxation Act, 1963] act in as much as it can be used by the man who drives it and such use of it on public roads would be enough to attract the levy. [State of Maharashtra* v. *Smt. Anuja Dilip Chhajed* - 2013-VIL-22-Bom].

Advance Ruling provisions in A.P. VAT – Applicability in Central Sales Tax: The Andhra Pradesh High Court has held that Section 67 of the A.P.VAT Act, 2005 does not empower the authority for clarification and advance ruling to issue clarifications or rulings in respect of implementation of statutes such as the Central Sales Tax Act (other than the VAT Act). The Court held that, the provision for "Advance Ruling" is a mechanism introduced by the Legislature to ensure uniformity in orders of assessment, appellate and revision orders, with regard to the classification of goods under different entries of the various schedules to the Act or the rate of tax applicable to such goods etc., thereby avoiding conflicting orders being passed by different assessing authorities. Such a mechanism can only be introduced by way of a substantive provision in a statute and cannot be implied. In this case, the question which arose for consideration was whether the provisions relating to clarification and advance rulings contained in Section 67 of the A.P.VAT Act, 2005 would automatically apply to assessments made under the Central Sales Tax Act, 1956, inasmuch as Section 9 of the latter Act applies the machinery provisions of the former Act to assessments, levy and collection of tax under the latter Act. It was held that Section 9(2) of the Central Sales Tax Act only makes applicable provisions of the appropriate State Sales Tax Law relating to assessment, re-assessment, collection and enforcement of tax, including any interest or penalty. A provision relating to "Advance Ruling" would not fall into any of the above categories. [*Prathista Industries Limited* v. *Commercial Tax Officer* - 2013-VIL-16-AP].

INCOME TAX

Ratio decidendi

Broad function and product comparability alone need to be considered for TNMM: The appellant was engaged in the business of providing R&D in various field of engineering including computer software. As results of the research were transferred to the associated enterprise (AE) in a computer readable form, the appellant classified itself engaged in Information Technology enabled Services (ITeS). It had also registered itself with NASSCOM accordingly. The TP study of the appellant was also conducted considering it as engaged in ITeS. The Tribunal however rejected the claim of the appellant and held that the appellant should be regarded as being engaged in rendering R&D services to its AEs. The appellant also objected to the inclusion as comparables of two entities engaged R&D in pharmaceuticals and clinical trials. It argued that that only those companies that are engaged in R&D activities in the same industry in which it operates could be used as comparables. This was rejected by the Tribunal holding that when

Transaction Net Margin Method is adopted, only broad functional and product comparability is to be considered as net margins are less influenced by differences in products and functions. [*GE India Technology Centre Pvt. Ltd* v. *DDIT* - ITA No.789/Bang/2010 – Order dated 31-12-2012].

Transfer of shares resulting in transfer of underlying Indian assets not necessarily avoidance: A French holding company held shares in an Indian company as its only assets. The appellant, who was holding 100% shares of the French holding company, transferred the shares to an independent third party in France. The Authority of Advance Ruling held that the gain arising on transfer of shares of a French company would be taxable in India under the Income Tax Act as well as under the tax treaty as the transaction resulted in transfer of underlying assets situated in India (this ruling was rendered even before the Income Tax Act was amended retrospectively to consider indirect transfers as taxable in India). A writ petition was filed against the ruling as well as against a notice issued by the Tax Department. The High court observed that the French holding company was an independent corporate entity having a separate commercial substance/ business purpose and was not a device for avoiding Indian tax. The High Court therefore held that its corporate veil cannot be pierced to consider the transaction as giving raise to taxability in India. The High Court also observed that the retrospective amendment to the Income Tax Act would not impact the allocation of right to tax between two countries under a Tax Treaty. [*Sanofi Pasteur Holding SA* v. *Union of India* - W.P.No.14212 of 2010, decided on 15-2-2013]

Consideration for equipment with embedded software sold as chattel, cannot be broken down for components: The appellant, a non-resident under Income Tax Act, had licensed its IP relating to manufacture of CDMA phones to other non-resident OEMs. The OEMs manufactured CDMA mobiles outside India, but sold a few consignments in India also. The department contended that the royalty paid by the OEMs, to the extent of mobile phones sold in India was taxable in India as the income was sourced indirectly from India in as much as the IP was used in mobile phones users in India.

The Tribunal observed that the OEMs did not carry on their business in India and the mobile users in India did not constitute source of income for the appellant in India. The Tribunal further held that, when software is embedded in a chipset which forms part of an equipment that is sold in India, the sale is of an equipment as a 'chattel' and the tax department cannot breakdown the consideration for equipment into sale of various components, Accordingly, the Tribunal held that the royalty received by the appellant from the OEMs for use of IP in manufacture of phones outside India as not taxable in India. [*Qualcomm Incorporated* v. *ACIT* ITA No 3696 of 2009, ITAT New Delhi Order dated 31-1-2013]

Solatium for loss of office is a capital receipt: The appellant was a firm of chartered accountants associated with a reputed international consultancy firm from which it received referral work for over 13 years. The appellant was requested to disassociate itself from the international firm, for which it received a lumpsum consideration. The sum was credited to the capital accounts of the

partners of the firm and was claimed as capital receipt not liable to tax. This claim of the appellant that the said sum was received for 'loss of source of income' was not accepted by the department who sought to tax the sum as revenue receipt. The High Court distinguished between compensation received for injury to trading operations arising from breach of contract and compensation received as solatium for loss of office. The court held that the receipt represented compensation for the loss of a source of income in the form of referral work from a reputed international consultancy firm and hence would be on capital account. The Court further observed that it did not matter if appellant continued to be in receipt of income from its other similar operations. [*Khanna and Annadhanam* v. *CIT* - ITA No.1286/2008, Delhi High Court Order dated 29-1-2013]

Investment in building of residential nature though not 'a residential house' eligible for deduction from capital gains: The tax payer entered into a development agreement with a developer for demolition of her old building and re-construction a new building with three floors. The tax payer received consideration in the form of cash plus two built up floors in the new building. The department held that the consideration for transfer of right was the cash received plus the cost incurred by builder for constructing the two floors. The tax payer claimed that as the said capital gains was re-invested in the said two floors and hence was eligible for deduction under Section 54 of the Income Tax Act, 1961. This claim was rejected by the tax department on the ground that the section provides for deduction only in respect of "a residential house" and the two floors in which the tax payer claimed to have invested the sum would be regarded as two residential houses.

However, the Delhi High Court held that the expression "a" residential house should be understood in a sense that building should be of residential in nature and "a" should not be understood to indicate a singular number. The Court also held that the section uses the expression "a residential house" and not "a residential unit". The Court thus concluded that Section 54 requires the tax payer to acquire a "residential house" and so long as the tax payer acquires a building, which may be constructed, for the sake of convenience, in such a manner as to consist of several units which can, if the need arises, be conveniently and independently used as an independent residence, the requirement of the section was satisfied. [*CIT* v. *Gita Duggal* – ITA 1237/2011, Delhi High Court Judgment dated 21-2-2013].